

**NEW MEXICO CONSUMPTIVE USE AND
FORBEARANCE AGREEMENT
AMONG
THE GILA RIVER INDIAN COMMUNITY, SAN CARLOS IRRIGATION
AND DRAINAGE DISTRICT, THE UNITED STATES, FRANKLIN
IRRIGATION DISTRICT, GILA VALLEY IRRIGATION DISTRICT,
PHELPS DODGE CORPORATION, THE SECRETARY OF THE
INTERIOR, AND OTHER PARTIES LOCATED IN THE UPPER VALLEY
OF THE GILA RIVER**

This New Mexico Consumptive Use and Forbearance Exchange Agreement (hereinafter defined as the "Agreement") is entered into as of the date executed below, by and among the United States (as hereinafter defined), the Secretary (as hereinafter defined), the Gila River Indian Community, the San Carlos Irrigation and Drainage District, the Gila Valley Irrigation District, the Franklin Irrigation District, the Brown Canal Company of the Gila Valley Irrigation District, the Curtis Canal Company of the Gila Valley Irrigation District, the Dodge-Nevada Canal Company of the Gila Valley Irrigation District, the Fort Thomas Canal Company of the Gila Valley Irrigation District, the Graham Canal Company of the Gila Valley Irrigation District, the Highline Canal Company of the Gila Valley Irrigation District, the Montezuma Canal Company of the Gila Valley Irrigation District, the San Jose Canal Company of the Gila Valley Irrigation District, the Smithville Canal Company of the Gila Valley Irrigation District, Sunset Canal, New Model Canal, the Union Canal Company of the Gila Valley Irrigation District, the Sunset Ditch Company, the NM New Model Community Ditch Association, the Valley Canal Company, and the Phelps Dodge Corporation.

1.0 PREAMBLE.

1.1 WHEREAS, the purpose of this Agreement is to allow the Secretary to exercise the rights authorized by sections 304(d) and (f) of the Colorado River Basin Project Act (as hereinafter defined).

1.2 WHEREAS, the State of New Mexico may elect to have constructed facilities on the Gila River and the San Francisco River to provide for the Consumptive Use (as hereinafter defined) authorized by sections 304(d) and (f) of the Colorado River Basin Project Act (such facilities hereinafter defined as the "NM Unit");

1.3 WHEREAS, in the event the Secretary as Authorized Diverter (as hereinafter defined) commences Diversions or Consumptive Use pursuant to this Agreement, the Gila River Indian Community and the San Carlos Irrigation and Drainage District agree not to bring claims or otherwise object to Diversions and Consumptive Use from the Gila River and the San Francisco River undertaken in accordance with this Agreement in consideration of Deliveries of water from the Central Arizona Project that the Secretary as CAP Owner (as hereinafter defined) holds pursuant to section 304(f) of the Colorado River Basin Project Act and the Secretary as CAP Owner agrees to make such Deliveries pursuant to the terms of this Agreement;

1.4 WHEREAS, in the event the Secretary as Authorized Diverter commences Diversions or Consumptive Use pursuant to this Agreement, the UV Irrigation Districts (as hereinafter defined), Phelps Dodge Corporation, and the Canal Companies (as hereinafter defined) agree not to bring claims or otherwise object to Diversions or Consumptive Use undertaken by the

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Secretary as Authorized Diverter in accordance with this Agreement in consideration of the benefits provided to them in the UV Agreement (as hereinafter defined).

1.5 WHEREAS, in the event the Secretary as Authorized Diverter commences Diversions or Consumptive Use pursuant to this Agreement, the UV Non-Signatories (as hereinafter defined) shall be obligated through the UV Agreement not to bring claims or otherwise object to Diversions or Consumptive Use undertaken by the Secretary as Authorized Diverter in accordance with this Agreement in consideration of the benefits provided to them in the UV Agreement.

1.6 WHEREAS, in the event the State of New Mexico notifies the Secretary that the State has elected to have the NM Unit constructed or developed, as authorized by the Colorado River Basin Project Act , as amended by the Arizona Water Settlements Act of 2004, the Secretary as NM Unit and as Authorized Diverter shall contract with NM CAP Entity (as hereinafter defined) to design, construct, operate and maintain the NM Unit in accordance with the terms of this Agreement;

1.7 WHEREAS, the Parties agree that the Secretary as Authorized Diverter's Diversions and Consumptive Use of water from the Gila River and the San Francisco River (as hereinafter defined) in accordance with this Agreement will not give rise to claims that such Diversions or Consumptive Use impair or cause economic injury or cost to their rights existing on September 30, 1968, in Arizona to water from the Gila River and the San Francisco River (as those terms are both hereinafter defined); and

1.8 WHEREAS, the Parties believe and intend that the Secretary as Authorized Diverter's Diversions and Consumptive Use of water from the Gila River and the San Francisco River in

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accordance with this Agreement will not impair or cause economic injury or cost to rights existing, or determined to exist as of September 30, 1968, in Arizona, to water from the Gila River and the San Francisco River.

NOW, THEREFORE, the Parties agree as follows:

2.0 DEFINITIONS.

For purposes of this Agreement, the following terms shall have the meanings set forth below:

2.1 “Additional Arizona Daily Demand” means the daily demand of the Additional Arizona Rights as provided by term 1.3 of Exhibit 2.47.

2.1A “Additional Arizona Rights” means the rights to the waters of the Gila River and San Francisco Rivers that satisfy the conditions of term 1.2 of Exhibit 2.47. “Additional Arizona Right” means any such right.

2.2 “Agreement” means this agreement and the Exhibits attached hereto, which are hereby incorporated by reference.

2.3 “Allottee” means a person who holds a beneficial real property interest in an Indian allotment that is: (A) located within the Reservation; and (B) held in trust by the United States.

2.4 “Call System” means that procedure approved by the Globe Equity Enforcement Court in the order issued on March 10, 1999, or any procedure subsequently approved by the Globe Equity Enforcement Court for the same purpose.

2.5 “Canal Companies” has the meaning set forth in the UV Agreement.

2.6 “CAP” or “Central Arizona Project” means that reclamation project authorized and constructed by the United States in accordance with Title III of the Colorado River Basin Project Act (43 U.S.C. §§ 1521 *et seq.*).

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2.7 “CAP Fixed OM&R Charge” means ‘Fixed OM&R Charge’ as that term is defined in the CAP Repayment Stipulation.

2.8 “CAP Pumping Energy Charge” means ‘Pumping Energy Charge’ as that term is defined in the CAP Repayment Stipulation.

2.9 “CAP Repayment Stipulation” means the Revised Stipulation Regarding a Stay of Litigation, Resolution of Issues During the Stay and for Ultimate Judgment Upon the Satisfaction of Conditions, filed in *Central Arizona Water Conservation District v. United States, et al.*, No. CIV 95-625-TUC-WDB (EHC), No. CIV 95-1720-PHX-EHC (Consolidated Action), U. S. District Court for the District of Arizona, and the Order dated April 28, 2003, entered therein, and any amendment or revision thereof. This is the same case referred to in the Act as No. CIV 95-09625-09TUC-09WDB (EHC), No. CIV 95-091720-PHX-EHC (Consolidated Action).

2.10 “CAP System” means: (A) the Mark Wilmer Pumping Plant, (B) the Hayden-Rhodes Aqueduct, (C) the Fannin-McFarland Aqueduct, (D) the Tucson Aqueduct, (E) the pumping plants and appurtenant works of the Central Arizona Project aqueduct system that are described in (A) through (D), and (F) any extensions of, additions to, or replacement features described in (A) through (E).

2.11 “CAP Turnout” means the place or places to which the Secretary as CAP Owner shall cause the NM CAP Water to be delivered pursuant to this Agreement on the CAP System as are agreed by the Community, the District, and CAWCD.

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2.12 “CAWCD” or the “Central Arizona Water Conservation District” means the political subdivision of the State of Arizona that is the contractor under the CAP Repayment Contract.

2.13 “CFS” means cubic feet per second.

2.14 “Colorado River Basin Project Act” means that act approved by Congress on September 30, 1968, (43 U.S.C. §§ 1501 *et seq.*), 82 Stat. 885, as amended by the Arizona Water Settlements Act of 2004.

2.15 “Consumptive Use” means measured Diversions by the Secretary as Authorized Diverter pursuant to this Agreement, minus Return Flows. All such measured Diversions shall be accounted as Consumptive Use until such time as there are actual Return Flows. This definition of “Consumptive Use” includes reservoir evaporation losses as required by section 304(f) of the Colorado River Basin Project Act. Consumptive Use as defined in this Agreement has no relation to and shall have no effect on the definition or interpretation of “consumptive use” as that term is defined under: (i) article VIII(2) of the Globe Equity Decree, (ii) the UV Agreement or (iii) the Settlement Agreement.

2.16 “Consumptively Use” means the act of Consumptive Use.

2.17 “Deliver” or “Delivered” means CAWCD’s delivery of NM CAP Water to the CAP Turnout. “Delivery” means CAWCD’s act of delivering NM CAP Water to the CAP Turnout.

2.18 “District NM CAP Account” means the account established by the District and the Community according to the terms of Exhibit 2.18.

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2.19 “Divert” or “Diverting” means to receive, withdraw or develop and produce or capture water by means of a ditch, canal, flume, bypass, dam, pipe line, pit, collection or infiltration gallery, conduit, well, pump, turnout, or other mechanical device or any other human act.

“Diversion” means the act of Diverting.

2.20 “Diversion Point” means a diversion point identified in the table of priorities that begins on page fourteen (14) of the Globe Equity Decree, and or their replacements, whether or not now existing and whether or not shared by one or more Canal Company.

2.21 “Exhibit” means an exhibit to this Agreement.

2.21A “Forbearing Parties” means all of the Parties except the Secretary. The term includes the United States as defined herein.

2.22 “Gila River” means the Gila River, its tributaries and underground water sources at or above Ashurst-Hayden Diversion Dam, other than the San Francisco River, its tributaries and underground water sources.

2.23 “Gila River Indian Community” or “Community” means the government composed of members of the Pima Tribe and the Maricopa Tribe, which is organized under section 16 of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 476).

2.24 “Globe Equity Decree” means that decree dated June 29, 1935, entered in *United States of America v. Gila Valley Irrigation District, et al.*, Globe Equity No. 59, by the U. S. District Court for the District of Arizona. The term “Globe Equity Decree” includes all court orders and decisions supplemental to that decree.

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2.25 “Globe Equity Enforcement Court” means the U. S. District Court for the District of Arizona solely in its capacity as the court having and exercising continuing jurisdiction over the Globe Equity Decree.

2.26 “Member” or “Members” means any person or persons duly enrolled as members of the Gila River Indian Community.

2.26A “NM CAP Entity” means the entity or entities to be formed or designated by the State of New Mexico to enter into the NM Unit Agreement with the Secretary as NM Unit and as Authorized Diverter. The NM CAP Entity shall be an entity that: (a) does not have sovereign immunity; (b) does not have the protection of the 11th Amendment to the U.S. Constitution; (c) continues to satisfy all these conditions throughout its existence.

2.27 “NM CAP Water” means water from the CAP made available pursuant to the second sentence of section 304(d) of the Colorado River Basin Project Act.

2.28 “NM CAP Water Bank” means the water account established and managed pursuant to Paragraph 6.

2.29 “NM CAP Mitigation Water Bank” means the water account established and managed pursuant to Paragraph 7.

2.30 “NM Priority and Apportionment Terms” means the adjusted method described in Exhibit 2.29, of determining the priority year, the regulation year(s), and apportionment rights under the Globe Equity Decree for purposes of this Agreement. Such method shall become effective on January 1 of the first Year during which the Secretary as Authorized Diverter Diverts water for the NM Unit pursuant to and in accordance with this Agreement.

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2.31 “NM Risk Allocation Terms” means the method, described in Exhibit 2.30, of allocating certain risks of increased demands on the waters of the Gila River and San Francisco River resulting from Additional Arizona Rights, and Diversions and Consumptive Use pursuant to this Agreement. Such method shall become effective on January 1 of the first Year during which the Secretary as Authorized Diverter Diverts water for the NM Unit pursuant to and in accordance with this Agreement.

2.32 “NM Unit” means the unit or units of the Central Arizona Project in New Mexico to be designed, constructed, operated and maintained by or under the authority of the Secretary as NM Unit and as Authorized Diverter pursuant to sections 301(a)(4) and 304 of the Colorado River Basin Project Act to Consumptively Use water from the Gila River and San Francisco River.

2.33 “NM Unit Agreement” means the agreement to be entered into by and between the Secretary as NM Unit and as Authorized Diverter and the NM CAP Entity upon notice to the Secretary from the State of New Mexico that it intends to have the NM Unit built or developed. The principal terms of the NM Unit Agreement are set forth in Exhibit 2.48.

2.34 “Other UV Signatory” has the meaning set forth in the UV Agreement.

2.35 “Paragraph” means a numbered paragraph of this Agreement including all Subparagraphs in such Paragraph.

2.36 “Party” means an entity represented by a signatory to this Agreement and “Parties” means more than one of such entities. The United States’ participation as a Party shall be in the capacity as described in subparagraph 2.49.

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2.37 “Phelps Dodge Corporation” or “Phelps Dodge” means the New York corporation of that name, Phelps Dodge’s subsidiaries (including without limitation Phelps Dodge Morenci, Inc., a Delaware corporation of that name), and Phelps Dodge’s successors and assigns.

2.38 “Return Flows” means water that the Secretary as Authorized Diverter has Diverted pursuant to this Agreement that is measured as it is subsequently returned to the Gila River or the San Francisco River. Return Flows that are directly measurable shall be measured using equipment that is calibrated and maintained to industry standards. Return Flows that cannot be directly measured shall be determined using methods and procedures generally accepted in the engineering profession to make indirect determinations of water Diverted but subsequently returned to the Gila River and the San Francisco River.

2.39 “San Carlos Apache Tribe” means the San Carlos Apache Tribe, a tribe of Apache Indians organized under section 16 of the Act of June 18, 1934 (25 U.S.C. §476).

2.40 “San Carlos Irrigation and Drainage District” or “the District” means the entity of that name that is a political subdivision of the State of Arizona and an irrigation and drainage district organized under the laws of the State of Arizona.

2.41 “San Francisco River” means the San Francisco River, its tributaries and underground water sources. The San Francisco is a tributary of the Gila River above Ashurst-Hayden Diversion Dam, but is not included in the definition of “Gila River” for purposes of this Agreement.

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2.42 “SCIIP” or “SCIP” means the San Carlos irrigation project authorized pursuant to the Act of June 7, 1924 (43 Stat. 475). The term “SCIIP” or “SCIP” includes any amendments or supplements to the act described in the preceding sentence.

2.43 “Secretary” means the Secretary of the U.S. Department of the Interior acting solely in the capacities as: (a) owner of the CAP; (b) as the official responsible for the design, construction, operation and maintenance of the NM Unit; (c) the official authorized to Divert and responsible for Diversions pursuant to this Agreement for the benefit of the NM CAP Entity; (d) the official authorized to disburse funds under Section 403 of the Colorado River Basin Project Act (43 U.S.C. 1543) as amended by the Arizona Water Settlements Act; and (e) in no other capacity.

2.43A “Secretary as Authorized Diverter” means the Secretary of the U.S. Department of the Interior acting solely in the capacity as the official authorized to Divert and responsible for Diversions pursuant to this Agreement for the sole benefit of the NM CAP Entity and in no other capacity.

2.43B “Secretary as CAP Owner” means the Secretary of the U.S. Department of the Interior acting solely in the capacity as owner of the CAP and in no other capacity.

2.43C “Secretary as NM Unit” means the Secretary of the U.S. Department of the Interior acting solely in the capacity as the official responsible for the design, construction, operation and maintenance of the NM Unit and party to the NM Unit Agreement and in no other capacity.

2.44 “Settlement Agreement” means that certain amended and restated agreement authorized and approved by section 203 of the Arizona Water Settlements Act of 2004 and entered into

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among the Community, the District, the United States, the State of Arizona and certain other named parties.

2.44A “State of New Mexico” or “New Mexico” means the State of New Mexico acting through the Interstate Stream Commission.

2.45 “Stored Water” means all water stored in the San Carlos Reservoir that is available under the Globe Equity Decree for release through the gates of the Coolidge Dam for conveyance down the channel of the Gila River for Diversion and use by the Community and the District.

2.46 “Subparagraph” means a numbered subparagraph of this Agreement and any subsections thereof.

2.47A “Technical Committee” means the technical committee established pursuant to Subparagraph 12.4.

2.47 “Terms of New Mexico Diversions” means the terms pursuant to which the Secretary as Authorized Diverter may Divert water of the Gila River and the San Francisco River without objection by the Forbearing Parties, a copy of which is attached as Exhibit 2.47.

2.48 “Terms of NM Unit Agreement” means the terms and conditions to be included in the NM Unit Agreement as set forth in Exhibit 2.48.

2.49 “United States” or “United States of America” means the United States of America acting on behalf of the Community, Members, and Allottees, and as operator of SCIP and in no other capacity. The term “United States” and “United States of America” as used in this Agreement specifically excludes the United States in its capacity as trustee for any other federally

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recognized Indian tribe, including the San Carlos Apache Tribe, and any other capacity except those indicated in the first sentence of this Subparagraph 2.49.

2.50 “UV Agreement” means the agreement entered into by and among the Community, the United States, the District, Gila Valley Irrigation District, Franklin Irrigation District, the Canal Companies, Phelps Dodge and certain other parties in the upper valley of the Gila River, a copy of which is attached to the Settlement Agreement as exhibit 26.2.

2.51 “UVD” has the meaning set forth in the UV Agreement. “UVDs” shall mean all such persons or entities.

2.52 “UV Irrigation District” means either the Franklin Irrigation District or the Gila Valley Irrigation District. “UV Irrigation Districts” means both the Franklin Irrigation District and the Gila Valley Irrigation District.

2.53 “UV Non-Signatories” has the meaning set forth in the UV Agreement.

2.54 “Water Commissioner” has the meaning provided by article XII of the Globe Equity Decree.

2.55 “Year” means a calendar year.

2.56 Certain of the Exhibits have terms that are specifically defined for purposes of such Exhibits only. Such definitions shall apply only to those Exhibits in which they appear. In the event of any conflict between the definitions in this Paragraph 2 and the definitions set forth in any Exhibit, for purposes of such Exhibit, the definitions set forth in such Exhibit shall control.

