MEMORANDUM

TO: Potential Water Authority Members
FROM: M. Cole Emmons, Assistant County Attorney
DATE: October 10, 1996
RE: Final El Paso County Water Authority Establishing Contract

Enclosed please find a copy of the El Paso County Water Authority Establishing Contract that the Water Resource Study Commission finalized with minor revisions on October 2, 1996. Rather than again sending out both redline and clean versions of the final Contract, since there were few revisions, I have only sent a clean version for signature. I will indicate the revisions below.

George Goddu made the following suggested revisions which the Water Resource Study Commission adopted and they indeed make the Contract a better instrument. Revisions are indicated below by shading:

Page 1, Art. I., para. c. “To appropriate, acquire, sell, lease, dispose of, or exchange water and/or water rights or to implement plans of augmentation or exchange or recharge.”

Pages 3 and 4, Art. III., para. 1, last sentence. “Such party shall not be entitled to participate in any then existing Project (as hereinafter defined) of the Authority or its Members except by addendum to any agreement providing for accomplishment of such Project (the “Project Participation Agreement”) which may shall be approved by such party and all parties to such Project Participation Agreement (the “Project Participants”).

Page 7, Art. VI., para. 1.c. “the acquisition of water and/or water rights; or”
Page 7, Art. VI., para. 2. All references to “Enabling Contract” in this paragraph and elsewhere were changed globally to “Establishing Contract.”

The following concerns were considered; however, the Water Resource Study Commission did not accept them as revisions to the Establishing Contract, but indicated that they should be addressed in the By-Laws or the Rules and Regulations of the Water Authority when those documents are drafted.

Page 2, Art. II., para. h. Ownership of general assets and distribution of proceeds from the sale of general assets of the Authority (not in the context of withdrawal of membership) should be clarified.

Page 2, Art. II., para. i. The issue of the Water Authority’s powers of eminent domain and condemnation as they concern Members’ assets and/or property should be addressed.

Page , Art. IX., para. 3. There should be specification of what the “General Assets” of the Water Authority are, how they are owned, and how they are distributed upon withdrawal or termination of membership in the Authority.

I invite you to sign the Establishing Contract and join the El Paso County Water Authority.

M. Cole Emmons

Enclosure
cc: J. Patrick Kelly, El Paso County Attorney
Mark Gebhart, El Paso County Senior Environmental Planner
ESTABLISHING CONTRACT
FOR
EL PASO COUNTY WATER AUTHORITY

The undersigned, desiring to create the El Paso County Water Authority, a water authority, a body corporate and politic, a separate governmental entity, a political subdivision and a public corporation of the State of Colorado, pursuant to Section 18(2)(a) and 2(b) of Article XIV, Constitution of the State of Colorado, and to subsection 29-1-204.2, Colorado Revised Statutes 1973, as amended (the "Act"), by this Establishing Contract, by and among the parties listed on Exhibit A attached hereto and made a part hereof pursuant to Article III hereof, the Members, each of which are either municipalities, special districts, or other political subdivisions of the State of Colorado authorized by law to own and operate water systems, hereby agree:

ARTICLE I
Name

The name of the entity hereby established shall be The El Paso County Water Authority (the "Authority").

ARTICLE II
Purpose and Powers

The purpose of the Authority is to effect the development of water resources, systems and facilities in whole or in part for the benefit of the Members and their inhabitants, and others. The functions, services and general powers of the Authority are, to the extent permitted by law, as follows:

(a) To acquire, construct, manage, maintain, or operate water systems, facilities, works or improvements, or to acquire a leasehold or any other interest therein, including without limitation dams, reservoirs, other storage facilities, diversion works, treatment facilities, transmission and collection facilities, and ancillary to the foregoing, recreation facilities and hydroelectric generating and transmission facilities.

(b) To acquire, hold, lease (as lessor or lessee), sell, or otherwise dispose of any legal or equitable interest in real or personal property utilized for the authorized purposes of the Authority, including water treatment, distribution, and waste water disposal.

(c) To appropriate, acquire, sell, lease, dispose of, or exchange water and/or water rights or to implement plans of augmentation or exchange or recharge.
(d) To conduct its business and affairs for the benefit of the Members and their inhabitants and others, in the discretion of the Board of Directors.

(e) To enter into, make and perform contracts of every kind with the Members, the County of El Paso, the United States, any state or political subdivision thereof, or any city, town, municipality, city and county, any special district formed pursuant to Title 32, C.R.S., or any predecessor thereof, or any corporation, or any other organization of any kind with the capacity to contract for any of the purposes contemplated under this contract.

