

INTERGOVERNMENTAL AGREEMENT BETWEEN THE ARIZONA WATER BANKING AUTHORITY AND THE GILA RIVER INDIAN COMMUNITY FOR THE DEVELOPMENT OF INTENTIONALLY CREATED SURPLUS FIRING CREDITS

This Intergovernmental Agreement (“AWBA ICS Firming IGA” or “this IGA”) is made this ____ day of **XXX**, 2019, and is between the Arizona Water Banking Authority, an agency of the State of Arizona (“AWBA”) and the Gila River Indian Community (“the Community”), a federally recognized Indian tribe organized pursuant to the Indian Reorganization Act of 1934. The Community and AWBA are sometimes each referred to in this IGA as a “Party” and collectively as the “Parties.”

RECITALS

- A. AWBA acts as an agent for the State of Arizona in meeting the State’s firming obligations to the Community under section 105(b)(2)(A) of the Arizona Water Settlements Act (Pub. L. No. 108-451, 118 Stat. 3478) and the Amended and Restated Gila River Indian Community Water Rights Settlement Agreement.
- B. On June 16, 2015, AWBA and the Community entered into an intergovernmental agreement (“2015 IGA”), attached as Attachment 1, that establishes an annual process to ensure that the obligations of the State of Arizona under section 105(b)(2)(A) of the Act are satisfied.
- C. Exhibit B of the 2015 IGA describes several firming methods identified by the Parties that may be utilized to satisfy a firming obligation.
- D. On December 13, 2007, the Secretary of the Interior (“Secretary”) executed a Record of Decision (Record of Decision) that included Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead (2007 Interim Guidelines). These 2007 Interim Guidelines include a mechanism to encourage and account for augmentation and conservation of water supplies, referred to as intentionally created surplus. One category of ICS is Extraordinary Conservation ICS (“ICS”).
- E. Certain parties in the Lower Basin and the Secretary developed additional operational tools through the Lower Basin Drought Contingency Operations Plan (“LBOps”), to address and reduce the likelihood of the continued decline of the elevation of Lake Mead. Through **[insert federal authorization]** and the Lower Basin Drought Contingency Plan Agreement (“LBDCP Agreement”), the parties thereto agreed to the implementation of the LBOps.
- F. In connection with the adoption of the LBDCP Agreement, including the LBOps, and the implementation of its terms of the LBDCP in Arizona, the AWBA and various other parties within Arizona have developed an implementation plan (“Arizona LBDCP Implementation Plan”), designed, among other things, to offset deliveries of ICS contemplated to occur

prior to December 31, 2016, through conservation of additional volumes of water in Lake Mead during that time (“Offset Goal”). The Arizona LBDCP Implementation Plan is described and attached as an exhibit to the Arizona Drought Contingency Plan Framework Agreement (“DCP Framework Agreement”).

- G. The Arizona LBDCP Implementation Plan estimates that the minimum volume of system conservation and ICS needed to offset the delivery of Central Arizona Water Conservation District ICS as mitigation from January 1, 2020 to December 31, 2026, requires the creation of at least 400,000 acre-feet of system conservation and ICS (“Conservation Offsets”) to meet the Offset Goal.
- H. To facilitate the Offset Goal in Arizona LBDCP Implementation Plan, the Community proposes to create, in accordance with the Arizona ICS Framework Agreement, at least 200,000 acre-feet of ICS in 2019 through 2021 to be left in Lake Mead until at least December 31, 2026.
- I. Under Section IV.A. of the LBOps, ICS created in 2019 and 2020 shall be assessed a one-time, ten percent reduction for system and evaporation losses.
- J. The AWBA desires to provide payment to the Community for creation of 50,000 acre-feet of the 200,000 acre-feet of ICS created by the Community in order to accrue 45,000 acre-feet of firming credits to satisfy a future firming obligation.
- K. This AWBA ICS Firming IGA for the accrual of firming credits through payment for creation of ICS by the Community (“ICS Firming Credits”) shall be considered an additional method to satisfy the firming obligations set forth in the 2015 IGA.