3.0 LIST OF EXHIBITS.

<u>Exhibit No.</u>	<u>Name of Exhibit</u>
2.18	District NM CAP Account
2.29	NM Priority and Apportionment Terms
2.30	NM Risk Allocation Terms
2.47	Terms of New Mexico Diversions
2.48	Terms of NM Unit Agreement
6	Examples of Operation of NM CAP Water Bank
7	Examples of Operation of NM CAP Mitigation Water Bank
11.3.1	UV Non-Signatory Waiver for purposes of Paragraph 11

4.0 DIVERSION AND CONSUMPTIVE USE OF GILA RIVER AND SAN FRANCISCO RIVER WATER.

4.1 The Secretary as Authorized Diverter's right to Divert and Consumptively Use water from the Gila River and the San Francisco River pursuant to this Agreement is explicitly conditioned on the following conditions precedent:

4.1.1 Receipt by the Gila Valley Irrigation District of all the funds to be provided pursuant to Paragraph 13; and

4.1.2 The Secretary as NM Unit and as Authorized Diverter, and the NM CAP Entity must execute the NM Unit Agreement and the NM Unit Agreement as executed must include the terms and provisions set forth in Exhibit 2.48 (Terms of NM Unit Agreement) and must not include any additional terms or conditions that are inconsistent or conflict with the terms and provisions set forth in Exhibit 2.48.

4.2 Subject to the terms of this Agreement, without regard to any priority or entitlement of the Forbearing Parties to Divert or store water under the Globe Equity Decree, the Secretary as Authorized Diverter may Divert water from the Gila River and the San Francisco River solely in accordance with Exhibit 2.47 (Terms of New Mexico Diversions).

4.3 The Secretary as Authorized Diverter may Consumptively Use from the Gila River and the San Francisco River a combined total not to exceed one hundred forty thousand (140,000) acre-feet of water during any consecutive ten (10) Year period, provided that such Consumptive Use is in accordance with this Agreement.

4.4 The Secretary as Authorized Diverter may Consumptively Use no more than four thousand (4,000) acre-feet per Year from the San Francisco River. Any such Consumptive Use shall be included in the total amount of allowable Consumptive Use in a ten-Year period set forth in Subparagraph 4.3 and in the annual amount of allowable Consumptive Use set forth in Subparagraphs 4.6 and 4.8.

4.5 The Secretary as Authorized Diverter shall not begin Diversions in any given Year until such time as there is thirty thousand (30,000) acre-feet of Stored Water in that Year, whereupon the Secretary as Authorized Diverter may Divert up to the maximum annual amount of allowable Consumptive Use set forth in Subparagraphs 4.6 and 4.8, regardless whether there is subsequently less than thirty thousand (30,000) acre-feet of Stored Water in that Year.

4.6 In any given Year, the Secretary as Authorized Diverter may Consumptively Use up to sixty-four thousand (64,000) acre-feet of water, provided that

4.6.1 such Consumptive Use is in accordance with this Agreement; and

4.6.2 there are credits in the NM CAP Water Bank equal to or greater than the amount of such Consumptive Use at the time of such Consumptive Use.

4.7 If during any five (5) Year period the annual average of NM Diversion Days on which the Secretary as Authorized Diverter is precluded from Consumptively Using water because there is less than thirty thousand (30,000) acre-feet of Stored Water increases above the annual average number of such days for the period 1968 through 1996 (inclusive), the minimum Stored Water requirement set forth in Subparagraph 4.2 shall be reduced by an amount calculated in the following manner:

4.7.1.1 Every five (5) years the Technical Committee shall determine the minimum Stored Water requirement for purposes of Subparagraph 4.5 that would have yielded an average annual number of days on which the Secretary as Authorized Diverter would have been precluded from Diverting that is equal to the average annual number of days the Secretary as Authorized Diverter operating the NM Unit would have been precluded from Diverting during the period from 1968 through 1996.

4.7.1.2 Thereafter, the Technical Committee shall reconsider this new limitation and adjust it as appropriate every five (5) Years in the manner set forth in Subparagraph 4.7.1.1; provided however, that the minimum Stored Water requirement of Subparagraph 4.5 shall never exceed thirty thousand (30,000) acre-feet.

4.7.1.3 An example of the manner in which Subparagraph 4.7.1.1 will operate is as set forth below in this Subparagraph.

4.7.1.3.1 Five years after the Secretary as Authorized Diverter begins Diversions of water pursuant to this Agreement, the Technical Committee determines that the number of days the Secretary as Authorized Diverter

would have been precluded from Diverting by the storage limitation had the Secretary as Authorized Diverter been Diverting during the period 1968 to 1996, inclusive was 290 days, or 10 days per year on average.

4.7.1.3.2 The Technical Committee then determines that the number of days the Secretary as Authorized Diverter actually Diverted during the most recent five years of operation was 60 days, or 12 days per year on average.

4.7.1.3.3 The Technical Committee then determines that the average amount of Stored Water in San Carlos Reservoir during the most recent five years of operation, that would have resulted in the Secretary as Authorized Diverter having been precluded from Diverting 50 days, or 10 days per year on average, was twenty-five thousand (25,000) acre-feet. The minimum Stored Water requirement for purposes of Subparagraph 4.5 would then become twenty-five thousand (25,000) acre-feet until recalculated by the Technical Committee after another five years have elapsed.

4.7.1.3.4 If the minimum Stored Water requirement for purposes of Subparagraph 4.5 calculated as set forth in this Subparagraph were to equal, for example, thirty-three thousand (33,000) acre-feet, the minimum Stored Water requirement for purposes of Subparagraph 4.5 would remain at thirty thousand (30,000) acre-feet for the succeeding five years.

4.8 The Secretary as Authorized Diverter shall not Consumptively Use more than sixty-four thousand (64,000) acre-feet in any given Year.

4.9 No later than the last day of each month, the Secretary as Authorized Diverter shall provide the Forbearing Parties and the NM CAP Entity with a report of the total amount of water that the Secretary as Authorized Diverter has Consumptively Used pursuant to this Agreement for the preceding month. Such report shall separately indicate the total amount of measured Diversions by the Secretary as Authorized Diverter pursuant to this Agreement during such month, as well as the Return Flows measured in such month. Simultaneously with providing such report to the Forbearing Parties, the Secretary as Authorized Diverter shall post such report on an internet website maintained by the Secretary for the purpose of posting reports required pursuant to this Agreement.

4.10 The Secretary as Authorized Diverter shall not be required to Consumptively Use water from the Gila River or the San Francisco River in any given Year.

4.11 The Secretary as Authorized Diverter's Diversions of water from the Gila River and the San Francisco River, or any combination thereof, shall not exceed three hundred fifty (350) CFS at any time.

4.12 The Secretary as Authorized Diverter, pursuant to the NM Unit Agreement, may allow the NM CAP Entity to Divert water on behalf of the NM Unit in compliance with the terms and conditions of this Agreement, provided that:

4.12.1 the NM CAP Entity continues to meet all the conditions of Subparagraph 2.26A;

4.12.2 the Secretary as Authorized Diverter does not assign or delegate her authority to Divert water pursuant to this Agreement to the NM CAP Entity; and

4.12.3 the Secretary as Authorized Diverter does not assign or delegate to the NM CAP Entity her responsibilities and obligations to the Forbearing Parties and the UV Non-Signatories and remains responsible to the Forbearing Parties and the UV Non-

Signatories for the NM CAP Entity's compliance with the terms and conditions of this Agreement and also for any damages that the Forbearing Parties or the UV Non-Signatories might incur in the event the NM CAP Entity fails to comply with the terms and conditions of this Agreement.

4.13 The Parties agree that in the event the Secretary as Authorized Diverter allows the NM CAP Entity to Divert water on behalf of the NM Unit pursuant to Subparagraph 4.12 and Paragraph 10, the NM CAP Entity shall not be an entity that must be joined as a party for purposes of Rule 19 of the Federal Rules of Procedure (or other applicable rule or statute governing when a person must be joined as a party to an action) and no Party shall file any motion or make any argument to a court hearing a Dispute under this Agreement that the NM CAP Entity is an entity that must be joined as a party.

4.14 The Secretary may commence Diversions and Consumptive Use upon the occurrence of the earliest of the following:

4.14.1 completion of construction of a mechanism, such as the pipeline described in Subparagraph 13.2, sufficient to satisfy the requirements of the Water Quality Injunction entered by the Globe Equity Court on or about May 28, 1996 (as amended) to enable fulfillment of the obligations set forth in sub-term 5.2.2 of Exhibit 2.30 (NM Risk Allocation Terms);

4.14.2 the permanent termination of the Water Quality Injunction entered by the Globe Equity Court on or about May 28, 1996 (as amended) or another permanent resolution whereby the delivery of water of a particular quality to the San Carlos Apache Tribe pursuant to article VI(2) of the Globe Equity Decree is no longer required;

4.14.3 January 1, 2016, provided that the NM CAP Entity has provided notice to the Forbearing Parties on or before January 1, 2014, that the NM CAP Entity intends to have Diversions begin on January 1, 2016; or

4.14.4 such date after January 1, 2016, that is at least two years subsequent to the date on which the NM CAP Entity provides notice to the Forbearing Parties that the NM CAP Entity intends to have Diversions begin.

4.15 Pursuant to section 304 of the Colorado River Basin Project Act, the Secretary may Divert and Consumptively Use water from the Gila River and the San Francisco River without regard to rights to water from such rivers with a priority date subsequent to September 30, 1968.

5.0 DELIVERIES OF NM CAP WATER.

5.1 The Secretary as CAP Owner may not Deliver NM CAP Water until after the NM Unit Agreement has been executed by the parties thereto.

5.2 The Secretary as CAP Owner may not Deliver more than eighteen thousand (18,000) acre-feet of NM CAP Water in any Year.

5.3 The Secretary as CAP Owner shall cause to be Delivered to the Community and the District one (1) acre-foot of NM CAP Water for each one (1) acre-foot of water that the Secretary as Authorized Diverter Consumptively Uses pursuant to this Agreement. This quantity of water shall be deemed sufficient and appropriate for the purposes of section 304(f)(1) of the Colorado River Basin Project Act.

5.4 Delivery of NM CAP Water for the NM CAP Water Bank.

- 5.4.1 Pursuant to the NM Unit Agreement, on or before September 1 of each Year, the NM CAP Entity shall notify the Secretary as CAP Owner in writing as to the amount of NM CAP Water that the NM CAP Entity wishes to have the Secretary as CAP Owner Deliver to the Community and the District in the following Year.
- 5.4.2 The Secretary as CAP Owner shall be responsible for the timely payment of all charges attendant to the Delivery of such water to the Community and the District. The Secretary as CAP Owner shall seek timely reimbursement from the NM CAP Entity for the CAP Fixed OM&R Charge and the CAP Pumping Energy Charge for the NM CAP Water Delivered pursuant to Subparagraph 5.4. The Community and the District shall timely reimburse the Secretary as CAP Owner for the NM CAP Water Delivered pursuant to Subparagraph 5.5.
- 5.4.3 The Delivery of such NM CAP Water to the Community and the District shall be without economic injury or cost to the Community or the District. Any economic injury or cost related to the Delivery of such NM CAP Water other than those for which reimbursement is required pursuant to Subparagraph 5.4.2 shall be the responsibility of the Secretary as CAP Owner; provided that any cause of action for monetary damages resulting from economic injury shall be subject to the provisions of section 213(a) of the Act or 28 U.S.C. 1491.
- 5.4.4 All NM CAP Water Delivered to the Community and the District at the request of the NM CAP Entity shall be credited to the NM CAP Water Bank in accordance with Paragraph 6.

5.4.5 Subject to Exhibit 2.18, the Community and the District shall share such NM CAP Water, with the Secretary as CAP Owner causing fifty-five percent (55%) of such NM CAP Water to be Delivered to the Community and forty-five percent (45%) to be Delivered to the District on an annual basis.

5.4.6 On or before September 15 of each Year, the Secretary as CAP Owner shall notify the Community and the District of the amount of NM CAP Water requested by New Mexico for Delivery in the following Year.

5.5 **Delivery of NM CAP Water for the NM CAP Mitigation Water Bank.**

5.5.1 On or before September 30 of any given Year, the Community and the District may request that the Secretary as CAP Owner Deliver, for the establishment of credits in the NM CAP Mitigation Water Bank, NM CAP Water available for Delivery in the following Year but not requested by the NM CAP Entity under Subparagraph 5.4, provided, however, no water may be Delivered for the establishment of credits in the NM CAP Mitigation Water Bank until after an Additional Arizona Right has been established.

5.5.2 The maximum amount of such NM CAP Water that may be Delivered to the Community and the District combined in any Year is the difference between (i) the maximum number of credits that may be in the NM CAP Mitigation Water Bank, as determined in Subparagraph 8.3, and (ii) the actual number of credits projected to be in the NM CAP Mitigation Water Bank as of January 1 of the Year in which such Delivery is to be made.

- 5.5.3 All such NM CAP Water Delivered to the Community and the District shall be credited to the NM CAP Mitigation Water Bank in accordance with Paragraph 8.
- 5.5.4 The Community and the District shall each be individually responsible for the timely reimbursement to the Secretary as CAP Owner of all applicable CAP charges for any NM CAP Water that each orders pursuant to Subparagraph 5.5.
- 5.6 On or before September 30 of each Year, the Community and the District shall each provide the Secretary as CAP Owner with a monthly schedule for the Delivery of NM CAP Water in the following Year, which shall include NM CAP Water to be Delivered for the NM CAP Water Bank and for the NM CAP Mitigation Water Bank.
- 5.7 The Secretary as CAP Owner shall cause NM CAP Water to be Delivered to the Community and the District in accordance with the schedules provided by the Community and the District pursuant to Subparagraph 5.6.
- 5.8 The costs of any NM CAP Water Delivered to the Community and the District pursuant to this Agreement shall be limited to CAP Fixed OM&R Charge and CAP Pumping Energy Charge. Such costs shall not include any other costs associated with the Delivery of such NM CAP Water, including, but not limited to, capital costs attendant to other units or portions of the CAP.
- 5.9 The NM CAP Water Delivered to the Community and the District pursuant to this Agreement shall have the priority set forth in section 304(e) of the Colorado River Basin Project Act.

6.0 NM CAP WATER BANK.

6.1 The Secretary as CAP Owner shall establish the NM CAP Water Bank to account for Deliveries of NM CAP Water to the Community and the District in advance of Consumptive Use of water pursuant to this Agreement. The Secretary as CAP Owner shall manage and account for the NM CAP Water Bank in accordance with Paragraph 6.

6.2 Beginning in the Year in which the NM Unit Agreement is executed, the Secretary as CAP Owner may Deliver NM CAP Water to the Community and the District in advance of Consumptive Use of water pursuant to this Agreement for the establishment of credits in the NM CAP Water Bank.

6.3 The total number of credits in the NM CAP Water Bank shall not exceed seventy thousand (70,000) acre-feet at any time.

6.4 On January 1 of each Year, the Secretary as CAP Owner shall add a credit in the NM CAP Water Bank of one acre-foot for each acre-foot of NM CAP Water scheduled in the previous Year to be delivered in the then current Year to the Community and the District pursuant Subparagraph 5.4.

6.5 On December 31 of each Year, the Secretary as CAP Owner shall deduct from the NM CAP Water Bank one-acre foot credit for each acre-foot of:

6.5.1 water reported as Consumptively Used during the preceding twelve (12) months pursuant to Subparagraph 4.7; and

6.5.2 NM CAP Water for the NM CAP Water Bank scheduled for Delivery in the preceding twelve (12) months pursuant to Subparagraph 5.4, but not actually Delivered during those months for reasons outside the control of the Community or the District.

6.6 Exhibit 6 sets forth examples of the operation of the NM CAP Water Bank.

7.0 DISTRICT NM CAP ACCOUNT.

7.1 The Community shall establish and administer the District NM CAP Account in accordance with Exhibit 2.18.

7.2 The District NM CAP Account shall account for: (1) NM CAP Water otherwise delivered to the Community and the District; and (2) water delivered by the Community to the District in accordance with Exhibit 2.18.

7.3 The credits in the District NM CAP Account shall not have any effect on the credits in the NM CAP Water Bank or NM CAP Mitigation Water Bank.

7.4 The District, the Secretary as CAP Owner and the NM CAP Entity shall have the right to audit the Community's management of the District NM CAP Account in accordance with Exhibit 2.18.

7.5 On or before the fifteenth of each month, the Community shall provide the NM CAP Entity, the Secretary as NM Unit, and the District with a report setting forth the activity in the District NM CAP Account for the previous month.

8.0 NM CAP MITIGATION WATER BANK.

8.1 The Secretary as CAP Owner shall establish the NM CAP Mitigation Water Bank to account for Deliveries of NM CAP Water to the Community and the District in advance of any reduction in Diversions by the Community or the District pursuant to Sub-term 1.1 of Exhibit 2.30 (NM Risk Allocation Terms). The Secretary as CAP Owner shall manage and account for the NM CAP Mitigation Water Bank in accordance with Paragraph 8.

8.2 Beginning in the Year in which an Additional Arizona Right is established, but not before the Year in which the NM Unit Agreement is executed, the Secretary as CAP Owner may Deliver NM CAP Water to the Community and the District in advance of any reduction in Diversions by the Community or the District pursuant to Sub-term 1.1 of Exhibit 2.30 (NM Risk Allocation Terms) for the establishment of credits in the NM CAP Mitigation Water Bank.

8.3 The total number of credits in the NM CAP Mitigation Water Bank shall not exceed at any time the lesser of twenty thousand (20,000) acre-feet or five times the Additional Arizona Rights in existence at that time.

8.4 On January 1 of each Year, the Secretary as CAP Owner shall add a credit in the NM CAP Mitigation Water Bank of one acre-foot for each acre-foot of NM CAP Water scheduled in the previous Year to be delivered for the NM CAP Mitigation Water Bank in the then current Year to the Community and the District pursuant to Subparagraph 5.6.

8.5 On December 31 of each Year, the Secretary as CAP Owner shall deduct from the NM CAP Mitigation Water Bank one-acre foot credit for each acre-foot of:

8.5.1 reduced Diversions by the Community and the District pursuant to Sub-term 1.1 of Exhibit 2.30 (NM Risk Allocation Terms); and

8.5.2 NM CAP Water scheduled for Delivery for the NM CAP Mitigation Water Bank in the preceding twelve (12) months pursuant to Subparagraph 5.6, but not actually Delivered during those months for reasons outside the control of the Community or the District.

8.6 Deliveries of NM CAP Water for the NM CAP Mitigation Water Bank shall not count against the limitations on Consumptive Use set forth in Subparagraphs 4.2, 4.3, 4.4, 4.5 and 4.6.

8.7 Exhibit 7 sets forth examples of the operation of the NM CAP Mitigation Water Bank.

9.0 TERMS OF NEW MEXICO DIVERSIONS.

9.1 The Secretary as Authorized Diverter shall only Divert and Consumptively Use water from the Gila River and the San Francisco River in accordance with this Agreement.