(f) To employ agents and employees.

(g) To incur debts, liabilities, or obligations to the extent and in the manner permitted by law and as provided herein, and to borrow money and, from time to time, to make, accept, endorse, execute, issue and deliver bonds, notes and other obligations of the Authority for monies borrowed or in payment for property acquired, or for any of the other authorized purposes of the Authority, and as provided by law, and to the extent permitted by law to secure the payment of any such obligations by mortgage, pledge, deed, indenture, agreement, or other collateral instrument, or by other lien upon, assignment of, or agreement in regard to, all or any part of the properties, rights, assets, contracts, easements, revenues and privileges of the Authority. The bonds, notes and any other obligations of the Authority shall not themselves be the debts, liabilities or obligations of the Members.

(h) To buy, lease, construct, appropriate, contract for, invest in, and otherwise acquire, and to own, hold, maintain, equip, operate, manage, improve, develop, and deal in and with, and to sell, lease, exchange, transfer, convey, and otherwise dispose of, and to mortgage, pledge, hypothecate and otherwise encumber real and personal property of every kind, tangible and intangible, utilized for the purposes of the Authority.

(i) To have and to exercise the power of eminent domain and, in the manner provided by law, to condemn property for public use as rights-of-way only if such property is not owned by any public utility and devoted to such public use pursuant to state authority.

(j) To construct and maintain works and establish and maintain facilities across or along any public street or highway, provided the Authority shall promptly restore any such street or highway to its former state of usefulness. In the use of streets or highways, the Authority shall be subject to the reasonable rules and regulations of the state, county, city, or town where such highways or streets lie.
(k) To fix, maintain and revise fees, rates and charges for the use of the Authority's functions, services (including, without limitation, water storage service) or facilities, and for waters conveyed or treated thereby, and to adopt, by resolution, reasonable regulations to exercise the Authority's powers to carry out its purposes, for the public welfare, and pertaining to such facilities and waters, including, without limitation, the use and protection of such facilities and waters.

(l) To sue and be sued in the name of the Authority.

(m) To have and use a corporate seal.

(n) To permit other municipalities, special districts, or political subdivisions of the state which are authorized to supply water to enter this Establishing Contract and Project Participation Agreements at the discretion of the Board by a favorable vote of a majority of the Directors present at a regular or special meeting of the Board. Such contract entry would be subject to fulfilling any and all conditions or requirements of the contract(s).

(o) To provide for the rehabilitation of any surfaces adversely affected by the construction of water pipelines, facilities, or systems through the rehabilitation of plant cover, soil stability, and other measures appropriate to the subsequent beneficial use of such lands.

(p) To establish Water Activity Enterprise(s) as may be required or as may be beneficial to conduct water activities, as provided by law.

(q) In general, to exercise all powers which are now conferred by law upon a water authority organized pursuant to the Act, or essential to the provision of its functions, services and facilities, subject to such limitations as are or may be presented by law.

ARTICLE III
Members, Board of Directors and Powers

1. Members. Membership in the Authority shall be limited to those parties to this Establishing Contract which are authorized by law to be members of such an authority pursuant to subsection 29-1-204.2, C.R.S.. Such parties which have not elected to execute this Contract by ________________, 1996, shall in any event be allowed to execute an addendum to this Contract, join the Authority and become Members in the future upon approval of such addendum by the Board. Such addendum may contain reasonable terms and conditions requiring such party to reimburse the then existing Members for a reasonable share of all expenses previously incurred and expended by such Members and assuming a fair and equitable share of the outstanding liabilities of the Authority. Such party shall not be entitled to participate in any then
existing Project (as hereinafter defined) of the Authority or its Members except by addendum to any agreement providing for accomplishment of such Project (the "Project Participation Agreement") which shall be approved by such party and all parties to such Project Participation Agreement (the "Project Participants").

2. **Board of Directors.** All legislative power, as hereinafter defined, of the Authority shall be vested in a Board of Directors (the "Board" and the "Directors"). Each Director shall be a person designated by the governing body of the Member which the Director represents and there shall be one Director from each Member. Each Member may select one or more alternates who may act as a Director in the absence or unavailability of the person selected by that Member as Director.

3. **Initial Directors.** The name, address, and Member represented of each of the initial Directors and alternates is as listed in Exhibit B attached hereto.

4. **Tenure of Directors.** Each Director shall serve until replaced by the Member which the Director represents.

5. **Vacancy.** A vacancy occurring on the Board, whether such vacancy be the result of resignation, removal by the governing body of the Member, or for any other reason, shall be filled by the selection of a successor Director in the same manner as is provided in paragraph 2 of this Article.