AGREEMENT

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, and intending to be legally bound, the parties hereby agree as follows:

1. Term. This IGA shall be effective as of the date set forth in the introductory paragraph of this IGA (the “Effective Date”) and shall thereafter continue in full force and effect until it expires as set forth in Section 7 of this IGA.
2. Creation of ICS. As part of the AZ LBDCP Implementation Plan the Community shall create 200,00 acre-feet of ICS as follows:
 - 2.1 The Community shall create 12,500 acre-feet of ICS in 2019 and 37,500 acre-feet of ICS in 2020 (“AZ Firming ICS”) in accordance with the Arizona ICS Framework Agreement to satisfy its obligations under this IGA.
 - 2.2 The Community shall create 100,000 acre-feet of ICS in 2019 (“Reclamation Firming ICS”) in accordance with the Arizona ICS Framework Agreement.

2.3 Except as provided in Section 2.5, the Community agrees that it shall not order delivery of the AZ Firming ICS or Reclamation Firming ICS and shall not transfer or assign the AZ Firming ICS or Reclamation Firming ICS at any time before December 31, 2026.

2.4 The Community shall create an additional fifty thousand (50,000) acre-feet of ICS (“Community ICS”) in accordance with the Arizona ICS Framework Agreement. Except as provided in, Section 2.5, the Community shall not take delivery of Community ICS at any time before December 31, 2026.

2.5 The Community agrees to create an additional twenty-two thousand (22,000) acre-feet of ICS (“Conditional ICS”) in accordance with the Arizona ICS Framework Agreement. Except as provided in, Section 2.5, the Community shall not take delivery of Community ICS at any time before December 31, 2026.

2.6 If at any time before December 31, 2026, the parties to Arizona DCP Framework Agreement determine that the estimated minimum volume of Conservation Offsets needed to offset the delivery of Central Arizona Water Conservation District ICS on at least an acre-foot by acre-foot basis will be less than four hundred thousand (400,000) acre-feet, the Community may take delivery of Arizona Firming ICS or Community Offset ICS in an amount that does not create a deficit in the volume of Conservation Offsets necessary to meet the Offset Goal.

3. Price. Subject to the terms and conditions of this IGA, AWBA agrees to pay the Community for the creation of the 45,000 acre-feet of AZ Firming ICS as follows:

3.1. A minimum of two million five hundred thousand dollars (\$2,500,000) for the AZ Firming ICS created in 2019, at \$240 per acre-foot of AZ Firming ICS, to accrue ICS Firming Credits after a one-time deduction of ten percent (10%) is assessed of AZ Firming ICS created in 2019 pursuant to Section IV. A. 2. of the Lower Basin Drought Contingency Operations Agreement.

3.2. The balance of AZ Firming ICS created in 2020 shall be paid at \$247.20 per acre-foot of AZ Firming ICS, to accrue ICS Firming Credits after a one-time deduction of ten percent (10%) is assessed of AZ Firming ICS created in 2020 pursuant to Section IV. A. 2. of the Lower Basin Drought Contingency Operations Agreement. Payments may be made in installments at the discretion of AWBA in accordance with the pricing schedule set forth in Section 4 of this IGA.

4. Installments. If AWBA elects to make installment payments for the AZ Firming ICS created under Section 3.2 the per acre-foot unit price for AZ Firming ICS shall be in accordance with the following schedule:

2020	\$247.20/acre-foot
2021	\$254.62/acre-foot
2022	\$261.60/acre-foot
2023	\$268.80/acre-foot

2024	\$276.00/acre-foot
2025	\$283.20/acre-foot
2026	\$290.40/acre-foot
2027	\$297.60/acre-foot
2028	\$304.80/acre-foot
2029	\$312.00/acre-foot

5. Billing.

5.1. AWBA agrees to use good faith efforts to procure funding to carry out the intent of this IGA.

5.2. AWBA shall make the \$2.5 million payment described in Section 3.1 to the Community on or before December 31, 2019.

5.3. On or before September 1 of each year of this IGA, AWBA shall estimate the amount of funding AWBA shall have available for the payment described in Section 6.1 (“Annual Funding Amount”) for inclusion in AWBA’s preliminary Annual Plan of Operation (“APO”) for the following year.

5.4. On or before December 31 of each year of the IGA, AWBA shall confirm under its final APO for the following year the Annual Funding Amount available for accrual of ICS Firming Credits that year.

5.5. Except for 2019, no later than May 1 of each year of this IGA, the Community shall invoice AWBA for the payment amount identified in the AWBA’s APO for that year. In 2019, the Community shall invoice AWBA for the payment amount identified in Section 5.2 within 30 days after the United States approves the Community’s 2019 ICS Creation Plan.