9.2 The Forbearing Parties, and the UV Non-Signatories through the UV Agreement, shall not object to any Diversion or Consumptive Use by the Secretary as Authorized Diverter that is undertaken in accordance with this Agreement.

9.3 The Forbearing Parties agree to the changes in the Call System and accounting for apportionments under the Globe Equity Decree set forth in the NM Priority and Apportionment Terms. Upon the State of New Mexico providing notice to the Secretary that it intends to have the NM Unit constructed or developed, the Forbearing Parties, other than the United States, further agree to petition the Globe Equity Enforcement Court to request that the Water

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Commissioner administer the Call System and accounting for apportionments in accordance with the terms and conditions set forth in Exhibit 2.29 (NM Priority and Apportionment Terms).

9.4 The Forbearing Parties agree to undertake the actions required pursuant to Exhibit 2.30 (NM Risk Allocation Terms).

9.4.1 The UV Non-Signatories, Other UV Signatories, UVDs to the extent they are obligated under this Agreement or the UV Agreement, the Gila Valley Irrigation District, the Franklin Irrigation District and the Canal Companies shall comply with the terms and conditions of term 5 of Exhibit 2.30 (NM Risk Allocation Terms). As partial consideration to such persons and entities for undertaking the obligation to comply with the terms and conditions of term 5 of Exhibit 2.30 (NM Risk Allocation Terms), the Gila Valley Irrigation District shall receive funds pursuant to Paragraph 13, which funds shall be used solely for the purpose of developing programs or constructing facilities to assist with mitigating the risks and costs associated with compliance with the terms and conditions of term 5 of Exhibit 2.30 (NM Risk Allocation Terms).

9.5 If any UVD is able to prove in a court of competent jurisdiction that: (a) such UVD's ability to Divert or pump water has been impaired due to New Mexico Diversions, and (b) such impairment constitutes economic injury that would violate sections 304(d) and (f) of the Colorado River Basin Project Act, the following shall apply:

9.5.1 The Canal Company and the UV Irrigation District (if any) serving the UV Decreed Acres adversely affected by such impairment, shall, if practical, cause

Pumped water to be delivered to such UV Decreed Acres to the extent necessary to fully mitigate such impairment.

9.5.2 If delivering Pumped water to such UV Decreed Acres is not practical, such Canal Company and the UV Irrigation District shall pay the UVD sufficient money to offset such economic injury.

9.5.3 If Pumped water is available at a reasonable cost to such UVD to mitigate such economic injury (whether or not also available to such Canal Company and such UV Irrigation District), the Parties agree that the presumptive measurement of the economic injury for which the Canal Company and the UV Irrigation District will be liable shall be, at the option of such Canal Company and UV Irrigation District, the cost of acquiring such Pumped water. Such presumption shall not limit the amount of damages that such Canal Company or such Irrigation District may be required to pay by a court.

9.5.4 Pumping by any Canal Company or UV Irrigation District as provided by this Subparagraph 9.6 shall not be an act Not in Compliance with the UV Agreement, provided such Pumping does not cause the limits of subparagraph 6.2 of the UV Agreement to be exceeded. To the extent the limits of subparagraph 6.2 of the UV Agreement are exceeded due to such Pumping, mitigation will be required as provided by the UV Agreement.

9.5.5 In any cause of action brought by a UV Non-Signatory alleging impairment as described in Subparagraph 9.6, no Party shall object to the intervention by the Canal

Company and the UV Irrigation District (if any), serving the UV Decreed Acres alleged to be adversely affected by such impairment.

9.6 Provided the NM Unit is Diverting pursuant to and in accordance with the NM Consumptive Use and Forbearance Agreement, UV Non-signatories, the Other UV Signatories, the UVDs to the extent they are obligated under this Agreement or the UV Agreement, the UV Irrigation Districts, the Canal Companies, the Community, the District, and the United States, consistent with the provisions of Exhibit 2.30 (NM Risk Allocation Terms), shall reduce their Calls for water diversions from the surface of the Gila River pursuant to the Globe Equity Decree with the diversion devices identified in the table of priorities in article V (as amended) of the Globe Equity Decree, and/or their replacements, whether or not now existing and whether or not shared by one or more Canal Company, to the extent necessary and possible so that the Calls of the Additional Arizona Rights are satisfied. To the extent any UVD seeks to make a Call that would be inconsistent with the previous sentence, such UVD shall be acting "Not in Compliance with this Agreement" as that term is defined in the UV Agreement and the UV Irrigation Districts and the Canal Companies shall not place such Call on behalf of such UVD.

10.0 NM UNIT AGREEMENT.

10.1 Within one (1) year of receipt by the Secretary of notice from the State of New Mexico that it has elected to have the NM Unit constructed or developed, the Secretary shall enter into the NM Unit Agreement with the NM CAP Entity for the design, construction or development, operation, and maintenance of the NM Unit.

10.1.1 The Secretary as NM Unit shall transfer to the NM CAP Entity such portions of the Secretary as NM Unit's responsibility to design, construct (or otherwise

develop), operate or maintain the NM Unit as the NM CAP Entity may request, including any or all of such responsibilities.

10.1.2 At the NM CAP Entity's request, the Secretary as Authorized Diverter shall allow the NM CAP Entity to Divert water on behalf of the NM Unit; provided that:

10.1.2.1 the NM CAP Entity Diverts water on behalf of the NM Unit in compliance with the Exhibit 2.47 (Terms of New Mexico Diversions);

10.1.2.2 the Secretary as Authorized Diverter remains responsible to the Forbearing Parties and to the UVDs for ensuring the NM CAP Entity's compliance with Exhibit 2.47 (Terms of the New Mexico Diversions), and for damages resulting from the failure to do so; provided that any cause of action for monetary damages shall be subject to the provisions of section 213(a) of the Act or 28 U.S.C. 1491;

10.1.2.3 the Secretary as Authorized Diverter remains responsible to the Forbearing Parties and to the UVDs for all rights and responsibilities hereunder, and for damages resulting from the failure to do so; provided that any cause of action for monetary damages resulting from economic injury shall be subject to the provisions of section 213(a) of the Act or 28 U.S.C. 1491; and,

10.1.2.4 the NM CAP Entity meets the conditions set forth in Subparagraph 2.26A.

10.2 The NM Unit Agreement shall contain the terms and conditions set forth in Exhibit 2.48 (Terms of NM Unit Agreement), which terms and conditions may not be modified without the written consent of all the Forbearing Parties. The NM Unit Agreement may include terms and

conditions in addition to those set forth in Exhibit 2.48, provided that such additional terms and conditions are consistent and do not conflict with those terms and conditions set forth in Exhibit 2.48. The NM CAP Entity and the Secretary may modify such additional terms and conditions, provided that any such modification is consistent and does not conflict with the terms and conditions set forth in Exhibit 2.48.

11.0 DISPUTE RESOLUTION.

11.1 In the event the Secretary as Authorized Diverter commences Diversions or Consumptive Use pursuant to this Agreement, the Forbearing Parties agree not to bring claims or otherwise object to Diversions and Consumptive Use undertaken by the Secretary as Authorized Diverter in accordance with this Agreement, except as provided in this Agreement for claims regarding the enforcement or interpretation of this Agreement. The Parties shall utilize the dispute resolution mechanism set forth in this Paragraph 11 as the sole and exclusive means to resolve any dispute, controversy or disagreement regarding Diversions and Consumptive Use undertaken by the Secretary as Authorized Diverter pursuant to this Agreement (“Dispute”). The Forbearing Parties, other than the United States, agree that their sole recourse for any violation or breach of this Agreement shall be against the Secretary and that they shall not seek recourse against the NM CAP Entity unless:

11.1.1 the NM CAP Entity seeks to intervene in an action initiated pursuant to this Paragraph 11 as provided for in Subparagraph 11.11, or

11.1.2 a court of competent jurisdiction determines that the NM CAP Entity is a person that must be joined as a party in such an action as provided by Federal Rule of Civil

Procedure 19, or other applicable rule or statute governing when a person must be joined as a party to an action;

11.1.3 . provided that in either event, the Forbearing Parties, other than the United States, shall not seek relief against the NM CAP Entity not available against the Secretary in the same action.

11.2 In the event the Secretary as Authorized Diverter commences Diversions or Consumptive Use pursuant to this Agreement, the UV Non-Signatories shall be obligated through the UV Agreement not to bring claims or otherwise object to Diversions and Consumptive Use undertaken by the Secretary as Authorized Diverter in accordance with this Agreement, except as provided in this Agreement for claims regarding the enforcement or interpretation of this Agreement. UV Non-Signatories shall be obligated through the UV Agreement to utilize the dispute resolution mechanism set forth in this Paragraph 11 as the sole and exclusive means to resolve any Dispute. The UV Non-Signatories shall be obligated through the UV Agreement to agree that their sole recourse for any claim or objection to Diversions and Consumptive Use undertaken by the Secretary as Authorized Diverter in accordance with this Agreement shall be against the Secretary and that the UV Non-Signatories shall not seek recourse against the NM CAP Entity unless:

11.2.1 the NM CAP Entity seeks to intervene in an action initiated pursuant to this Paragraph 11 as provided for in Subparagraph 11.11,

11.2.2 a court of competent jurisdiction determines that the NM CAP Entity is a person that must be joined as a party in such an action as provided by Federal Rule of Civil

Procedure 19, or other applicable rule or statute governing when a person must be joined as a party to an action; or

11.2.3 provided that in either event, the UV Non-Signatories, shall not seek relief against the NM CAP Entity not available against the Secretary in the same action..

11.3 Subject to Subparagraph 11.3.1, the UVDs shall have the right to participate in any Dispute, including the right to initiate and or participate in any consultation pursuant to Subparagraph 11.4 and the right to file or intervene in any action initiated pursuant to Subparagraph 11.6.

11.3.1 Any UVD seeking to participate in any Dispute, who is not a Forbearing Party, must first provide the Parties with an executed version of Exhibit 11.3.1 waiving any and all claims that this Agreement does not apply, bind or obligate such UVD on the ground that such UVD has not executed this Agreement and agreeing to be bound by the terms of this Agreement.

11.4 All Disputes shall be submitted in writing to the Secretary by the party desiring relief with a copy to all Parties, the NM CAP Entity and the State of New Mexico. Within three (3) business day of receipt of such notice, the Secretary shall set a time for a consultation among such parties as wish to participate in such consultation to resolve the Dispute. Such consultation must occur within seven (7) business days of the receipt of such notice.

11.5 All parties shall participate in such consultation in good faith.

11.6 Subject to Subparagraph 11.7, should the consultation with the Secretary not resolve the Dispute, any party to such consultation may bring an action in a federal court of competent

jurisdiction, but not the courts of the District for the District of Columbia, seeking such relief as is appropriate and available pursuant to this Agreement.

11.7 Except for an action for a temporary restraining order to protect a party from immediate and irreparable harm, a party to a consultation initiated pursuant to Subparagraph 11.4 may not initiate an action pursuant to Subparagraph 11.6 sooner than ten (10) business days from the date on which the Secretarial consultation pursuant to Subparagraph 11.4 begins.

11.8 The remedies available to a party in an action initiated pursuant to Subparagraph 11.6 shall include: (i) injunctive relief, including specific performance; and, (ii) subject to Subparagraph 11.8.1, if injunctive relief is not available or not adequate to compensate a Party for damages incurred as a result of such breach, monetary damages; provided that any action against the United States for monetary damages shall be subject to the provisions of section 213(a) of the Act or 28 U.S.C. 1491.

11.8.1 Subject to 11.8.2, monetary damages shall only be available if the party seeking damages has

11.8.1.1 initiated consultation pursuant to Subparagraph 11.4 no later than six (6) months after such party knew, or upon the exercise of reasonable diligence should have known, of the breach causing such damages, and

11.8.1.2 subject to Subparagraph 11.6, brings an action seeking recovery of such damages within six (6) months after initiating consultation; provided that any action against the United States for monetary damages shall be subject to the provisions of section 213(a) of the Act or 28 U.S.C. 1491.

11.8.2 Notwithstanding 11.8.1, monetary damages shall not be available to the extent they were incurred more than thirty-six (36) months before the person alleging such damages initiates consultation pursuant to Subparagraph 11.4.

11.8.3 For purposes of this Subparagraph 11.8, all persons shall be deemed to have actual knowledge of the matters reported by the Secretary in full compliance with Subparagraph 4.8 no later than thirty (30) days after such reporting occurs.

11.9 **Waiver of sovereign immunity.** Pursuant to section 213(a) of the Act, the Community and the Secretary have provided a strictly limited waiver of their respective sovereign immunity for the sole and exclusive purposes of resolving a claim, controversy, or dispute that may arise with respect to the interpretation or enforcement of this Agreement, including monetary damages and the remedies provided by Subparagraph 11.8, and for no other reason; provided that any cause of action for monetary damages against the United States shall be subject to the provisions of section 213(a) of the Act or 28 U.S.C. 1491.

11.10 The Forbearing Parties and the UV-Non-Signatories may intervene in any action initiated by the Secretary against the NM CAP Entity pursuant to the NM Unit Agreement and no Party shall oppose such motion to intervene on any ground.

11.11 The NM CAP Entity may intervene in any action initiated by a Party pursuant to this Agreement and no Party shall oppose such motion to intervene on any ground. In any cause of action for monetary damages against the United States brought pursuant to the provisions of section 213(a) of the Act or 28 U.S.C. § 1491, the Parties, other than the United States, shall support the motion to intervene of the NM CAP Entity.

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11.12 Unless there has been a contrary judicial determination regarding appropriate jurisdiction, the Parties shall:

11.12.1 not file claims or seek enforcement of their respective rights under this Agreement in the Globe Equity Enforcement Court;

11.12.2 only assert such claims and seek such enforcement in another federal court of competent jurisdiction;

11.12.3 not file or support any motion to consolidate any action to enforce or interpret this Agreement in the Globe Equity Enforcement Court; and

11.12.4 oppose any motion to consolidate any action to enforce or interpret this Agreement in the Globe Equity Enforcement Court.

12.0 **ADMINISTRATION.**

12.1 All measurements necessary for the implementation of this Agreement shall be made by the U.S. Geological Survey, or such other entity designated by the Technical Committee for such purpose, using equipment that meets industry standards that are applicable to the measurements to be made. Such equipment shall be calibrated and maintained to industry standards that are applicable to the measurements to be made. For purposes of the measurement of stream flows, real-time readings by the U.S. Geological Survey, or such other entity as designated by the technical committee for such purpose, shall be used for purposes of determining compliance with Exhibit 2.47 (Terms of New Mexico Diversions).

12.2 Measurements of stream flow and Diversions of surface water of the Gila River or the San Francisco River shall be recorded and transmitted through the use of telemetry equipment to the U.S. Geological Survey, or such other entity designated by the Technical Committee for such purpose.

12.3 The cost of all measurements made pursuant to this Paragraph 12 that are additional to those costs of measurement borne by the Parties hereto as of the date of the execution to this Agreement, shall be borne by the Secretary.

12.4 **Technical Committee.**

12.4.1 The Parties shall establish a Technical Committee to address and resolve technical issues that may arise regarding the implementation of this Agreement, including but not limited to the following:

12.4.1.1 timing and methodology for measurement and accounting for stream flow, Diversions and Return Flows;

12.4.1.2 stream flow increases in Arizona resulting from watershed improvements or other water flow enhancement activities funded by the State of New Mexico, and the percentage of such increases that may be added to the Secretary's ten-year permissible Consumptive Use pursuant to this Agreement, provided that the maximum ten year permissible Consumptive Use pursuant to this Agreement shall under no circumstance exceed one hundred eighty thousand (180,000) acre-feet.

12.4.1.3 determination of the timing and impact of groundwater pumping as part of the NM Unit on the flows of the Gila River and the San Francisco River, including a determination of the effect, if any, that such groundwater pumping might have on Exhibit 2.48 (Terms of New Mexico Diversion); and,

12.4.1.4 any other issue mutually agreed by the Parties.

12.4.2 The Technical Committee shall be composed of technical representatives of the Community, the District, the Secretary as Authorized Diverter, the Gila Valley Irrigation District, the Franklin Irrigation District, and Phelps Dodge. Although not a Party, the Parties shall allow the NM CAP Entity to participate as a member of the Technical Committee.

12.4.3 Decisions of the Technical Committee shall be by unanimous agreement of all members on the Technical Committee except the Secretary as Authorized Diverter. If the Technical Committee is unable to reach unanimous agreement on any given issue, such issue may be submitted for resolution using the procedures set forth in Paragraph 11.

12.4.4 Decisions of the Technical Committee shall be binding for purposes of the interpretation and enforcement of this Agreement.

12.4.5 The decisions of the Technical Committee shall not be binding on the Secretary or the United States, provided that such decisions shall be applicable and enforceable against all other Parties and shall not be considered invalid with respect to such other Parties solely because they are not binding on the Secretary or the United

States. In the event that such a decision nevertheless is not enforceable or ineffective as to such other Parties because it is not binding on the Secretary or the United States, then such matter shall be submitted for decision to a court of competent jurisdiction as provided by Subparagraph 11.7, without first initiating consultation as otherwise required by such Subparagraph.

13.0 FUNDING FOR PURPOSES OF TERM 5 OF NM RISK ALLOCATION TERMS.

13.1 As partial consideration to the UV Non-Signatories, Other UV Signatories, UVDs to the extent they are obligated under this Agreement or the UV Agreement, the Gila Valley Irrigation District, the Franklin Irrigation District and the Canal Companies for undertaking the obligation to comply with the terms and conditions of term 5 of Exhibit 2.30 (NM Risk Allocation Terms), the Gila Valley Irrigation District shall receive funds pursuant to Paragraph 13, which funds shall be used solely for the purpose of developing programs or constructing facilities to assist with mitigating the risks and costs associated with compliance with the terms and conditions of term 5 of Exhibit 2.30 (NM Risk Allocation Terms).

13.2 On January 1, 2010, the Gila Valley Irrigation District shall request from the Secretary funds in an amount of \$15 million (adjusted to reflect changes since the date of enactment of the Arizona Water Settlements Act of 2004 in the cost indices applicable to the type of design and construction involved in the design and construction of a pipeline from the Ft. Thomas Diversion Dam to the lands farmed by the San Carlos Apache Tribe, together with canal connections upstream from the Ft. Thomas Diversion Dam and connection devices appropriate to introduce Pumped water into the Pipeline), for the purposes outlined in Subparagraph 13.1. The Secretary shall provide to the Gila Valley Irrigation District such funds from the Lower Colorado River

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Basin Development Fund pursuant to section 403(f)(2)(D)(v) of the Colorado River Basin Project Act, as amended by the Arizona Water Settlements Act of 2004.