6. **Compensation.** Directors shall not receive compensation for their services from the Authority. The Board may provide for reimbursement of a Director for reasonable and necessary expenses incurred on behalf of, and authorized by the Authority to the extent permitted by law.

7. **Meetings.** Regular meetings of the Board shall be held at such place, on such day, and at such hour as the Board shall, from time to time establish. Special meetings may be held at any time and at any place within the State of Colorado either (a) when attended by Directors or alternates representing all members or (b) upon seventy-two (72) hours written notice delivered to the home or place of employment of each Director, unless such notice be waived in writing by a Director or alternate of any member nor represented at such meeting. The President or Vice President may, and on the written request of thirty percent (30%) of the Directors, shall, call a special meeting of the Board. All meetings shall be open to the public in accordance with the provisions of Sections 24-6-401, et seq., 10a, C.R.S. (Open Meetings law of the Colorado Sunshine Act). Notice of all regular, special, and committee meetings shall be appropriately posted at least twenty-four (24) hours in advance of such meetings. Minutes shall be taken at all meetings of the Authority, including any committee meetings.

8. **Quorum.** A majority of the number of Directors in office shall constitute a quorum for the transaction of business, but if less than a majority of the Directors then in office is
present at a meeting, a majority of the Directors present, or if none are present, the Secretary or other officer, may adjourn the meeting to a different time and place, and in such case the Secretary shall notify absent Director(s) of the time and place of such adjourned meeting.

9. **Powers.** The powers and duties of the Board ("Legislative Power"), which shall be exercised by approval of a majority of the Directors present unless otherwise specified, provided a quorum is present, shall be:

   (a) To govern the business and affairs of the Authority and to establish, by a vote of at least two-thirds of the Directors present, the policies of the Authority.

   (b) To exercise all power of the Authority, including but not limited to:

       (i) Electing a President, Vice President Treasurer and Secretary of the Board of Directors;

       (ii) Adopting an operating budget, provided however that no debt may be incurred for the purposes of financing the day-to-day operations of the Authority;

       (iii) Establishing a method of assessment of each Member to finance the day-to-day operations of the Authority (unless otherwise established by the Board there shall be no dues for the 1996 calendar year).

   (c) To comply with the provisions of Parts 1, 5 and 6, Article 1, Title 29, C.R.S. 1973, as amended.

   (d) To keep minutes of its proceedings.

   (e) To establish By-laws of the Board and adopt, by resolution, regulations respecting the exercise of the Authority’s powers and purposes.

   (f) To authorize the employment of such employees, agents, consultants, and contractors, as in the discretion of the Board may be necessary, subject to the limitations of any adopted budget.

   (g) To provide for accounting and auditing of the Authority, and in the event a Water Activity Enterprise is established, or multiple Water Activity Enterprises are established, to provide for separate accounting and auditing of the Authority and each Water Activity Enterprise.

   (h) In general, to exercise all powers which are now, or may in the future be, conferred by law or are essential to the provision of the Authority’s functions, services and facilities, subject to such limitations as are, or as may be, prescribed
10. **Voting: General Rule.** Except where another method of voting is specified, each Director shall be entitled to one vote.

**ARTICLE IV**

**Executive Committee, Officers and Powers**

**Executive Committee.** There may be elected by eighty (80%) percent of the Directors present, from among the Directors, an Executive Committee of five Members, including the President and Vice President, to be responsible for such matters as may be determined by the Directors.

**ARTICLE V**

**Indemnification, Immunity, and Liability**

1. **Indemnification.** The Authority shall, to the extent permitted and within the limitations of the Colorado Governmental Immunity Act, indemnify and defend each Director, officer and employee of the Authority in connection with any claim or actual or threatened suit, action, proceeding in which he or she may be involved in his or her official capacity by reason of his or her being or having been such Director, officer or employee, or by reason or any action or omission by him or her in any such capacity. The Authority shall have no obligation to indemnify and defend any such Director, officer or employee for any claim, suit, action or proceeding arising out of criminal offenses or willful and wanton misconduct of such Director, officer or employee.

2. **Immunity.** The Authority and/or its members may assert any and all immunity protections to which they may be entitled under Sections 24-10-101, et. seq., 10a, C.R.S. (Colorado Governmental Immunity Act), or any other applicable law. The immunity of the Authority shall not be waived by any Director of the Authority without the written approval of the Authority as expressed in a duly adopted and executed resolution.

3. **Liability of Members.** Except as otherwise expressly provided herein or in any Project Participation Agreement, the members of the Authority shall have no liability for the obligations and liabilities of the Authority.