5.6. In the event AWBA is unable to obtain the full or partial Annual Funding Amount for any year of this Agreement, AWBA shall provide written notice informing the Community of the difference in available funds such that the Community can make any necessary billing adjustments prior to invoicing AWBA.

5.7. Except as provide in Section 5.2, payment by AWBA to the Community shall be made on or before the thirtieth (30th) day following the invoice date. Failure by the AWBA to make payment within 30 days following the invoice date shall not constitute a default or breach of this IGA so long as AWBA provides complete payment for the 2019 ICS on or before December 31, 2029, or by a date thereafter if later agreed to in writing by the Parties.

6. Procedures for Implementing Firming Method.

6.1. Provided payment is made to the Community as set forth in Section 5.2, AWBA can register accrued ICS Firming Credits to the Firming Account upon payment. Thereafter, the annual ICS Firming Credits that AWBA can register to the Firming Account

shall be calculated by dividing the Annual Funding Amount by the per-acre foot price corresponding to that year and then multiplying the result by zero-point-nine (0.9) and rounding to the nearest whole number. For example, if the Funding Amount in 2020 is \$3,000,000, AWBA would register 10,922 acre-feet of ICS Firming Credits to its Firming Account.

6.2. After December 31, 2026, in a year when the State of Arizona has a firming obligation to the Community, upon the request of AWBA, the Community shall cause ICS Firming Credits to be delivered to satisfy the State of Arizona's firming obligation so long as there are ICS Firming Credits in the Firming Account; provided, however, the Community's obligation to deliver ICS Firming Credits under this IGA shall be subject to the rules, regulations, or guidelines governing the delivery of ICS.

6.3. After December 31, 2026, the Parties agree to use the ICS Firming Credits created under this IGA before any other firming resources established in the 2015 IGA, or otherwise, during a year when the State of Arizona has a firming obligation to the Community.

6.4. In the Community's sole discretion, ICS Firming Credits created pursuant to this IGA may be debited to reduce the State of Arizona's firming obligation to the Community on an acre-foot per acre-foot basis under any other method agreed to by the Parties, such as pre-firming, beginning after December 31, 2026, subject to the rules, regulations or guidelines governing the delivery of ICS.

6.5. The use of ICS Firming Credits shall be considered an additional method to satisfy the firming obligations set forth in the 2015 IGA.

7. Renewal, Expiration, or Termination. Unless otherwise extended or renewed by the parties to this IGA, this IGA and all rights and privileges, duties and obligations, as set forth hereunder shall expire at the close of business on December 31, 2029. However, any ICS Firming Credits registered to the Firming Account under this IGA shall survive the expiration or termination of this IGA until all AWBA Firming Credits have been extinguished to satisfy a firming obligation.
8. Default. Unless otherwise provided, the failure of either party to perform any term, covenant, or condition of this IGA, if that failure continues for thirty days following the receipt of written notice from the other party.
9. Remedies. If an event of default occurs, the non-defaulting party may immediately terminate this IGA by written notice to the defaulting party and/or may pursue specific performance.
10. Miscellaneous Provisions.

10.1. Interpretation. This IGA is governed by and must be construed and interpreted in accordance with and in reference to the laws of the State of Arizona.

10.2. No Third-Party Beneficiaries. This IGA is solely for the benefit of the Parties and does not create, nor shall it be construed to create, rights in any third party unless expressly provided herein. No third party may enforce the terms and conditions of this IGA.

10.3. Conflict of Interest. The Parties to this IGA are hereby notified of A.R.S. § 38-511.

10.4. Availability of Funds. In accordance with ARS § 35-154, every payment obligation of the AWBA under this IGA is conditioned upon the availability of funds appropriated or allocated for payment of such obligation. If funds are not allocated or available for the continuance of this IGA, this IGA may be terminated by the AWBA at the end of the period for which funds are available. No liability shall accrue to the AWBA in the event this provision is exercised, and the AWBA shall not be obligated or liable for any future payments or for any damages as a result of termination under this paragraph.

10.5. Permits. The Parties shall obtain and maintain all licenses, permits and authority necessary to perform their obligations pursuant to this IGA, and shall comply with all applicable state, federal and local laws, including but not limited to those regarding employment insurance, disability insurance and worker's compensation. This IGA does not relieve either party from any obligation or responsibility imposed upon it by law.

10.6. No Employment. Neither Party shall be considered an officer, employee or agent of the other. No monitoring or supervisory responsibility over the other Party's activities arises on the part of the other arises or as a result of, or pursuant to, this IGA other than as expressly provided herein.