13.3 The condition set forth in Subparagraph 4.1.1 shall be deemed to have been met if the Gila Valley Irrigation District receives all the funds provided by Subparagraph 13.2, either from the Secretary, or from the State of New Mexico, or any combination thereof on or before the date on which Diversions begin pursuant to this Agreement.

13.4 If the NM CAP Entity provides notice to the Forbearing Parties that it intends to begin Diversions on January 1, 2016, and if the Gila Valley Irrigation District has not received as of the date of such notice all the funds to be provided to it pursuant to Subparagraph 13.2, then, as a condition to precedent to beginning Diversions, the State of New Mexico must enter into an enforceable agreement with the Gila Valley Irrigation District for payment to the Gila Valley Irrigation District on before January 1, 2016, a sum equal to the amount otherwise due to the Gila Valley Irrigation District minus any amounts received by the Gila Valley Irrigation District on the date that the State of New Mexico makes such payment. The State of New Mexico's obligation in such agreement shall be contingent on assignment to the State of New Mexico by the Gila Valley Irrigation District of any remaining entitlement that the Gila Valley Irrigation District may have pursuant to Subparagraph 13.2.

14.0 MISCELLANEOUS.

14.1 NM CAP Entity.

14.1.1 The NM CAP Entity is not a Party to this Agreement but is intended by the Parties to be a third party beneficiary of this Agreement. The NM CAP Entity may enforce any and all of its rights under this Agreement.

14.1.2 The NM CAP Entity shall be entitled to a copy of any and all notices provided to the Parties hereunder.

14.1.3 The Parties shall not amend this Agreement without the NM CAP Entity's written consent.

14.2 The UVDs who are not Parties to this Agreement are intended by the Parties to be third party beneficiary of the following provisions: Paragraph 4, Paragraph 10, Paragraph 11, Exhibit 2.29 (NM Priority and Apportionment Terms), Exhibit 2.30 (NM Risk Allocation Terms), Exhibit 2.47 (Terms of New Mexico Diversions), Exhibit 2.48 (Terms of NM Unit Agreement) and this Subparagraph 14.2. The Parties intend that the UV Non-Signatories shall be bound through the UV Agreement by the obligations set forth in each of the provisions listed above. Subject to Subparagraph 11.3.1, the UVDs may enforce any and all of their rights under such provisions.

14.3 Except as set forth in Subparagraphs 14.1 and 14.2, the Parties do not intend for any other person or entity to be a third party beneficiary of this Agreement and this Agreement shall not create any obligations, rights, duties or responsibilities for any such other persons or entities.

14.4 Phelps Dodge.

14.4.1 Phelps Dodge is a Party to this Agreement and is bound by the terms hereof with respect to its water rights under the Globe Equity Decree in Arizona and New Mexico and by the Terms of the New Mexico Diversions set forth in Exhibit 2.47

hereof insofar as that Exhibit sets forth Phelps Dodge's agreement not to object to the Diversions for the New Mexico Unit on the San Francisco River in New Mexico that are made in accordance with Exhibit 2.47. This Agreement shall not affect, alter or diminish Phelps Dodge's rights to Divert water of any character from the Gila River in that part of New Mexico that is outside the area that is subject to the Globe Equity Decree.

14.4.2 Nothing in this Agreement shall prohibit Phelps Dodge and the Community from effecting an exchange of CAP Water for water from the Gila River for use in Arizona by Phelps Dodge; provided, that any such exchange shall be junior in priority to the rights of the Secretary as Authorized Diverter under this Agreement, provided that this Subparagraph shall not prohibit any Party from objecting to any such exchange.

14.5 The State of New Mexico's execution of this Agreement is solely and exclusively for purposes of its approval of this Agreement as required pursuant to section 212(a) of the Arizona Water Settlements Act of 2004. The State of New Mexico is not a third party beneficiary of this Agreement and is not a Party hereto.

14.6 Pursuant to section 212(h)(1) of the Arizona Water Settlements Act, the execution of this Agreement by the Secretary shall not constitute a major Federal action under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

14.7 The Parties recognize that the terms of this Agreement have been developed through intensive negotiation. Consequently, this Agreement, including its Exhibits, should be strictly interpreted according to its terms.

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14.8 If any provision or clause of this Agreement or application thereof to any person or circumstance is held invalid or unenforceable, such invalidity or unenforceability shall not affect such other provisions, clauses or applications of this Agreement as can be given effect without the invalid or unenforceable provision, clause or application. To this end, the provisions and clauses of this Agreement are severable; provided, however, that if the severance would deprive any Party of its material benefits under this Agreement, that Party shall be released from this Agreement. Upon the release of any Party from this Agreement, any other Party whose material benefits under this Agreement depend on the obligations of such released Party shall also be released from this Agreement.

14.9 Nothing herein shall affect, alter or diminish rights to use of waters of the Gila River system within New Mexico, or the authority of the State of New Mexico to administer such rights for use within the state, including rights decreed by article IV of the decree of the United States Supreme Court in *Arizona v. California*, 376 U.S. 340.

14.10 This Agreement and each of its provisions are to be construed fairly and reasonably. All Parties have each been represented by attorneys in connection with the preparation of this Agreement and as such, there shall be no presumption of construction of this Agreement in favor of any Party or against any Party. The Paragraph and Subparagraph titles and numbering used in this Agreement are for convenience only and shall not be considered in the construction of this Agreement.

14.11 Each of the terms and conditions of this Agreement shall be binding on and inure to the benefit of the Parties and their successors and assigns.

14.12 No member or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this Agreement or to any benefit that may arise here from. This shall not be construed to extend to this Agreement if made with a corporation or company for its general benefit.

14.13 This Agreement has been negotiated in good faith for the purposes of advancing the settlement of legal disputes, including pending litigation, and all of the Parties agree that no information exchanged or offered, or compromises made, in the course of negotiating this Agreement may be used as either evidence or argument by any Party hereto in any legal or administrative proceeding other than a proceeding for the approval of this Agreement.

14.14 This Agreement is the entire agreement between the Parties. All previous agreements, statements, contracts and representations by or among the Parties and their agents relating to the subject matter of this Agreement are hereby merged into this Agreement and no evidence of any such agreement, contract, representation or statement shall be admissible to interpret this Agreement. The Parties warrant that they are not relying on any such agreement, contract, representation or statement as a reason for entering this Agreement. Any modification of this Agreement shall be void unless it is in writing and signed by all the Parties, as well as by the NM CAP Entity as required by Subparagraph 14.1.3.

14.15 This Agreement may be executed in multiple counterparts, each of which shall be considered an original and all of which, taken together, shall constitute one agreement.

14.16 This Agreement is entered into pursuant to Federal reclamation law under the authority of the Reclamation Act of 1902 (Pub. L. 57-161, c. 1093, 32 Stat. 388 (June 17, 1902)) and acts

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amendatory and supplementary hereto. The Secretary shall be subject to an order of specific performance pursuant to Public Law 97-293, Title II, §221.

14.17 A failure to call by the Community, the District or the United States on behalf of either pursuant to any provision of this Agreement, or any provision or exhibit of the Settlement Agreement, shall not serve as a defense against any call against any other water user at or upstream of the Ashurst-Hayden Diversion Dam.

14.18 Service of process shall be by Certified U.S. Mail, as provided under Federal Rules of Procedure 4(d), using the addresses specified in Subparagraph 14.19 regarding notices.

14.19 The expenditure or advance of any money or the performance of any obligation by the United States, in any of its capacities, under this Agreement shall be contingent upon appropriation of funds therefor. No liability shall accrue to the United States, in any of its capacities, in the event funds are not appropriated.

14.20 **Nonreimbursability of New Mexico Unit Fund.** Funds withdrawn from the New Mexico Unit Fund as that term is described in section 212 of the Act shall be nonreimbursable.

14.21 Any notice to be given or payment to be made under this Agreement shall be properly given or made when received or when deposited in the United States mail, certified or registered, return receipt requested, postage prepaid, addressed as follows, or addressed to such other address as the Party to receive such notice shall have designated by written notice given as required by this Subparagraph 14.21. Notice or payment shall be deemed to have been received at the earlier of (a) actual delivery or (b) the first business day that is at least four (4) calendar

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days after the notice or payment has been deposited in the United States mails in accordance with
this Subparagraph 14.21:

- (a) As to the United States:
- The Secretary of the Interior
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
- Regional Director
Southwest Regional Office
Bureau of Indian Affairs
P.O. Box 10
Phoenix, Arizona 85001
- Regional Director
Bureau of Reclamation
Lower Colorado Region
P.O. Box 427
Boulder City, Nevada 89005

- (b) As to the Community:
- Governor
Gila River Indian Community
P.O. Box 97
Sacaton, Arizona 85247
- General Counsel
Gila River Indian Community
P.O. Box 97
Sacaton, Arizona 85247

- (c) As to the District:
- San Carlos Irrigation and Drainage District
P. O. Box 218
Coolidge, Arizona 85228
Attn: General Manager and General Counsel

(d) As to the Gila Valley Irrigation District

Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546
Attn: General Manager

With a copy to:

L. Anthony Fines
Law Offices of L. Anthony Fines
33 North Stone Avenue
Suite 1850
Tucson AZ 85701

(e) As to the Franklin Irrigation District

Franklin Irrigation District
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546
Attn: General Manager, Franklin Irrigation District

With a copy to:

David A. Brown
Michael J. Brown
Brown & Brown, P.C.
P. O. Box 3128
Pinetop, AZ 85935

(f) As to Phelps Dodge Corporation:

Phelps Dodge Corporation
One North Central Avenue
Phoenix, Arizona 85004-3014
Attn: General Counsel

With a copy to:

Cynthia M. Chandley
Ryley Carlock and Applewhite
One North Central Avenue, Suite 1200
Phoenix, Arizona 85004

- (g) As to Brown Canal Company:

Brown Canal Company
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

- (h) As to Curtis Canal Company:

Curtis Canal Company
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

- (i) As to Dodge-Nevada Canal Company:

Dodge-Nevada Canal Company
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

- (j) As to Fort Thomas Canal Company:

Fort Thomas Canal Company
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

- (k) As to Graham Canal Company:

Graham Canal Company
-c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

- (l) As to Highline Canal Company:

Highline Canal Company
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

(m) As to Montezuma Canal Company:

Montezuma Canal Company
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

(n) As to San Jose Canal Company:

San Jose Canal Company
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

(o) As to Smithville Canal Company:

Smithville Canal Company
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

(p) As to Union Canal Company:

Union Canal Company
c/o Gila Valley Irrigation District
207 Fifth Street
Safford, Arizona 85546

(q) As to Sunset Ditch Company:

Sunset Ditch Company
Attn: Kent Clouse
Rt. 1
Box 154
Duncan, AZ 85534

with a copy to:

Pete V. Domenici, Jr., Esq.
Dolan & Domenici, P.C.
6100 Seagull Street, NE
Suite 205
Albuquerque, AZ 87109

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(r) As to NM New Model Community Ditch Association:

New Model Community Ditch Association
Attn: Scott Lovett
Rt. 1
Box 378
Duncan, AZ 85534

with a copy to:

Pete V. Domenici, Jr., Esq.
Dolan & Domenici, P.C.
6100 Seagull Street, NE
Suite 205
Albuquerque, AZ 87109

(s) As to Valley Canal Company:

Valley Canal Company
Route 1
Box 54
Duncan, AZ 85344

(t) As to the NM CAP Entity

c/o the Director of the New Mexico Interstate Stream Commission

15.0 APPROVAL, CONSENT AND RATIFICATION.

Each Party, by execution of the signature pages by its duly authorized representative(s), does hereby approve, endorse, consent to and ratify this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement dated as of the day and year signed below:

GILA RIVER INDIAN COMMUNITY

By: Richard P. Narcia
Its: _____
Dated: _____

Approved as to Form: Jennifer K. Yip
Its: _____

State of Arizona)
County of MARICOPA) ss

Subscribed and sworn to before me this 9th day of Dec, 2005 by Richard P. Narcia as Governor and for and on behalf of the Gila River Indian Community.

Jose G. Solarez, Jr.
Notary Public

My commission expires: 10/15/2008



**SAN CARLOS IRRIGATION AND DRAINAGE
DISTRICT**

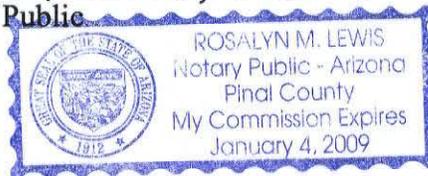
By: *J. Michael Urton*
Its: President
Dated: 5/13/06

STATE OF ARIZONA)
) ss.
County of PINAL)

Subscribed and sworn to before me this 13th day of May, ²⁰⁰⁶~~2005~~ by
J. MICHAEL URTON as PRESIDENT and for and on behalf of the
San Carlos Irrigation and Drainage District.

Rosalyn M. Lewis
Notary Public

My commission expires:
January 4, 2009



FRANKLIN IRRIGATION DISTRICT

By: Wilbur H. Lunt * *
Its: Pres.
Dated: 9-14-06

Approved as to Form:

Counsel for the Franklin Irrigation District
STATE OF ARIZONA)
County of Greenlee) ss.

Subscribed and sworn to before me this 14th day of Sept., 2006 by
Wilbur H. Lunt as President and for and on behalf of the
Franklin Irrigation District.

Janelle Palmer
Notary Public

My commission expires:



**** SUBJECT TO: AMENDMENT No. 1 TO THE NEW MEXICO CONSUMPTIVE USE AND FORBEARANCE AGREEMENT AMONG THE GILA RIVER INDIAN COMMUNITY, SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT, THE UNITED STATES, FRANKLIN IRRIGATION DISTRICT, GILA VALLEY IRRIGATION DISTRICT, PHELPS DODGE CORPORATION, THE SECRETARY OF THE INTERIOR, AND OTHER PARTIES LOCATED IN THE UPPER VALLEY OF THE GILA RIVER**

PHELPS DODGE MORENCI, INC.

By: JM
Its: President
Dated: DECEMBER 13, 2005

Approved as to Form:
Counsel for the Phelps Dodge Morenci, Inc.
STATE OF ARIZONA)

County of MARICOPA) ss.

Guthrie M. Chely

Subscribed and sworn to before me this 13th day of DEC, 2005 by
T. R. SNIDER as PRESIDENT and for and on behalf of
Phelps Dodge Morenci, Inc.

Monica Rapps
Notary Public

My commission expires:



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This Agreement is approved pursuant to the Act, and, to the extent applicable, 25 U.S.C. § 81.

THE UNITED STATES OF AMERICA

By: 
In its capacity as defined in this Agreement
Dated: DEC 21 2005
Attest: _____

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THE SECRETARY OF THE INTERIOR

By: 
In all the capacities as defined in this
Agreement
Dated: DEC 21 2005
Attest: _____

BROWN CANAL COMPANY

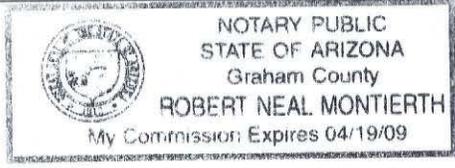
By: _____
Name: Tommy Clout
Title: president

STATE OF ARIZONA)
) ss.
County of Graham)

The foregoing instrument was acknowledged before me this 16 day of Jan,
2006 by Tommy Clout, the President of Brown Canal Company, a
Corporation, on behalf of the Corporation.

Robert Neal Montierth
Notary Public

My commission expires:



CURTIS CANAL COMPANY

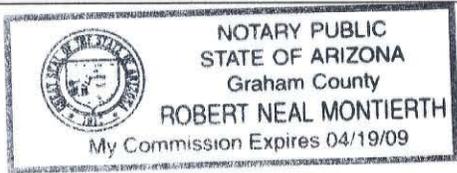
By: *R.J. Colvin*
Name: R.J. Colvin
Title: President

STATE OF ARIZONA)
) ss.
County of Graham)

⁶ The foregoing instrument was acknowledged before me this 26th day of January,
200~~5~~ by R.J. Colvin, the President of Curtis Canal Company, a
Corporation, on behalf of the Corporation.

Robert Neal Montierth
Notary Public

My commission expires:



DODGE-NEVADA CANAL COMPANY

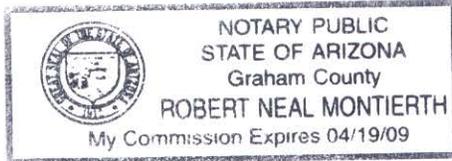
By: _____
Name: Marco Palmer
Title: President

STATE OF ARIZONA)
) ss.
County of Graham)

6 The foregoing instrument was acknowledged before me this 20th day of January,
2008 by Marco Palmer, the President of Dodge-Nevada Canal
Company, a Corporation, on behalf of the Corporation.

Robert Neal Montierth
Notary Public

My commission expires:



FORT THOMAS CANAL COMPANY

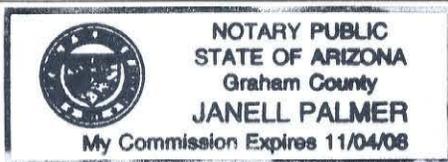
By: Scott Bryce
Name: Scott Bryce
Title: President

STATE OF ARIZONA)
) ss.
County of Graham)

6 The foregoing instrument was acknowledged before me this 7th day of February,
2005 by Scott Bryce, the President of Fort Thomas Canal Company,
a Corporation, on behalf of the Corporation.

Janell Palmer
Notary Public

My commission expires:



GRAHAM CANAL COMPANY

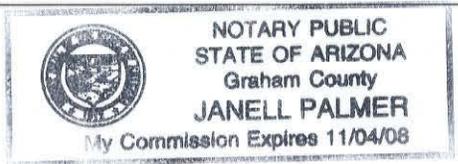
By: _____
Name: Delbert Housholder
Title: President

STATE OF ARIZONA)
) ss.
County of Graham)

The foregoing instrument was acknowledged before me this 16th day of January, 2005 by Delbert Housholder, the President of Graham Canal Company, a Corporation, on behalf of the Corporation.

Janelle Palmer
Notary Public

My commission expires:



HIGHLINE CANAL COMPANY

By: Bret Whitmer
Name: Bret Whitmer
Title: President

STATE OF ARIZONA)
) ss.
County of Graham)

⁶ The foregoing instrument was acknowledged before me this 24th day of January, 2008 by Bret Whitmer, the President of Highline Canal Company, a Corporation, on behalf of the Corporation.

Janell Palmer
Notary Public

My commission expires:



MONTEZUMA CANAL COMPANY

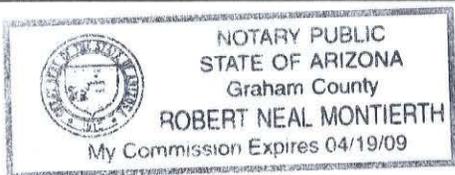
By: *Jerry Kempton*
Name: Jerry Kempton
Title: President

STATE OF ARIZONA)
) ss.
County of Graham)

6 The foregoing instrument was acknowledged before me this 24th day of January, 2005 by Jerry Kempton, the President of Montezuma Canal Company, a Corporation, on behalf of the Corporation.