**ARTICLE VI**

**Authority Projects**

1. **Definitions.** For purposes of this Contract, the term "Project" shall mean one or more of the following, including all costs and incidental expenses in connection therewith:

(a) any dam, reservoir, other storage facility, diversion works, transmission
facility, collection, treatment, distribution or wastewater facility, ancillary recreational facility, ancillary hydroelectric generation and/or transmission facility, or other capital improvement for the development or disposal of water resources or wastewater (or interest in any of the foregoing) to be in whole or in part constructed or otherwise acquired by or on behalf of the Authority, as well as any facility required to connect such capital improvement to the facilities of a Member or others; or

(b) the acquisition of a leasehold interest in any of the foregoing, or the entering into a contract to purchase or receive, water or storage capacity, or any of the foregoing; or

(c) the acquisition of water and/or water rights; or

(d) The financing of any of the foregoing, and in connection therewith the issuance of bonds, notes or other evidences of indebtedness.

2. Project Participation. No Project shall be acquired, constructed or financed except pursuant to a Project Participation Agreement hereafter approved by the Board and executed by the Authority and such Members as may desire to participate in the Project, and such Project Participation Agreement shall determine the respective rights and liabilities of the Project Participants. If less than all Members execute such a Project Participation Agreement, the Directors representing the Project Participants shall constitute a subcommittee of the Board referred to as the "Project Committee." All provisions of this Contract governing the Board and all provisions of the Project Participation Agreement approved by the Board shall govern such a Project Committee with regard to the Project. All actions taken by a Project Committee in accordance with a Project Participation Agreement shall be deemed action of the Authority, and shall be taken in the name of the Authority, provided, however, that the execution of any Project Participation Agreement shall obligate only those Participants executing such agreement and provided further that Members which are not Project Participants shall have no rights or liabilities with regards to said Project. This Establishing Contract shall be incorporated into each Project Participation Agreement by reference. A Project Participation Agreement may contain such provisions as are authorized by law and as the Authority and the Project Participants may determine, including, without limiting the generality of the foregoing, provisions authorized by Section 31-35-402(1)(h), 12b, C.R.S. Project Participation Agreements shall not contain any restrictions prohibiting or otherwise limiting any Member from obtaining water from any other source that such Member may desire on its own or in a combined manner with some other Member, non-member, or combination thereof. Project Participation Agreements may contain such terms and conditions as the Authority and the Project Participants determine and as are permitted under the Establishing Contract and by law, including, without limiting the generality of the foregoing, water supply parameters, including water quality standards and provisions for the commingling of water obtained from the Authority with water obtained from other sources, and water distribution system engineering standards. Each Project Participation Agreement shall
be in accordance with, and be consistent with, the terms and conditions of this Establishing Contract. No provision of a Project Participation Agreement shall be deemed to amend this Establishing Contract unless the Project Participation Agreement is so approved by the Authority. While a Member may withdraw from the Authority, upon proper notice as provided in Article IX.3 below, and may withdraw from a Project(s) in accordance with the provisions of each Project Participation Agreement, such a withdrawing Member will still be bound by, and be subject to, the benefits and obligations accrued under this Establishing Contract and under each Project Participation Agreement that that Member has entered.

**ARTICLE VII**
Non-Impairment of Member’s Powers

Nothing in this Contract shall be deemed to restrain any of the powers of the Members including, but not limited to, the sale or furnishing of water service by any Member to any entity, public or private, within or outside the boundaries of such Member.

**ARTICLE VIII**
Amendment

1. **Amendment.** Except as hereinafter provided, this Contract and the contractual obligations and rights hereunder, shall continue in full force and effect until amended or modified by unanimous approval of the governing bodies of eighty percent (80%) of all of the Members.

2. **Unanimous Approval.** The following provisions of this Contract may only be amended or modified by action of the governing bodies of all of the Members:

   (i) This Article VIII;
   (ii) Article III, 9(b)(iii); and
   (iii) Article IX.

**ARTICLE IX**
Term, Termination, Withdrawal and Expulsion

1. **Term.** This Contract shall remain in full force and effect until rescinded or terminated by action of the governing bodies of all of the Members.