10.7. Severability. The provisions of this IGA are severable to the extent that if any provision is held unenforceable under applicable law, the remaining provisions of the IGA shall remain in effect.

10.8. Indemnification. Each Party to this IGA is independently responsible in the event of its own negligence. Neither Party agrees to indemnify the other Party.

10.9. Resolution of Disputes. The Parties shall attempt to resolve all claims, disputes, controversies, or other matters in question between the Parties arising out of, or relating to, this IGA ("Dispute") promptly, equitably, and in a good faith manner. Any Dispute arising out of this IGA is subject to arbitration to the extent required by A.R.S. §12-133 and § 12-1518. The prevailing Party in such arbitration may seek enforcement of such award in any court of competent jurisdiction.

10.10. Amendments. This IGA may be modified, amended or revoked only by the express written agreement of the Parties.

10.11. Entire Agreement. This IGA constitutes the entire agreement between the parties and no understandings or obligations not expressly set forth in this IGA are binding upon the parties.

10.12. Waiver. No delay in exercising any right or remedy shall constitute a waiver unless such right or remedy is waived in writing signed by the waiving party. A waiver by any party of any right or remedy hereunder shall not be construed as a waiver of any other right or remedy, whether pursuant to the same or a different term, condition or covenant.

10.13. Captions. All captions, titles, or headings in this IGA are used for the purpose of reference and convenience only and do not limit, modify, or otherwise affect any of the provisions of this IGA.

10.14. Rules, Regulations and Amendment or Successor Statutes. All references in this IGA to the Arizona Revised Statutes include all rules and regulations promulgated by ADWR under such statutes and all amendment statutes and successor statutes, rules, and regulations to such statutes, rules, and regulations existing as of the date of this IGA.

10.15. Notices. Any notice, demand, or request authorized or required by this IGA shall be in writing and shall be deemed to have been duly delivered by email to a valid email address designated by the Parties, or if mailed, first-class or delivered, to the following address:

10.16. Equal Opportunity. The Parties shall comply with State Executive Order No. 75-5, as amended by State Executive Order No. 2009-9, and all other applicable Federal and State laws, rules and regulations relating to equal opportunity and non-discrimination, including the Americans with Disabilities Act.

10.17. Records and Inspections. All books, accounts, reports, files and other records in relation to this IGA shall be subject at all reasonable times to inspection and audit by the Parties throughout the term of this IGA and for a period of five years after the completion of this IGA. Upon request, a Party must produce original of any or all such records.

10.18. No Party will be considered to be in default in the performance of any of its obligations hereunder (other than obligations to make payments) when a failure of performance is due to uncontrollable forces. The term "uncontrollable forces" shall mean any cause beyond the control of the Party unable to perform such obligation, including, but not limited to, failure of or threat of failure of facilities, flood, earthquake, storm, fire, lightning and other natural catastrophes, epidemic, war, riot, civil disturbance or disobedience, strike, labor dispute, labor or material shortage, sabotage, terrorism, or restraint by court order or public authority, and action or nonaction by, or failure to obtain the necessary authorizations or approvals from, any governmental agency or authority, which by exercise of due diligence such Party could not reasonably have been expected to avoid and which by exercise of due diligence it shall be unable to overcome. Drought is not an "uncontrollable force" for the purposes of this IGA. Nothing contained herein shall be construed to require a Party to settle any strike or labor dispute in which it is involved.

For the AWBA:

Manager
Arizona Water Banking Authority
P.O. Box 36020
Phoenix, Arizona 85067-6020
voconnell@azwater.gov

For the Community:

Gila River Indian Community
Att'n: General Counsel
Post Office Box 97
525 W. Gu u Ki
Sacaton, Arizona 85147

The designation of the address or addressee, including email addresses, may be changed by notice given as provided in this Section 10.15.

Notice is deemed to have been given on the date on which notice is personally delivered, delivered to an overnight delivery service, mailed or emailed. Notice is deemed to have been received on the date on which the notice is actually received, or delivery is refused.

IN WITNESS WHEREOF, both the Community and AWBA have executed this IGA on the date first listed above.

GILA RIVER INDIAN COMMUNITY

**ARIZONA WATER BANKING
AUTHORITY**

By: _____

By: _____
Thomas Buschatzke, Chair

Approved as to form:

Attest:

By: _____

By: _____
Kathryn A. Sorensen, Secretary