Robert Neal Montierth
Notary Public

My commission expires:



SAN JOSE CANAL COMPANY

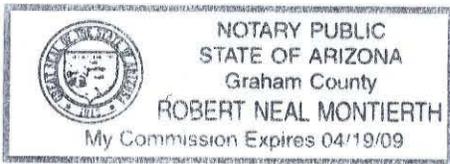
By: _____
Name: Jerry Kempton
Title: President

STATE OF ARIZONA)
) ss.
County of Graham)

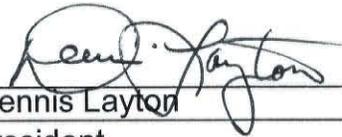
The foregoing instrument was acknowledged before me this 17th day of January,
2005 by Jerry Kempton, the President of San Jose Canal Company, a
Corporation, on behalf of the Corporation.

Robert Neal Montierth
Notary Public

My commission expires:



UNION CANAL COMPANY

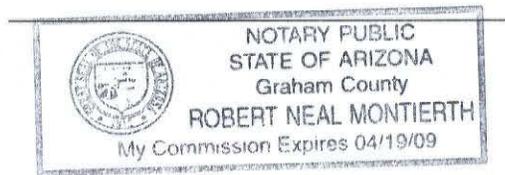
By: 
Name: Dennis Layton
Title: President

STATE OF ARIZONA)
) ss.
County of Graham)

6 The foregoing instrument was acknowledged before me this 26th day of January, 2005 by Dennis Layton, the President of Union Canal Company, a Corporation, on behalf of the Corporation.


Notary Public

My commission expires:



SUNSET DITCH COMPANY

By: C. Kent Clouse
Name: C. Kent Clouse
Title: Mayordomo

STATE OF ^{New Mexico} ARIZONA)
County of Hidalgo) ss.

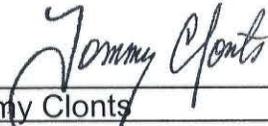
The foregoing instrument was acknowledged before me this 15 day of Dec, 2005 by C. Kent Clouse, the Mayordomo of Sunset Ditch Company, a _____, on behalf of the _____.

 Nelda Potter
Notary Public

My commission expires:
 Jan. 25, 2007



FOURNESS CANAL COMPANY

By: 
Name: Tommy Clonts
Title: President

State of Arizona)
) ss
County of Graham)

6 The foregoing instrument was acknowledged before me this 14th day of February,
2005 by Tommy Clonts, the President of the Fourness Canal Company,
a Corporation, on behalf of the Corporation.


Notary Public

My commission expires:

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COLVIN-JONES CANAL COMPANY

Langley Eden Farms, LLC

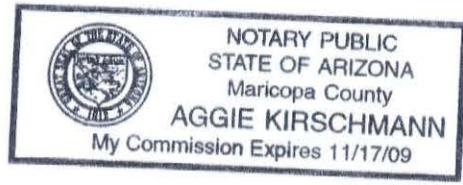
By: [Signature]
Name: Steven G. Rees
Title: Manager

State of Arizona)
) ss
County of MARICOPA

6 The foregoing instrument was acknowledged before me this 17th day of OCTOBER
2008 by Steven G. Rees, the landowner of the Colvin-Jones Canal
Company, an unincorporated on behalf of the entity
entity

[Signature]
Notary Public

My commission expires:
11-17-09



SUNSET CANAL

By: _____
Name: _____
Title: _____

State of Arizona)
) ss
County of)

The foregoing instrument was acknowledged before me this _____ day of _____,
2005 by _____, the _____ of Sunset Canal, a
_____, on behalf of the _____.

Notary Public

My commission expires:

NEW MODEL CANAL

By: Scott Lovett
Name: Scott Lovett
Title: BOARD PRESIDENT

State of Arizona)
) ss
County of Greenlee)

The foregoing instrument was acknowledged before me this 2 day of Feb,
2006 by Scott Lovett, the BOARD PRESIDENT of New Model Canal, a
_____, on behalf of the _____.

Nelda Potter

Notary Public

My commission expires:
JAN. 25, 2007

**NM NEW MODEL COMMUNITY DITCH
ASSOCIATION**

By: Scott Lovett
Name: Scott Lovett
Title: BOARD PRESIDENT

STATE OF ^{New Mexico} ~~ARIZONA~~)
County of Hidalgo) ss.

The foregoing instrument was acknowledged before me this 19 day of Dec,
2005 by Scott Lovett, the President of NM New Model Community
Ditch Association, a _____, on behalf of the _____.

Dalida Peltro
Notary Public

My commission expires:
JAN 25th 2007

VALLEY CANAL COMPANY

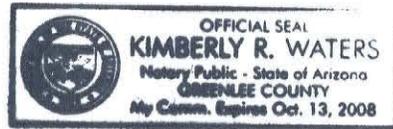
By: Robert L Lunt
Name: Robert L Lunt
Title: President of Board

STATE OF ARIZONA)
) ss.
County of Greenlee)

The foregoing instrument was acknowledged before me this 6th day of February 2006 by Robert L. Lunt, the President of Board of Valley Canal Company, a _____, on behalf of the _____.

Kimberly R. Waters
Notary Public

My commission expires:
10/13/2008



STATE OF NEW MEXICO

By: _____
Name: _____
Title: _____

The State of New Mexico's execution is solely for the purpose of indicating its approval of this Agreement as required by section 212(a) of the Arizona Water Settlements Act of 2004

EXHIBIT 2.18

DISTRICT NM CAP ACCOUNT

A. Definitions.

Capitalized terms in this Exhibit that are not expressly defined herein shall have the same meaning as in the NM Consumptive Use and Forbearance Agreement. The following terms shall have the following meanings when capitalized in this Exhibit. In the event of a conflict, the definition in this Exhibit shall control for purposes of interpreting this Exhibit.

1. "District NM CAP Account" means the account established according to the Terms of this Exhibit.
2. "Gila River" means the Gila River, its tributaries and underground water sources at or above Ashurst-Hayden Diversion Dam, other than the San Francisco River, its tributaries and underground water sources.
3. "NM CAP Entity" means the entity or entities to be formed or designated by the State of New Mexico to enter into the NM Unit Agreement with the Secretary as NM Unit and as Authorized Diverter. The NM CAP Entity shall be an entity that: (a) does not have sovereign immunity; (b) does not have the protection of the 11th Amendment to the U.S. Constitution; and (c) continues to satisfy all these conditions throughout its existence.
4. "NM Daily Diversion Right" means the amount of water that the Secretary as Authorized Diverter may Divert determined in accordance with Exhibit 2.48.
5. "NM Diversion Day" means a calendar day during which the Secretary as Authorized Diverter Diverts water pursuant to the Agreement.
6. "NM Unit Agreement" means the agreement to be entered into by and between the Secretary as NM Unit and as Authorized Diverter, and the NM CAP Entity upon notice to the Secretary from the State of New Mexico that it intends to have the NM Unit built or developed. The principal terms of the NM Unit Agreement are set forth in Exhibit 2.48.
7. "San Francisco River" means the San Francisco River, its tributaries and underground water sources. The San Francisco is a tributary of the Gila River at or above Ashurst-Hayden Diversion Dam, but is not included in the definition of "Gila River" for purposes of this Agreement.
8. "Secretary as Authorized Diverter" means the Secretary of the U.S. Department of the Interior acting solely in the capacity as the official authorized to Divert and responsible for Diversions pursuant to this Agreement for the benefit of the NM CAP Entity and in no other capacity.
9. "Secretary as CAP Owner" means the Secretary of the U.S. Department of the Interior acting solely in the capacity as owner of the CAP and in no other capacity.

10. "Sub-term" shall be a sub-term of this Exhibit 2.18.
11. "Term" shall be a term of this Exhibit 2.18. "Terms" shall be more than one such Term.

B. Terms.

1. The Community shall establish and administer the District NM CAP Account in accordance with the Terms of this Exhibit 2.18.
2. Upon the initiation of Deliveries of NM CAP Water pursuant to this Agreement:
 - 2.1 On January 1 of each Year, the Community shall add forty-five hundredths (0.45) acre-foot credit to the District NM CAP Account for each acre-foot of NM CAP Water scheduled in the previous Year to be delivered in the then current Year to the Community and the District pursuant to Subparagraph 5.4 of the NM Consumptive Use and Forbearance Agreement, until the number of credits in the District NM CAP Account reaches twenty-eight thousand eight hundred (28,800) acre-feet of credits.
 - 2.2 At such time as the credits in the District NM CAP Account reach twenty-eight thousand eight hundred (28,800) acre-feet, NM CAP Water Delivered pursuant to Paragraph 5 of this Agreement shall be divided fifty-five one hundredths (0.55) to the Community and forty-five one hundredths (0.45) to the District so long as the credits in the District NM CAP Account remain at twenty-eight thousand eight hundred (28,800) acre-feet. In the event the credits in the District NM CAP Account are reduced below twenty-eight thousand eight hundred (28,800) acre-feet, Deliveries shall be made to the Community as provided in Sub-term 2.1.
 - 2.3 The District may call on water from the District NM CAP Account at any time regardless of Diversions by the Secretary as Authorized Diverter, up to the balance in the District NM CAP Account.
 - 2.4 Within three (3) days after the District calls for water pursuant to Sub-term 2.3 above, the Community shall Deliver to the District, the amount of water requested by the District, at a rate not to exceed 160 CFS, up to the balance in the District NM CAP Account. Such water shall be from a source available to the Community from the sources identified in paragraph 4 of the Settlement Agreement, other than reclaimed water.
 - 2.5 The District NM CAP Account shall be debited one (1) acre-foot for each one (1) acre-foot of water delivered to the District by the Community pursuant to Sub-term 2.4.

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- 2.6** On or before the fifteenth of each month, the Community shall provide the Secretary as NM Unit, the District, and the NM CAP Entity with a report of the activity in the District NM CAP Account which shall, at a minimum, include the following:
- 2.6.1** The balance in the District NM CAP Account as of first day of the preceding month;
 - 2.6.2** An accounting of the water delivered to the District by the Community pursuant to Sub-term 2.4 above during the preceding month; and
 - 2.6.3** The balance in the District NM CAP Account as of the last day of the preceding month.
- 2.7** The Secretary as NM Unit, the District, and the NM CAP Entity shall have the right to audit the District NM CAP Account at their own expense.

EXHIBIT 2.29

NM PRIORITY AND APPORTIONMENT TERMS

A. Definitions.

Capitalized terms in this Exhibit that are not expressly defined herein shall have the same meaning as in the Agreement. The following terms shall have the following meanings when capitalized in this Exhibit. In the event of a conflict, the definition in this Exhibit shall control for purposes of interpreting this Exhibit.

1. "Call System" means that procedure approved by the Globe Equity Enforcement Court in the order issued on March 10, 1999, or any procedure subsequently approved by the Globe Equity Enforcement Court for the same purpose.
2. "Diversion Deficit" has the meaning set forth in sub-term 1.2 of Exhibit 2.30 (NM Risk Allocation Terms).
3. "Diversion Point" means a Diversion point identified in the table of priorities in article V (as amended) of the Globe Equity Decree, and or their replacements, whether or not now existing and whether or not shared by one or more Canal Company.
4. "Gila River" means the Gila River, its tributaries and underground water sources at or above Ashurst-Hayden Diversion Dam, other than the San Francisco River, its tributaries and underground water sources.
5. "GX" means the Diversion point or points on the mainstem of the Gila River in New Mexico upstream from all Diversion Points, except the Diversion Points of the Sunset Ditch Company and the NM New Model Community Ditch Association, at which Diversion point or points the Secretary as Authorized Diverter may Divert surface water from the mainstem of the Gila River in accordance with the NM Consumptive Use and Forbearance Agreement, which Diversion point or points the Secretary as Authorized Diverter must identify before water may be Diverted from the Gila River. Such Diversion point or points must also be upstream from any point of measurement used for computing consumptive use pursuant to Article VIII of the Globe Equity Decree unless the Water Commissioner, when computing such consumptive use, subtracts from such measured flows at the upstream point of measurement the flows Diverted by the Secretary as Authorized Diverter below such point of measurement.
6. "NM Diversion Day" means a calendar day during which the Secretary as Authorized Diverter Diverts water pursuant to the NM Consumptive Use and Forbearance Agreement.
7. "Normal Apportionment Account" means the account used to account for apportionments calculated pursuant to article VIII of the Globe Equity Decree.

8. "San Francisco River" means the San Francisco River, its tributaries and underground water sources. The San Francisco is a tributary of the Gila River at or above Ashurst-Hayden Diversion Dam, but is not included in the definition of "Gila River" for purposes of this Agreement.
9. "Secretary as Authorized Diverter" means the Secretary of the U.S. Department of the Interior, or the Secretary's duly authorized representative, acting solely in the capacity as the official authorized to Divert and responsible for Diversions pursuant to this Agreement for the benefit of the NM CAP Entity and in no other capacity."
10. "Sub-term" means a sub-term of this Exhibit.
11. "SY" means the Diversion point located upstream from the Arizona/New Mexico boundary at which the Secretary as Authorized Diverter may Divert surface water from the mainstem of the San Francisco River in accordance with the NM Consumptive Use and Forbearance Agreement, which point the Secretary as Authorized Diverter must identify before water may be Diverted from the San Francisco River.
12. "Term" means a term of this Exhibit.
13. "UVD New Mexico Apportionment Account" means the apportionment account used to account for certain additional apportionments as determined pursuant to Sub-term 3.1.
14. "UVD NM Risk Allocation Apportionment Account" means the apportionment account used to account for certain additional apportionments as determined pursuant to Sub-term 3.2.

B. Terms.

1. The following Terms shall govern the calculations of apportionments and the determination of priority diversion rights with reference to the Globe Equity Decree.
2. When the Secretary as Authorized Diverter Diverts water pursuant to this Agreement on NM Diversion Day, the priority year and regulation years under the Call System shall be adjusted as follows:
 - 2.1 The amount Diverted by the Secretary as Authorized Diverter, if any, from the Gila River at GX shall be added on the day following the NM Diversion Day to the measured flow at gage No. USGS 09432000 (or replacement gage) located on the Gila River Below Blue Creek, near Virden.
 - 2.2 The amount Diverted by the Secretary as Authorized Diverter, if any, from the San Francisco River at SY shall be added on the day following the NM Diversion Day to the measured flow at gage No. USGS 09444500 (or replacement gage) located on the San Francisco River at Clifton, Arizona.
 - 2.3 The priority year under the Call System, for a run of water, shall be determined after the additions provided by Sub-terms 2.1 and 2.2 of this Exhibit. All parties with Diversion

Points upstream from Ashurst-Hayden Diversion Dam shall be entitled to divert water in accordance with such priority year, subject however to Sub-term 2.4 of this Exhibit, when apportionment rights are being exercised. The additions provided by Sub-terms 2.1 and 2.2 of this Exhibit, however, shall not be considered when determining gains and losses in connection with the Call System.

2.4 When the UVDs (and the Canal Companies) are exercising apportionment rights, the "regulation year(s)" under the Call System, regardless of the locations of their Diversion Points, shall be calculated based on the amount of water actually available for diversion. The regulation year(s) for parties with Diversion Points upstream from the Ashurst-Hayden Diversion Dam shall not be adjusted to a more junior regulation year due to the fact that parties with Diversion Points at or downstream from the Ashurst-Hayden Diversion Dam may have less available water as a result of the water Diverted by the Secretary as Authorized Diverter.

2.5 The time lags in Sub-terms 2.1 and 2.2 of this Exhibit assume that GX is located in the vicinity of Red Rock, New Mexico and that SY is located in New Mexico close to the Arizona border. If GX and/or SY are located at other locations or if, as provided by the NM Consumptive Use and Forbearance Agreement, the Secretary as Authorized Diverter Diverts from additional locations, the time lags shall be adjusted by the unanimous decision of the settlement technical committee established pursuant to subparagraph 14.1. of the UV Agreement to the nearest one-day increment. If such settlement technical committee is unable to agree on the time lags, any Party with a technical representative on such settlement technical committee may submit the unresolved issue to binding arbitration pursuant to the procedures set forth in subparagraph 12.1 of the UV Agreement. If the time lags are determined by the Water Commissioner and the decisions of the Water Commissioner are not subject to review by arbitration, then time lags as determined by the Water Commissioner shall be subject to review by the Globe Equity Enforcement Court just as all other decisions of the Water Commissioner are subject to such review.

3. The apportionments calculated under article VIII of the Globe Equity Decree shall be supplemented with additional apportionments as set forth below, with such additional apportionments to be accounted for in either the UVD New Mexico Apportionment Account pursuant to Sub-term 3.1 below or the UVD NM Risk Allocation Apportionment Account pursuant to Sub-term 3.2 below.

3.1 UVD New Mexico Apportionment Account.

(a) As of 12:01 a.m. on January 1 of each Year, the apportionment rights in the UVD New Mexico Apportionment Account shall be ten thousand (10,000) acre feet, plus those apportionment rights that have accrued in the UVD New Mexico Apportionment Account during the final three months of the previous Year that are still in such account as of 11:59 p.m. on December 31 of the previous Year.

(b) If, during any Year, the Secretary as Authorized Diverter Diverts more than ten thousand (10,000) acre-feet, one (1) acre foot credit for each acre foot of Diversion during such Year in excess of ten thousand (10,000) acre-feet shall be added to the UVD New Mexico Apportionment Account.

(c) The apportionment rights in the UVD New Mexico Apportionment Account are supplemental to and shall be accounted for separately from the apportionment rights of the Normal Apportionment Account and the UVD NM Risk Allocation Apportionment Account. Subject to Sub-terms 3.3 and 3.4, the apportionment rights in the UVD New Mexico Apportionment Account shall be available for use by the UVDs (and the Canal Companies) and distributed in the same manner that the Normal Apportionment Account is distributed and available for use.

3.2 UVD NM Risk Allocation Apportionment Account.

(a) As of 12:01 a.m. on January 1 of each Year, the apportionment rights in the UVD NM Risk Allocation Apportionment Account shall be the amount in the UVD NM Risk Allocation Apportionment Account as of 11:59 p.m. on December 31 of the previous Year, but not more than the number of TBI Eligible Acres as of such January 1 multiplied by four (4).

(b) If at any time the UVDs (and the Canal Companies) suffer a Diversion Deficit, the amount of such Diversion Deficit shall be added to the UVD NM Risk Allocation Apportionment Account.