2. **Termination.** In the event of the rescission or termination of this Contract and the dissolution of the Authority, all right, title and interest of the Authority in the General Assets (as hereinafter defined) of the Authority shall be conveyed to the Members who are such at the time of rescission or termination and to the past Members who have withdrawn (but not those past Members who have been expelled), as tenants-in-common, subject to any outstanding liens, mortgages or other pledges of such General Assets. The interest in the General Assets of the Authority conveyed to each Member shall be that proportion which the total dollar amount paid
by such Member to the Authority for all purposes other than a Project or Projects, during the life of the Authority (except amounts attributable to the Authority’s payment of bond interest), bears to the total dollar amount of all such payments made to the Authority by all such Members during the life of the Authority. The term “General Assets” as used herein shall include all legal and equitable interests in real or personal property, tangible or intangible of the Authority, except those acquired as part of a Project (“Project Assets”). In the event of the termination or rescission of this Contract and dissolution of the Authority, the disposition of each Project and of all Project Assets shall be as provided for in each respective Project Participation Agreement, provided however, that with respect to each Project, the Project Participants may otherwise provide, by unanimous agreement, for the disposition of any and all interests of the Authority in the Project to any successor to the Authority, or for any alternative disposition among such Project Participants. In no event may this Contract be rescinded or terminated or the Authority dissolved if the Authority has bonds, notes or other obligations outstanding, unless provision for full payment of such obligations, by escrow or otherwise, has been made, not in contravention of the terms of such obligations.

3. **Withdrawal.** Any Member may withdraw from the Authority by giving written notice thereof to the Authority at least ten (10) days in advance. Such withdrawing Member shall pay all of its assessments and obligations hereunder that have accrued as of the effective date of its withdrawal; however, such withdrawing Member’s responsibility for paying such accrued assessments and obligations shall survive the Member’s withdrawal. Failure to pay an assessment or other obligations and failure to cure default of the same within the time limits provided in Article X may be deemed intent of that defaulting Member to withdraw from the Authority, or may be considered as grounds for expulsion. Withdrawal from any Project may be accomplished only in accordance with the provisions of the applicable Project Participation Agreement.

4. **Expulsion.** A Member may be expelled from the Authority for non-payment of any amount due under this Contract upon the vote of eighty percent (80%) of all the Members, not including the Member considered for expulsion. A Project Participant may be expelled only in accordance with the provisions of the applicable Project Participation Agreement. An expelled Member or Project Participant shall remain liable for any and all amounts payable to the Authority or payable pursuant to a Project Participation Agreement by such Member that have accrued as of the effective date of expulsion. Upon expulsion, the expelled Member or Project Participant shall forfeit any and all rights to reimbursement or refund of monies paid to the Authority or pursuant to any Project Participation Agreement.

**ARTICLE X**
\*Default and Right to Cure*

A Member shall continue to be eligible to participate in the business of the Authority only if it regularly pays to the Authority its assessments and other obligations when such assessments
and other obligations become due. While a Member is under no obligation to pay any particular assessment it does not wish to pay, payment of all assessments approved by the Authority shall be a condition of continued membership in the Authority. In the event any such assessment or other obligation is not paid when due, that Member shall be in default and shall not be entitled to participate further in the business of the Authority or in any Project, provided however, that said Member shall have thirty (30) days after written notice from the Authority in which to cure such default, but in no event shall it be relieved of its obligation to make any payments for which it shall be legally responsible and which shall remain due and payable. The Authority shall have the right to compel payment of any amounts due and owing by appropriate legal process and the defaulting Member shall be liable for the costs of any action taken or suit necessary to compel payment together with attorney's fees and costs incurred by the Authority for such purposes. Continued participation, after default, by any such Member in the business of the Authority or any Projects shall only be upon such terms and conditions as the Board then deems appropriate. Any default by a Member under this Establishing Contract or any Project Participation Agreement shall constitute a default under that particular Contract or Agreement to which such Member is a party. Default under any Project Participation Agreement shall be provided for in the provisions of each Project Participation Agreement.

**ARTICLE XII**

Severability

If any provision of this Contract or the application thereof to any party, person, or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Contract which can be given effect without the invalid provision or application, and to this end the provisions of this Contract, and each and every provision thereof, are declared to be severable.

**ARTICLE XIII**

Execution of Contract

This Contract may be executed in several counterparts, each of which will be an original but all of which together shall constitute one and the same Contract.
IN WITNESS WHEREOF, the undersigned Members have caused this instrument to be executed as of this ____ day of __________, 1996.

BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY, COLORADO

By:________________________________________
   Loren R. Whittemore, Chairperson

ATTEST:

________________________________________
Deputy County Clerk
ATTEST: 
By: ________________ (Entity)
Chairperson/President

Secretary

ATTEST: 
By: ________________ (Entity)
Chairperson/President

Secretary

ATTEST: 
By: ________________ (Entity)
Chairperson/President

Secretary

ATTEST: 
By: ________________ (Entity)
Chairperson/President

Secretary