(c) The apportionment rights in the UVD NM Risk Allocation Apportionment Account are supplemental to and shall be accounted for separately from the apportionment rights of the Normal Apportionment Account and the UVD New Mexico Apportionment Account. Subject to Sub-terms 3.3 and 3.4, the apportionment rights in the UVD NM Risk Allocation Apportionment Account shall be available for use by the UVDs (and the Canal Companies) and distributed in the same manner that the Normal Apportionment Account is distributed and available for use.

3.3 When the UVDs (and the Canal Companies) divert on apportionment and have rights in their Normal Apportionment Account, unless they advise the Impartial Administrator otherwise, they shall be deemed to be diverting against their Normal Apportionment Account and such account shall be reduced accordingly. After the Normal Apportionment Account has been exhausted, when the UVDs (and the Canal Companies) divert on apportionment, they shall be deemed to be diverting against their UVD New Mexico Apportionment Account and such account shall be reduced accordingly. After the UVD New Mexico Apportionment Account has been exhausted, when the UVDs (and the Canal Companies) divert on apportionment, they shall be deemed to be diverting against their UVD NM Risk Allocation Apportionment Account and such account shall be reduced accordingly. When the UVDs (and the Canal Companies) divert based the UVD New Mexico Apportionment Account or the UVD NM Risk Allocation Apportionment Account, their diversions shall be “in disregard of the ... prior rights of the plaintiff” to same extent their diversions under article VIII(2) of the Globe Equity Decree are “in disregard of the ... prior rights of the plaintiff.”

3.4 The apportionment rights in the UVD New Mexico Apportionment Account and the UVD NM Risk Allocation Account shall not be subject to deductions for evaporation, seepage, transit losses, or other losses.

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3.5 Other parties to the Globe Equity Decree who have apportionment rights based on the UVDs' apportionment rights shall also have apportionment rights based on apportionment rights in the UVD New Mexico Apportionment Account and the UVD NM Risk Allocation Apportionment Account.

4. To the extent the Water Commissioner does not or will not administer the UVD New Mexico Apportionment Account or the UVD NM Risk Allocation Apportionment Account as provided by this Exhibit 2.29, the settlement technical committee established pursuant to subparagraph 14.1. of the UV Agreement shall adopt methodologies for implementing this Exhibit 2.29. The impartial administrator selected pursuant to subparagraph 2.16. of the UV Agreement shall administer such methodologies and the Parties shall adjust their Calls in conformity with such methodologies. If such settlement technical committee is unable to unanimously agree on the methodologies, any Party with a technical representative on the settlement technical committee may submit the unresolved issue to binding arbitration pursuant to the procedures set forth in subparagraph 12.1 of the UV Agreement.

EXHIBIT 2.30

NM RISK ALLOCATION TERMS

The Terms of this Exhibit 2.30 shall not become effective until Additional Arizona Rights are determined and Calls are made by the holder or holders of such rights to meet any Additional Arizona Daily Demand and shall apply only on those days that there is a New Mexico Diversion.

A. Definitions.

Capitalized terms in this Exhibit that are not expressly defined herein shall have the same meaning as in the Agreement. The following terms shall have the following meanings when capitalized in this Exhibit. In the event of a conflict, the definition in this Exhibit shall control for purposes of interpreting this Exhibit.

1. "Additional Arizona Daily Demand" means the daily demand of the Additional Arizona Rights as provided by sub-term 1.3 of Exhibit 2.47 (Terms of New Mexico Diversions).
2. "Additional Arizona Rights" means the additional Arizona rights to waters of the Gila River and the San Francisco River that satisfy the conditions stated in sub-term 1.2 of Exhibit 2.47 (Terms of New Mexico Diversions).
3. "Call" or "Calls" when used in this Exhibit 2.30 means diversions of water made in accordance with a court decree or order pursuant to a decree
4. "Call System" means that procedure approved by the Globe Equity Enforcement Court in the order issued on March 10, 1999, or any procedure subsequently approved by the Globe Equity Enforcement Court for the same purpose.
5. "Diversion Deficit" means the deficit suffered by the UVDs (and the Canal Companies) determined pursuant to and in accordance with Sub-term 1.2.
6. "Gila River" means the Gila River, its tributaries and underground water sources at or above Ashurst-Hayden Diversion Dam, other than the San Francisco River, its tributaries and underground water sources.
7. "New Mexico" means the State of New Mexico and its designees.
8. "New Mexico Diversion" means a Diversion by the Secretary as Authorized Diverter on any given NM Diversion Day pursuant to and in accordance with the NM Consumptive Use and Forbearance Agreement.
9. "New Mexico Share" means the Secretary as Authorized Diverter's share of the Additional Arizona Daily Demand determined in accordance with sub-term 1.4 of Exhibit 2.47 (Terms of New Mexico Diversions).

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10. "NM Daily Diversion Right" means the amount of water that the Secretary as Authorized Diverter may Divert determined in accordance with Term 1 of Exhibit 2.47 (Terms of New Mexico Diversions).
11. "NM Diversion Day" means a calendar day during which the Secretary as Authorized Diverter Diverts water pursuant to the NM Consumptive Use and Forbearance Agreement.
12. "NM Unit" means the unit or units of the Central Arizona Project in New Mexico to be designed, constructed, operated and maintained by or under the authority of the Secretary as NM Unit or as transferred consistent with the terms of the NM Unit Agreement pursuant to sections 301(a)(4) and 304 of the Colorado River Basin Project Act to Consumptively Use water from the Gila River and San Francisco River.
13. "Parties" shall be the entities that execute the NM Consumptive Use and Forbearance Agreement.
14. "Pumping" has the meaning set forth in the UV Agreement.
15. "San Francisco River" means the San Francisco River, its tributaries and underground water sources. The San Francisco is a tributary of the Gila River at or above Ashurst-Hayden Diversion Dam, but is not included in the definition of "Gila River" for purposes of this Agreement.
16. "Secretary as Authorized Diverter" means the Secretary of the U.S. Department of the Interior, or the Secretary's duly authorized representative, acting solely in the capacity as the official authorized to Divert and responsible for Diversions pursuant to this Agreement for the benefit of the NM CAP Entity and in no other capacity.
17. "Sub-term" means a sub-term of this Exhibit.
18. "Term" means a term of this Exhibit.
19. "UVD NM Apportionment Account" means the apportionment account used to account for certain additional apportionments as determined pursuant to term 3 of Exhibit 2.29 (NM Priority and Apportionment Terms) that are in addition to the apportionments calculated under article VIII of the Globe Equity Decree.
20. "UVD Surface Diversions" means the Diversions the UVDs (and the Canal Companies) may make in accordance with the Globe Equity Decree with the Diversion devices identified in the table of priorities article V (as amended) of the Globe Equity Decree, and/or their replacements, whether or not now existing and whether or not shared by one or more Canal Company.
21. "UV Impact Zone" has the meaning set forth in the UV Agreement.

B. Terms.

1. If, with respect to a run of water under the Call System, as a result of the Additional Arizona Daily Demand on a given NM Diversion Day, the UVD Surface Diversions will be less than they would have been if the New Mexico Diversion had not occurred, the following will apply:

1.1 The Community and the District (and the United States on behalf of each) shall reduce their Calls for SCIP lands with respect to such run of water to the extent possible and necessary so that the UVD Surface Diversions will be the same under the Call System that they would be if there had been no New Mexico Diversion and no obligation to (a) reduce Calls as required by Term 4, (b) limit Calls as required by Sub-term 1.5 and Term 4, and (c) adjust the priority year as required by Exhibit 2.29, NM Priority and Apportionment Terms).

1.2 If with respect to such run of water, after the reductions in Calls by the Community and the District (and the United States on behalf of each) as provided in Term 1.1 above, the UVD Surface Diversions are less than they would have been under the Call System if the New Mexico Diversion had not occurred, the UVDs (and the Canal Companies) will be deemed to have suffered a Diversion Deficit.

1.3 The amount of the Diversion Deficit shall be calculated as:

(a) the amount the UVD Surface Diversions would have been under the Call System if there had been no New Mexico Diversion and no obligation to (a) reduce Calls as required by Term 4, (b) limit Calls as required by Sub-term 1.5 and Term 4, and (c) adjust the priority year as required by Exhibit 2.29, NM Priority and Apportionment Terms, minus

(b) the actual amount of the UVD Surface Diversions on such NM Diversion Day.

1.4 The UVDs (including the Canal Companies) shall receive one (1) acre foot additional apportionment for each one (1) acre-foot of Diversion Deficit as calculated pursuant to Sub-term 1.3 above. Such additional apportionments shall be added to the UVD NM Apportionment Account for use in accordance with Exhibit 2.29 (NM Priority and Apportionment Terms).

1.5 The Parties shall not attempt to prevent or limit legal Calls made pursuant to the Additional Arizona Rights or otherwise take any action to the extent preventing or limiting such Calls or taking such action would, directly or indirectly, result in the Secretary as Authorized Diverter not being able to Divert water from the Gila River and/or the San Francisco River in accordance with this Agreement. This Sub-term shall not prohibit the UV Irrigation Districts, the Canal Companies or the UVDs from Pumping water as otherwise permitted by the UV Agreement, nor shall it prevent any Party from Pumping water in accordance with Arizona law outside the UV Impact Zone.

2. To the extent the Community, the District, or both (or the United States on behalf of both), suffer a reduction of Natural Flow diversions at Ashurst -Hayden Diversion Dam as a result of their reductions in Calls in accordance with Sub-term 1.1 of this Exhibit 2.30, they shall be permitted to buy NM CAP Water pursuant to Subparagraph 5.5 of the NM Consumptive Use and Forbearance Agreement.

3. If Project deliveries of Natural Flow at Ashurst-Hayden Diversion Dam are reduced in accordance with Sub-term 1.1, the reduction of Natural Flow shall be born solely by the Community, and the District's deliveries of Natural Flow shall not be reduced. If the District has purchased, banked and has water available from the NM CAP Risk Allocation Water Bank, up to a maximum of eighteen hundred (1,800) acre-feet per Year of the District's banked water shall be used to maintain the District supply of Natural Flow, with the remainder being the responsibility of the Community. If Natural Flow is available to the Community, Community Natural Flow will be provided to the District to meet the Community's water delivery obligation under this Sub-term. If Community Natural Flow is inadequate, the Community shall provide the District with Project Stored Water, CAP water, or both, to meet the Community's water delivery obligation of this Sub-term. Water provided by the Community pursuant to this Sub-term shall be delivered to the District on a schedule that is comparable to the schedule of water delivery that would have occurred had the provisions of Sub-term 1.1 not existed.

4. Provided the Secretary as Authorized Diverter is Diverting pursuant to and in accordance with the NM Consumptive Use and Forbearance Agreement, the UV Non-Signatories, the Other UV Signatories, the UVDs (to the extent that they are bound by this Agreement or the UV Agreement), the UV Irrigation Districts, the Canal Companies, the Community, the District, and the United States, consistent with the requirements of Sub-term 1.1, shall reduce their Calls for water diversions from the surface of the Gila River pursuant to the Globe Equity Decree with the diversion devices identified in the table of priorities in article V (as amended) of the Globe Equity Decree, and/or their replacements, whether or not now existing and whether or not shared by one or more Canal Company, to the extent necessary and possible so that the Calls of the Additional Arizona Rights are satisfied. To the extent any UVD seeks to make a Call that would be inconsistent with the previous sentence, such UVD shall be acting "Not in Compliance with this Agreement" as that term is defined in the UV Agreement and the UV Irrigation Districts and the Canal Companies shall not place such Call on behalf of such UVD.

5. When the following conditions are satisfied, the UV Non-Signatories, Other UV Signatories, UVDs to the extent that they are bound by this Agreement or the UV Agreement, the Gila Valley Irrigation District, the Franklin Irrigation District and the Canal Companies shall take the actions required by Sub-term 5.2:

5.1.1 The Secretary as Authorized Diverter is complying with the Terms of New Mexico Diversions (Exhibit 2.47) and Paragraphs 4 and 9 of the Agreement.

5.1.2 On any day that follows a NM Diversion Day by two days, after the reduction in Calls provided by Sub-term 1.1, the quantity of water in the Gila River will be insufficient to satisfy the Additional Arizona Daily Demand, or any Calls made by or on behalf of the San Carlos Apache Tribe pursuant to article VI(2) of the Globe Equity Decree (and in

compliance with the other provisions of the Globe Equity Decree) (hereinafter referred to in this Term 5 as "SCAT Calls"), or both.

5.2 Provided the conditions in Sub-terms 5.1.1 and 5.1.2 are satisfied, the UV Non-Signatories, Other UV Signatories, UVDs to the extent that they are bound by this Agreement or the UV Agreement, the Gila Valley Irrigation District, the Franklin Irrigation District and the Canal Companies shall:

5.2.1 Take whatever actions using existing irrigation works (including pumping facilities) and such other facilities that may be practicably developed so as to ensure that the quantity of water flowing in the Gila River is sufficient to satisfy the Additional Arizona Daily Demand and to meet the SCAT Calls. With respect to the SCAT Calls, the UV Non-Signatories, Other UV Signatories, the UVDs to the extent that they are bound by this Agreement or the UV Agreement, the Gila Valley Irrigation District, the Franklin Irrigation District, and the Canal Companies may comply with this Term 5, in whole or in part, by delivering water to the San Carlos Apache Tribe in a pipeline, canal, the bed of the Gila River, or other delivery facility.

5.2.2 Bypass all additional amounts of water to the extent required by the Water Quality Injunction entered by the Globe Equity Enforcement Court on or about May 28, 1996 (as amended), except to the extent relieved of such requirement by the Globe Equity Enforcement Court.

5.3 This Term shall not require the UV Non-Signatories, Other UV Signatories, UVDs to the extent that they are bound by this Agreement or the UV Agreement, the Gila Valley Irrigation District, the Franklin Irrigation District, or the Canal Companies to stop or limit the Pumping of water as otherwise permitted by the UV Agreement, nor shall it prevent any Party from Pumping water in accordance with Arizona law outside the UV Impact Zone; provided, however, that this Sub-term shall not preclude Pumping into a pipeline, canal, the bed of the Gila River, or other delivery facility as is necessary to comply with the obligations of Sub-terms 5.2.1 and 5.2.2. None of the provisions of this Term 5 shall require Phelps Dodge to reduce any of the diversions referred to in sub-terms 1.9.3.1 through 1.9.3.4 of Exhibit 2.47.

5.4 To the extent that any UVD seeks to make a Call that would be inconsistent with this Term 5, such UVD shall be acting "Not in Compliance with this Agreement" as that term is defined in the UV Agreement and UV Irrigation Districts and the Canal Companies shall not place such Call on behalf of such UVD.

5.5 Taking any action to comply with this Term 5, including Pumping, by any UV Non-Signatory, Other UV Signatory, UVDs to the extent that they are bound by this Agreement or the UV Agreement, Gila Valley Irrigation District, Franklin Irrigation District, or the Canal Companies shall not be an act Not in Compliance with the UV Agreement, provide that such Pumping or other actions do not cause the limits of subparagraph 6.2 of the UV Agreement to be exceeded, except to the extent provided by subparagraph 5.7.1 of the UV Agreement. To the

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extent the limits of subparagraph 6.2 of the UV Agreement are exceeded due to such Pumping or actions, any and all remedies available, including mitigation, will be available as provided by the UV Agreement.

EXHIBIT 2.47

TERMS OF NEW MEXICO DIVERSIONS

A. Definitions.

Capitalized terms in this Attachment that are not expressly defined herein shall have the same meaning as in the NM Consumptive Use and Forbearance Agreement. The following terms shall have the following meanings when capitalized in this Attachment. In the event of a conflict, the definition in this Attachment shall control for purposes of interpreting this Attachment.

1. "Additional Arizona Daily Demand" means the daily demand of the Additional Arizona Rights as provided by Sub-term 1.3.
2. "Additional Arizona Rights" means the additional Arizona rights to waters of the Gila River and the San Francisco River that satisfy the conditions stated in Sub-term 1.2.
3. "Calls" when used in Sub-term 1.3 means diversions of water made in accordance with a court decree or order pursuant to a decree.
4. "Daily Diversion Basis" is the basis for determining the NM Daily Diversion Right determined in accordance with Sub-term 1.5.
5. "Diversion Point" means a diversion point identified in the table of priorities that begins on page fourteen (14) of the Globe Equity Decree, and or their replacements, whether or not now existing and whether or not shared by one or more Canal Company.
6. "Gila River" means the Gila River, its tributaries and underground water sources at or above Ashurst-Hayden Diversion Dam, other than the San Francisco River, its tributaries and underground water sources.
7. "GX" means the Diversion point or points on the mainstem of the Gila River in New Mexico upstream from all Diversion Points, except the Diversion Points of the Sunset Ditch Company and the NM New Model Community Ditch Association, at which Diversion point or points the Secretary as Authorized Diverter may Divert surface water from the mainstem of the Gila River in accordance with the NM Consumptive Use and Forbearance Agreement, which Diversion point or points the Secretary as Authorized Diverter must identify before water may be Diverted from the Gila River. Such Diversion point or points must also be upstream from any point of measurement used for computing consumptive use pursuant to Article VIII of the Globe Equity Decree unless the Water Commissioner, before computing such consumptive use, subtracts from such measured flows at the upstream point of measurement the flows Diverted by the Secretary as Authorized Diverter below such point of measurement.
8. "New Mexico" means the State of New Mexico and its designees.

9. "New Mexico Share" means the Secretary as Authorized Diverter's share of the Additional Arizona Daily Demand determined in accordance with Sub-term 1.4.
10. "New Mexico Interstate Stream Commission" means the agency of the State of New Mexico of that name, or any successor agency thereto.
11. "NM Daily Diversion Right" means the amount of water that the Secretary as Authorized Diverter may Divert determined in accordance with Term 1.
12. "NM Diversion Day" means a calendar day during which the Secretary as Authorized Diverter Diverts water pursuant to the NM Consumptive Use and Forbearance Agreement.
13. "NM Excess" means the portion of the waters flowing in the Gila River and San Francisco River from which the Secretary as Authorized Diverter may Divert water determined in accordance with Sub-term 1.6.
14. "Secretary as Authorized Diverter" means the Secretary of the U.S. Department of the Interior acting solely in the capacity as the official authorized to Divert and responsible for Diversions pursuant to this Agreement for the benefit of the NM CAP Entity and in no other capacity. "Parties" shall be the entities who execute the NM Consumptive Use and Forbearance Agreement."
15. "Secretary's Remote Diversion Points" means those Diversion points, located in New Mexico, at which the Secretary as Authorized Diverter, in accordance with the NM Consumptive Use and Forbearance Agreement, may Divert water from the Gila River, the San Francisco River, or both, regardless of whether the Diversions are from the surface waters of those rivers, as further provided in Sub-term 1.10.
16. "San Francisco River" means the San Francisco River, its tributaries and underground water sources. The San Francisco is a tributary of the Gila River at or above Ashurst-Hayden Diversion Dam, but is not included in the definition of "Gila River" for purposes of this Agreement.
17. "Sub-term" shall be a sub-term of the Terms of New Mexico Diversion.
18. "Sum of the Available Flows" has the meaning set forth in Sub-term 1.6.
19. "SY" means the Diversion point or points located on the mainstem of the San Francisco River upstream from the Arizona/New Mexico boundary at which point or points the Secretary as Authorized Diverter may Divert surface water from the mainstem of the San Francisco River in accordance with the NM Consumptive Use and Forbearance Agreement, which point or points the Secretary as Authorized Diverter must identify before water may be Diverted from the San Francisco River.
20. "Terms of New Mexico Diversion" shall be the terms, stated in section B of this Attachment (Exhibit), governing the conditions and requirements for the Secretary as

Authorized Diverter's Diversions of water pursuant to and in accordance with the NM Consumptive Use and Forbearance Agreement. "Term" shall be one such term.

21. "Upper Valleys Daily Demand" means the daily demand in cubic feet per second ("CFS") of diversion rights pursuant to the Globe Equity Decree with Diversion Points upstream from the San Carlos Reservoir, including the daily demand of the San Carlos Apache Tribe, all as determined in accordance with Sub-term 1.1.

B. Terms.

1. The NM Daily Diversion Right on a NM Diversion Day shall be determined as follows:

- 1.1 The Upper Valleys Daily Demand shall, at the option of the Secretary as Authorized Diverter, be either the amount in the table in Sub-term 1.1.1 or the amount calculated in accordance with Sub-term 1.1.2.

1.1.1 Table of the Upper Valleys Daily Demand:

For NM Diversion Days in the month of:	Upper Valleys Daily Demand (CFS)
January	82.5
February 1-13	137.5
February 14-28/29	215
March	292.5
April	432.5
May	437.5
June	442.5
July	442.5
August	442.5
September	442.5
October	267.5
November	152.5
December	75.5

- 1.1.2** The Upper Valleys Daily Demand shall be the sum of the following calls, calculated as of 8:00 am Arizona time on the NM Diversion Day:
 - 1.1.2.1** The call under the Globe Equity Decree for the Duncan-Virden Valley for the day following the NM Diversion Day; plus
 - 1.1.2.2** The call under the Globe Equity Decree for the Safford Valley for the day two days following the NM Diversion Day; plus
 - 1.1.2.3** The call under the Globe Equity Decree for the San Carlos Apache Tribe for the day two days following the NM Diversion Day.

- 1.2** The Additional Arizona Rights shall be all rights that satisfy all of the following conditions:
 - 1.2.1** such rights must be to appropriable water of the Gila River and the San Francisco River in Arizona that have been adjudicated by a court decree;
 - 1.2.2** such rights must not be rights that have been adjudicated by Globe Equity Decree as of the date of enactment of the Arizona Water Settlements Act;
 - 1.2.3** such rights must not be the rights of Phelps Dodge to divert up to 3,000 acre feet of surface water in Arizona from the San Francisco River or Eagle Creek as described in Sub-terms 1.9.3.1 through 1.9.3.4.
 - 1.2.4** the priority of such rights must be earlier than September 30, 1968; and,
 - 1.2.5** the holders of such rights must, absent the provisions of the NM Consumptive Use and Forbearance Agreement, be in position, directly or indirectly, to require that the Secretary as Authorized Diverter not Divert water from the Gila River and/or San Francisco River at locations GX, SY, and the Secretary's Remote Diversion Points to the extent such Diversions by the Secretary as Authorized Diverter would interfere with such rights.

- 1.3** The additional Arizona daily demand (the "Additional Arizona Daily Demand") shall be the sum of the following calculated as of 8:00 am Arizona time on the NM Diversion Day:
 - 1.3.1** The Calls for water made pursuant to the Additional Arizona Rights for the day following the NM Diversion Day for such rights located upstream of gage station No. USGS 09448500 located on the Gila River at the head of Safford Valley, near Solomon, or upstream from gage station No. USGS 09444500 on the San Francisco River at Clifton, Arizona, and
 - 1.3.2** The Calls for water made pursuant to the Additional Arizona Rights for the day two days following the NM Diversion Day for such rights located

downstream of gage station No. USGS 09448500 located on the Gila River at the head of Safford Valley, near Solomon, or downstream from gage station No. USGS 09444500 on the San Francisco River at Clifton, Arizona.

- 1.4 The New Mexico Share shall be fifty percent (50%) of the Additional Arizona Daily Demand, but not more than forty (40) CFS; provided that the New Mexico Share shall not include any demand associated with water rights created by a settlement that were not previously recognized by a court decree. This Sub-term does not apply to the severance and transfer of decreed water rights not resulting from a settlement.
- 1.5 The Daily Diversion Basis shall be the sum of (a) the New Mexico Share and (b) the Upper Valleys Daily Demand, calculated as of 8:00 am Arizona time on a daily basis for each NM Diversion Day.
- 1.6 If the sum of the flows, as of 8:00 a.m. Arizona time on the day preceding the NM Diversion Day, at gage station No. USGS 09430500 on the Gila River above Gila, New Mexico, and gage station No. USGS 09444500 on the San Francisco River at Clifton, Arizona, (the "Sum of the Available Flows") exceeds the Daily Diversion Basis (the "NM Excess"), the NM Daily Diversion Right, subject to the conditions stated in Sub-term 1.8, shall be the amount calculated in accordance with Sub-term 1.7; otherwise the NM Daily Diversion Right shall be zero (0) CFS.
- 1.7 For the months of January, February, March, April, October, November, and December, the NM Daily Diversion Right shall be computed by multiplying the NM Excess by 0.80. For the months of May, June, July, August, and September, the NM Daily Diversion Right shall be computed by multiplying the NM Excess by 0.75.
- 1.8 Notwithstanding any calculation made pursuant to Sub-term 1.7, the NM Daily Diversion Right shall not be exercised so as to cause the Secretary as Authorized Diverter to Consumptively Use more than one hundred forty (140,000) acre-feet of water in any period of ten (10) consecutive Years.
- 1.9 The Secretary as Authorized Diverter may Divert surface water from the Gila River at GX and from the San Francisco River at SY, subject to all of the following conditions:
 - 1.9.1 The sum of the Diversions at GX and SY may not exceed the NM Daily Diversion Right.
 - 1.9.2 The water flow in the Gila River, as measured at gage station No. USGS 09432000 located on the Gila River Below Blue Creek, Near Virden, New Mexico, following the Diversion at GX, may not be less than 120% of the call under the Globe Equity Decree for the Duncan-Virden Valley for the day following the NM Diversion Day.

- 1.9.3** The water flow in the San Francisco River, computed as the sum of the flow as measured at gage station No. USGS 09444000 located on the San Francisco Near Glenwood, New Mexico, and the flow as measured at gage station No. USGS 09444200 located on the Blue River Near Clifton, Arizona, may not, on any day when the Secretary as Authorized Diverter is Diverting water from the San Francisco River at SY, be less than 120% multiplied by the following: (i) three (3) CFS during any day in April through October, or (ii) thirty (30) CFS during any day in any other month. The condition in this Sub-term 1.9.3 will not apply under the following circumstances:
- 1.9.3.1** In any April, May, June, July, August, September, or October, to the extent that Phelps Dodge has previously Diverted sixty (60) acre-feet of water from the San Francisco River in Arizona or Eagle Creek, or any combination thereof, exclusive of Phelps Dodge's Diversions from Eagle Creek of imported groundwater or exchange water, during such month.
- 1.9.3.2** In any November or March, to the extent that Phelps Dodge has previously Diverted six hundred (600) acre-feet of water from the San Francisco River in Arizona or Eagle Creek, or any combination thereof, exclusive of Phelps Dodge's Diversions from Eagle Creek of imported groundwater or exchange water, during such month.
- 1.9.3.3** In any December, January, or February, to the extent that Phelps Dodge has previously Diverted one thousand (1,000) acre-feet of water from the San Francisco River in Arizona or Eagle Creek, or any combination thereof, exclusive of Phelps Dodge's Diversions from Eagle Creek of imported groundwater or exchange water, during such month.
- 1.9.3.4** In any Year to the extent that Phelps Dodge has previously Diverted three thousand (3,000) acre-feet of water from the San Francisco River in Arizona or Eagle Creek, or any combination thereof, exclusive of Phelps Dodge's Diversions from Eagle Creek of imported groundwater or exchange water, during such Year.
- 1.9.4** If the Secretary as Authorized Diverter must reduce its NM Daily Diversion Right from the San Francisco River due to the parameters stated in Sub-term 1.9.3, then fifty percent (50%) of the amount the Secretary as Authorized Diverter is prevented from Diverting under Sub-term 1.9.3, or ten (10) CFS, whichever is less, shall count toward the forty (40) CFS cap in Sub-term 1.4.

- 1.9.5** The Secretary as Authorized Diverter, in its sole discretion, may Divert any amount of water up to the NM Daily Diversion Right for a 24-hour period beginning at 8:00 a.m. Arizona time on a NM Diversion Day, but is not required to Divert any water.
- 1.9.6** The Secretary as Authorized Diverter shall report on a daily basis its Diversions to the Secretary as CAP Owner and to the Gila River Water Commissioner.
- 1.9.7** The Secretary as Authorized Diverter may not Divert more than four thousand (4,000) acre-feet of water in any Year from the San Francisco River at SY.
- 1.9.8** The Secretary as Authorized Diverter may not Divert either (a) underground water or (b) surface water from locations other than GX and SY unless the Secretary as Authorized Diverter complies with the applicable provisions of Sub-term 1.10.
- 1.9.9** The Secretary as Authorized Diverter may Divert in New Mexico at points below any point of measurement used for computing consumptive use pursuant to Article VIII of the Globe Equity Decree if the Water Commissioner, before computing such consumptive use, subtracts from the measured flows at such upstream point of measurement the flows Diverted by the Secretary as Authorized Diverter below such point of measurement.
- 1.10** On any NM Diversion Day, the Secretary as Authorized Diverter may Divert at the Secretary's Remote Diversion Points subject to the following conditions:

 - 1.10.1** At least one hundred (180) days before seeking to Divert at any of the Secretary as Authorized Diverter's Remote Diversion Points, the Secretary as Authorized Diverter must give written notice to all of the Parties and the Water Commissioner of the location of each such point;
 - 1.10.2** Within such one hundred eighty (180) days, the Technical Committee established in Subparagraph 12.4 of the NM Consumptive Use and Forbearance Agreement shall meet and attempt to agree on parameters that would permit the Secretary as Authorized Diverter to Divert water at the Secretary's Remote Diversion Points without putting the Parties (other than the Secretary) in a worse position than they would be if the Secretary as Authorized Diverter were only permitted to Divert surface water from the Gila River at GX and from the San Francisco River at SY; and
 - 1.10.3** If the Technical Committee is not, within ninety (90) days, able to determine parameters allowing the Secretary as Authorized Diverter to Divert at the Secretary's Remote Diversion Points, the Secretary as Authorized Diverter or the NM CAP Entity may immediately begin the dispute resolution process set forth in Paragraph 11 of the NM

Consumptive Use and Forbearance Agreement, provided that no resolution may put the Parties (other than the Secretary) in a worse position than they would be if the Secretary as Authorized Diverter were only permitted to Divert surface water from the Gila River at GX and from the San Francisco River at SY.

- 1.11** If the Secretary as Authorized Diverter chooses to use the values in Sub-term 1.1.1 as the basis for the Upper Valleys Daily Demand, and is in compliance with all other terms in the NM Consumptive Use and Forbearance Agreement, the Secretary shall not be responsible for any failure to satisfy the Upper Valleys Daily Demand.
- 1.12** If the Secretary as Authorized Diverter chooses to compute the Upper Valleys Daily Demand as provided in Sub-term 1.1.2, it shall be the responsibility of the Secretary as Authorized Diverter to bypass sufficient water to satisfy the Upper Valleys Daily Demand.
 - 1.12.1** If the Secretary as Authorized Diverter chooses to compute the Upper Valleys Daily Demand as in Sub-term 1.1.2 during a week, and the Upper Valleys Daily Demand is not met during that week, the Secretary as Authorized Diverter shall during the following week bypass an additional amount equal to the deficit in calls for the previous week ("Make-up Water").
 - 1.12.2** If the Secretary as Authorized Diverter does not bypass sufficient water to comply with Sub-term 1.12.1, the Secretary as Authorized Diverter shall as soon as such water is available, bypass an additional amount of water equal to one-hundred and fifty percent (150%) of the required Make-up Water (i.e., the Make-up Water plus an additional fifty percent (50%)).
 - 1.12.3** The remedies provided in this Sub-term 1.12 shall not preclude or limit any other remedies that may be available to any of the Parties to the NM Consumptive Use and Forbearance Agreement or the UVDs.

EXHIBIT 2.48

TERMS OF NM UNIT AGREEMENT

The NM Unit Agreement between the Secretary and the NM CAP Entity shall contain the following terms and conditions, among others:

1.0 PREAMBLE.

- 1.1 WHEREAS**, the State of New Mexico has notified the Secretary that it has elected to have facilities constructed or developed on the Gila River and the San Francisco River to provide for the Consumptive Use (as hereinafter defined) authorized by sections 304(d) and (f) of the Colorado River Basin Project Act (such facilities hereinafter defined as the "NM Unit");
- 1.2 WHEREAS**, the Secretary is obligated pursuant to section 212 of the Arizona Water Settlements Act to enter into this New Mexico Unit Agreement (hereinafter defined as the "NM Unit Agreement");
- 1.3 WHEREAS**, the NM Consumptive Use and Forbearance Agreement (as hereinafter defined) requires the inclusion in this NM Unit Agreement of terms and provisions set forth in exhibit 2.48 of the NM Consumptive Use and Forbearance Agreement;
- 1.4 WHEREAS**, the parties to the NM Consumptive Use and Forbearance Agreement have agreed that Diversions and Consumptive Use of water in accordance with said agreement will not give rise to claims that such Diversions or Consumptive Use impairs or causes economic injury or cost to their rights existing on September 30, 1968, in Arizona, to water from the Gila River and the San Francisco River (as those terms are both hereinafter defined);
- 1.5 WHEREAS**, it was the belief and intent of the parties to the NM Consumptive Use and Forbearance Agreement that Diversions and Consumptive Use of water in accordance with said agreement should not impair or cause economic injury or cost to rights existing, or determined to exist as of September 30, 1968, in Arizona, to water from the Gila River and the San Francisco River; and,
- 1.6 WHEREAS**, the Parties to this NM Unit Agreement shall only Divert and Consumptively Use water in accordance with the provisions herein regarding such Diversion and Consumptive Use that are identical to those included in the NM Consumptive Use and Forbearance Agreement.

2.0 DEFINITIONS.

For purposes of this NM Unit Agreement, the following terms shall have the meanings set forth below:

- 2.1 “Additional Arizona Daily Demand” means the daily demand of the Additional Arizona Rights as provided by term 1.3 of Attachment 3.1 (Terms of New Mexico Diversions).
- 2.2 “Agreement” means this agreement and the Attachments attached hereto, which are hereby incorporated by reference.
- 2.3 “Allottee” means a person who holds a beneficial real property interest in an Indian allotment that is: (1) located within the Reservation; and (2) held in trust by the United States.
- 2.4 “Attachment” means an attachment to this Agreement.
- 2.5 “Call System” means that procedure approved by the Globe Equity Enforcement Court in the order issued on March 10, 1999, or any procedure subsequently approved by the Globe Equity Enforcement Court for the same purpose.
- 2.6 “Canal Companies” has the meaning set forth in the UV Agreement.
- 2.7 “CAP” or “Central Arizona Project” means that reclamation project authorized and constructed by the United States in accordance with Title III of the Colorado River Basin Project Act (43 U.S.C. §§1521 *et seq.*).
- 2.8 “CAP Fixed OM&R Charge” means ‘Fixed OM&R Charge’ as that term is defined in the CAP Repayment Stipulation.
- 2.9 “CAP Pumping Energy Charge” means ‘Pumping Energy Charge’ as that term is defined in the CAP Repayment Stipulation.
- 2.10 “CAP Repayment Stipulation” means the Revised Stipulation Regarding Stay of Litigation, Resolution of Issues During the Stay and for Ultimate Judgment Upon the Satisfaction of Conditions, filed in *Central Arizona Water Conservation District v. United States, et al.*, No. CIV 95-625-TUC-WDB (EHC), No. CIV 95-1720-PHX-EHC (Consolidated Action), U.S. District Court for the District of Arizona, and the Order dated April 28, 2003, entered therein, and any amendment or revision thereof. This is the same case referred to in the Act as No. CIV 95-09625-09TUC-09WDB (EHC), No. CIV 95-091720-PHX-EHC (Consolidated Action).
- 2.11 “CAP System” means: (A) the Mark-Wilmer Pumping Plant, (B) the Hayden-Rhodes Aqueduct, (C) the Fannin-McFarland Aqueduct, (D) the Tucson Aqueduct, (E) the pumping plants and appurtenant works of the Central Arizona Project aqueduct

system that are described in (A) through (D), and (F) any extensions, additions or replacement for the features described in (A) through (E).

- 2.12** “CAP Turnout” means the place or places to which the Secretary as CAP Owner shall cause the NM CAP Water to be delivered pursuant to this Agreement on the CAP System as are agreed by the Community, the District and CAWCD.
- 2.13** “CAWCD” or “Central Arizona Water Conservation District” means the political subdivision of the State of Arizona that is the contractor under the CAP Repayment Contract.
- 2.14** “CFS” means cubic feet per second.
- 2.15** “Colorado River Basin Project Act” means that act approved by Congress on September 30, 1968, (43 U.S.C. §§ 1501 et seq.), 82 Stat. 885, as amended by the Arizona Water Settlements Act of 2004.
- 2.16** “Consumptive Use” means measured Diversions by the Secretary as Authorized Diverter for the NM Unit pursuant to this Agreement, minus Return Flows. All such measured Diversions shall be accounted as Consumptive Use until such time as there are actual Return Flows. This definition of “Consumptive Use” includes reservoir evaporation losses as required by section 304(f) of the Colorado River Basin Project Act. Consumptive Use as defined in this Agreement has no relation to and shall have no effect on the definition or interpretation of “consumptive use” as that term is defined under: (i) article VIII(2) of the Globe Equity Decree, (ii) the UV Agreement or (iii) the Settlement Agreement.
- 2.17** “Consumptively Use” means the act of Consumptive Use.
- 2.18** “Deliver” or “Delivered” means CAWCD’s delivery of NM CAP Water to the CAP Turnout. “Delivery” means CAWCD’s act of delivering NM CAP Water to the CAP Turnout.
- 2.19** “Divert” or “Diverting” means to receive, withdraw or develop and produce or capture water by means of a ditch, canal, flume, bypass, dam, pipe line, pit, collection or infiltration gallery, conduit, well, pump, turnout, or other mechanical device or any other human act. “Diversion” means the act of Diverting.
- 2.20** “Diversion Point” means a diversion point identified in the table of priorities that begins on page fourteen (14) of the Globe Equity Decree, and or their replacements, whether or not now existing and whether or not shared by one or more Canal Company.
- 2.21** “Gila River” means the Gila River, its tributaries and underground water sources at or above Ashurst-Hayden Diversion Dam, other than the San Francisco River, its tributaries and underground water sources.

- 2.22** “Gila River Indian Community” or “Community” means the government composed of members of the Pima Tribe and the Maricopa Tribe, which is organized under section 16 of the Act of June 18, 1934 (25 U.S.C. § 476).
- 2.23** “Globe Equity Decree” means the decree dated June 29, 1935, entered in *United States of America v. Gila Valley Irrigation District, et al.*, Globe Equity No. 59, in the U.S. District Court for the District of Arizona. The term “Globe Equity Decree” includes all court orders and decisions supplemental to that decree.
- 2.24** “Globe Equity Enforcement Court” means the U. S. District Court for the District of Arizona exercising continuing jurisdiction over the Globe Equity Decree.
- 2.25** “Member” or “Members” means any person or persons duly enrolled as members of the Gila River Indian Community.
- 2.26** “NM CAP Water” means water from the CAP made available pursuant to the second sentence of section 304(d) of the Colorado River Basin Project Act.
- 2.27** “NM CAP Water Bank” means the water account established and managed pursuant to paragraph 6 of the NM Consumptive Use and Forbearance Agreement.
- 2.27A** “NM CAP Entity” means the entity to be formed or designated by the State of New Mexico to enter into the NM Unit Agreement with the Secretary as NM Unit and as Authorized Diverter. The NM CAP Entity shall be an entity that: (a) does not have sovereign immunity; (b) does not have the protection of the 11th Amendment to the U.S. Constitution; and (c) continues to satisfy all these conditions throughout its existence.
- 2.28** “NM CAP Mitigation Water Bank” means the water account established and managed pursuant to paragraph 7 of the NM Consumptive Use and Forbearance Agreement.
- 2.29** “NM Unit” means the unit or units of the Central Arizona Project to be constructed or developed in New Mexico pursuant to sections 301(a)(4) and 304 of the Colorado River Basin Project Act to Consumptively Use water from the Gila River and San Francisco River.
- 2.30** “Paragraph” means a numbered paragraph of this Agreement including all Subparagraphs in such Paragraph.
- 2.31** “Party” means an entity represented by a signatory to this Agreement and “Parties” means more than one of such entities. The United States or the Secretary of the Interior’s participation as a Party shall be in the capacity as described in subparagraphs 2.38, 2.39, 2.40, and 2.41.
- 2.32** “Phelps Dodge Corporation” or “Phelps Dodge” means the New York corporation of that name, Phelps Dodge’s subsidiaries (including without limitation Phelps Dodge Morenci, Inc., a Delaware corporation of that name), and Phelps Dodge’s successors and assigns.

- 2.33** “Return Flows” means water that the Secretary as Authorized Diverter has Diverted pursuant to this Agreement that is measured as it is subsequently returned to the Gila River or the San Francisco River. Return Flows that are directly measurable shall be measured using equipment that is calibrated and maintained to industry standards. Return Flows that cannot be directly measured shall be determined using methods and procedures generally accepted in the engineering profession using equipment that is calibrated and maintained to industry standards to make indirect determinations of water Diverted but subsequently returned to the Gila River and the San Francisco River.
- 2.34** “San Carlos Apache Tribe” means the San Carlos Apache Tribe, a tribe of Apache Indians organized under section 16 of the Act of June 18, 1934 (25 U.S.C. §476).
- 2.35** “San Carlos Irrigation and Drainage District” or “the District” means the entity of that name that is a political subdivision of the State of Arizona and an irrigation and drainage district organized under the laws of the State of Arizona..
- 2.36** “San Francisco River” means the San Francisco River, its tributaries and underground water sources. The San Francisco is a tributary of the Gila River at or above Ashurst-Hayden Diversion Dam, but is not included in the definition of “Gila River” for purposes of this Agreement.
- 2.37** “SCIIP” or “SCIP” means the San Carlos irrigation project authorized pursuant to the Act of June 7, 1924 (43 Stat. 475). The term “SCIIP” or “SCIP” includes any amendments or supplements to the act described in the preceding sentence..
- 2.38** “Secretary” means the Secretary of the U.S. Department of the Interior, or the Secretary’s duly authorized representative, acting solely in the capacities as: (a) owner of the CAP; (b) as the official responsible for the design, construction, operation and maintenance of the NM Unit; (c) the official authorized to Divert and responsible for Diversions pursuant to this Agreement for the benefit of the NM CAP Entity; and (d) in no other capacity.
- 2.39** “Secretary as Authorized Diverter” means the Secretary of the U.S. Department of the Interior, or the Secretary’s duly authorized representative, acting solely in the capacity as the official authorized to Divert and responsible for Diversions pursuant to this Agreement for the benefit of the NM CAP Entity and in no other capacity.
- 2.40** “Secretary as CAP Owner” means the Secretary of the U.S. Department of the Interior, or the Secretary’s duly authorized representative, acting solely in the capacity as owner of the CAP and in no other capacity.
- 2.41** “Secretary as NM Unit” means the Secretary of the U.S. Department of the Interior, or the Secretary’s duly authorized representative, acting solely in the capacity as the official responsible for the design, construction, operation and maintenance of the NM Unit and party to the NM Unit Agreement and in no other capacity

- 2.42 “Settlement Agreement” means that certain amended and restated agreement authorized and approved by section 203 of the Arizona Water Settlements Act of 2004 and entered into among the Community, the District, the United States, the State of Arizona and certain other named parties.
- 2.43 “State of New Mexico” or “New Mexico” means the State of New Mexico or its designee for purposes of this Agreement.
- 2.44 “Stored Water” means all water stored in the San Carlos Reservoir that is available under the Globe Equity Decree for release through the gates of the Coolidge Dam for conveyance down the channel of the Gila River for Diversion and use by the Community and the District.
- 2.45 “Subparagraph” means a numbered subparagraph of this Agreement and any subsections thereof.
- 2.46 “Terms of New Mexico Diversions” means the terms pursuant to which the Secretary as Authorized Diverter may Divert water of the Gila River and the San Francisco River without objection by the Parties, a copy of which is attached as Attachment 3.1.
- 2.47 “UV Agreement” means the agreement entered into by and among the Community, the District, the United States on behalf of each, the Gila Valley Irrigation District, the Franklin Irrigation District, Phelps Dodge Corporation, the Canal Companies and certain other named parties in the Upper Valley of the Gila River, a copy of which is attached to the Settlement Agreement as exhibit 26.2.
- 2.48 “UVD” has the meaning set forth in the UV Agreement. “UVDs” shall mean all such persons or entities.
- 2.49 “UV Irrigation District” means either the Franklin Irrigation District or the Gila Valley Irrigation District. “UV Irrigation Districts” means both the Franklin Irrigation District and the Gila Valley Irrigation District.
- 2.50 “UV Non-Signatories” has the meaning set forth in the UV Agreement.
- 2.51 “Water Commissioner” has the meaning provided by article XII of the Globe Equity Decree.
- 2.52 “Year” means a calendar year.
- 2.53 Certain of the Attachments have terms that are specifically defined for purposes of such Attachments only. Such definitions shall apply only to those Attachments in which they appear. In the event of any conflict between the definitions in this Paragraph 2 and the definitions set forth in any Attachment, for purposes of such Attachment, the definitions set forth in such Attachment shall control.

3.0 ATTACHMENTS.

3.1 Terms of New Mexico Diversions

3.2 [Description of NM Unit] [to be completed at the time the NM Unit Agreement is negotiated]

4.0 CONSUMPTIVE USE OF GILA RIVER AND SAN FRANCISCO RIVER WATER.

4.1 The Secretary as Authorized Diverter's right to Divert and Consumptively Use water from the Gila River and the San Francisco River pursuant to this NM Unit Agreement is explicitly conditioned on the following condition precedent:

4.1.1. Receipt by the Gila Valley Irrigation District of the funds to be provided pursuant to paragraph 13 of the NM Consumptive Use and Forbearance Agreement.

4.2 Subject to the terms of this NM Unit Agreement, without regard to any priority or entitlement of the Forbearing Parties to Divert or store water under the Globe Equity Decree, the Secretary as Authorized Diverter may Divert water from the Gila River and the San Francisco River solely in accordance with Attachment 3.1 (Terms of New Mexico Diversions).

4.3 Consumptive Use from the Gila River and the San Francisco River shall not exceed a combined total not to exceed one hundred forty thousand (140,000) acre-feet of water during any consecutive ten (10) Year period, provided that such Consumptive Use is in accordance with this NM Unit Agreement.

4.4 Consumptive Use shall not exceed four thousand (4,000) acre-feet per Year from the San Francisco River. Any such Consumptive Use shall be included in the total amount of allowable Consumptive Use in a ten-Year period set forth in Subparagraph 4.3 of this NM Unit Agreement and in the annual amount of allowable Consumptive Use set forth in Subparagraphs 4.6 and 4.8 of this Agreement.

4.5 Diversions shall not begin in any given Year until such time as there is thirty thousand (30,000) acre-feet of Stored Water in that Year, whereupon the Secretary as Authorized Diverter may Divert up to the maximum annual amount of allowable Consumptive Use set forth in Subparagraphs 4.6 and 4.8.

4.6 In any given Year, there may be up to sixty-four thousand (64,000) acre-feet of Consumptive Use of water, provided that:

4.6.1. such Consumptive Use is in accordance with this NM Unit Agreement; and

4.6.2. there are credits in the NM CAP Water Bank equal to or greater than the amount of such Consumptive Use at the time of such Consumptive Use.

- 4.7 If during any five (5) Year period the annual average of NM Diversion Days on which the Secretary as Authorized Diverter is precluded from Consumptively Using water because there is less than thirty thousand (30,000) acre-feet of Stored Water increases above the annual average number of such days for the period 1968 through 1996 (inclusive), the minimum Stored Water requirement set forth in Subparagraph [4.2] shall be reduced by an amount calculated pursuant to the procedure set forth in subparagraph 4.7 of the NM Consumptive Use and Forbearance Agreement.
- 4.8 Consumptive Use shall not exceed sixty-four thousand (64,000) acre-feet in any given Year.
- 4.9 No later than the last day of each month, the Secretary as NM Unit shall provide the parties to the NM Consumptive Use and Forbearance Agreement with a report of the total amount of water Consumptively Used pursuant to this NM Unit Agreement for the preceding month.
- 4.10 There shall be no requirement to Consumptively Use water from the Gila River or the San Francisco River in any given Year.
- 4.11 Diversions of water from the Gila River and the San Francisco River, or any combination thereof, shall not exceed three hundred fifty (350) CFS at any time.
- 4.12 The Secretary shall Divert water and otherwise exercise her rights and authorities pursuant to the NM Consumptive Use and Forbearance Agreement for the sole benefit of the NM CAP Entity and for no other purpose.

5.0 CONSTRUCTION AND OWNERSHIP OF NM UNIT.

- 5.1 The Secretary as NM Unit shall have the responsibility to design and construct the NM Unit as described in Attachment 3.2. The Secretary as NM Unit shall consult with the NM CAP Entity in such design and construction.
- 5.2 Upon request by the NM CAP Entity, the Secretary as NM Unit shall transfer to the NM CAP Entity the responsibility for the design and construction of the NM Unit, at the sole option of the NM CAP Entity.
- 5.3 Funding for the design and construction of the NM Unit shall be as set forth in sections 107 and 212 of the Arizona Water Settlements Act of 2004.
- 5.4 All funds from the Lower Colorado River Basin Development Fund (the "LCRBDF") used to construct the NM Unit shall be non-reimbursable and such costs shall be excluded from the NM CAP Entity repayment obligation, if any, under the NM Unit Agreement.
- 5.5 The NM CAP Entity shall own and hold title to the NM Unit all portions of the NM Unit constructed hereunder.

6.0 TRANSFER OF OPERATION OF NM UNIT.

- 6.1 At the NM CAP Entity's request, the Secretary as NM Unit shall transfer to the NM CAP Entity the operations and maintenance of the NM Unit.
- 6.2 At the NM CAP Entity's request, the Secretary as Authorized Diverter shall allow the NM CAP Entity to Divert water pursuant to the Secretary's authorization, provided that:
 - 6.2.1. the NM CAP Entity diverts water for the NM Unit in compliance with Attachment 2.47 (Terms of New Mexico Diversions);
 - 6.2.2. the Secretary as Authorized Diverter remains responsible to the parties to the NM Consumptive Use and Forbearance Agreement and to the UV Non-Signatories for ensuring the NM CAP Entity's compliance with Attachment 2.47 (Terms of the New Mexico Diversions);
 - 6.2.3. the Secretary as Authorized Diverter remains responsible to the parties to the NM Consumptive Use and Forbearance Agreement for all rights and responsibilities there under; and,
 - 6.2.4. the NM CAP Entity meets the conditions set forth in subparagraph 2.26A of the NM Consumptive Use and Forbearance Agreement.
- 6.3 Notwithstanding any other provision of this Agreement, the Secretary as Authorized Diverter shall at all time retain its responsibility to:
 - 6.3.1. ensure the NM CAP Entity's compliance with the terms of this Agreement;
 - 6.3.2. coordinate the consultations required by subparagraph 11.4 of the NM Forbearance and Consumptive Use Agreement; and,
 - 6.3.3. provide all reports to the parties to the NM Forbearance and Consumptive Use Agreement as required therein.
- 6.4 The Secretary as NM Unit and as Authorized Diverter shall be responsible for ensuring that the operations of the NM Unit comply with applicable law, including but not limited to obtaining any permits required by the New Mexico State Engineer.
- 6.5 In the event the Secretary as NM Unit transfers to the NM CAP Entity the operations of the NM Unit pursuant to Subparagraph 6.1, the NM CAP Entity shall indemnify the Secretary for any and all liability that the Secretary incurs arising from the NM CAP Entity's failure to comply with its obligations hereunder.
- 6.6 In the event the Secretary as Authorized Diverter allows the NM CAP Entity to Divert water for the NM Unit pursuant to Subparagraph 6.2, the NM CAP Entity shall indemnify the Secretary for any and all liability the Secretary incurs arising from the NM CAP Entity's failure to comply with obligations hereunder, including, but not limited to its obligation to Divert solely in accordance with the Attachment 3.1 (Terms of New Mexico Diversions). The NM CAP Entity waives and release all rights to challenge or defend against its assumption of any liability or obligations incurred by the Secretary or the United States as a result of the NM CAP Entity's failure to comply with its obligations under Subparagraph 6.2, provided that the NM CAP Entity is not precluded from participating as a party to assert its defense that it complied with Attachment 3.1 (Terms of New Mexico Diversions) in any action against the United States or the Secretary seeking monetary damages in any action brought pursuant to paragraph 11 of CUFA, provided that the NM CAP Entity seeks to participate in such action in a timely manner. Nothing in the preceding sentence is intended to limit the defenses the NM CAP Entity may assert where the NM CAP Entity participates as a

party in any action against the United States or the Secretary seeking monetary damages pursuant to paragraph 11 of CUFA.

7.0 DISPUTE RESOLUTION.

- 7.1 In the event of any dispute, controversy or disagreement arising under this Agreement (“Dispute”), either Party may bring an action in the U.S. District Court for the District of New Mexico seeking such relief as is appropriate and available pursuant to this Agreement; provided that the NM CAP Entity may not bring such an action to resolve a Dispute arising from or relating to its obligation to indemnify the United States pursuant to Subparagraphs 6.5 and 6.6.
- 7.2 The remedies available to the Parties for breach of this Agreement shall be: (i) injunctive relief, including specific performance; or, (ii) if injunctive relief is not available or not adequate to compensate a Party for damages incurred as a result of such breach, monetary damages; provided that any action against the United States for monetary damages shall be brought pursuant to 28 U.S.C. 1491.
- 7.3 **Waiver of sovereign immunity.** The Secretary, to the extent consistent with section 213(a) of the Act or 28 U.S.C. 1491, has provided a strictly limited waiver of her sovereign immunity for the sole and exclusive purposes of resolving a Dispute and for no other reason.
- 7.4 The parties to the NM Consumptive Use and Forbearance Agreement, the UV Non-Signatories and the State of New Mexico may intervene in any action initiated by either Party to this Agreement pursuant to Subparagraph 7.1 and the Parties to this Agreement shall not object to such intervention on any ground whatsoever.
- 7.5 This Agreement is entered into pursuant to section 304 of the Colorado River Basin Project Act. The Secretary shall be subject to an order of specific performance pursuant to Public Law No. 97-293, Title III, Section 221. For purposes of any and all disputes, controversies or claims arising under this Agreement, the location of the NM Unit shall be deemed to be within the State of New Mexico.

8.0 MISCELLANEOUS.

8.1 Third party beneficiaries.

- 8.1.1. The parties to the NM Consumptive Use and Forbearance Agreement, the UVDs and the State of New Mexico are not Parties to this Agreement but are intended by the Parties to be third party beneficiaries hereof and may any and all of their rights under this Agreement.
- 8.1.2. The parties to the NM Consumptive Use and Forbearance Agreement and the State of New Mexico shall be entitled to any and all notices provided to the Parties hereunder.

- 8.1.3.** The Parties shall not amend those terms and provisions of this NM Unit Agreement that were included in exhibit 2.48 of the NM Consumptive Use and Forbearance Agreement without the prior written consent of the parties to the NM Consumptive Use and Forbearance Agreement.
- 8.1.4.** The Parties shall not amend any term or provision of this NM Unit Agreement without the prior written consent of the State of New Mexico.
- 8.2** Except as set forth in Subparagraph 8.1, the Parties do not intend for any other person or entity to be a third party beneficiary of this Agreement and this Agreement shall not create any obligations, rights, duties or responsibilities for any such other persons or entities.
- 8.3** Execution of this Agreement shall not constitute a major Federal action under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).
- 8.4** If any provision or clause of this Agreement or application thereof to any person or circumstance is held invalid or unenforceable, such invalidity or unenforceability shall not affect such other provisions, clauses or applications of this Agreement as can be given effect without the invalid or unenforceable provision, clause or application. To this end, the provisions and clauses of this Agreement are severable.
- 8.5** Upon receipt by the Secretary of written notice from the NM CAP Entity that it deems the severance of any provision of the NM Consumptive Use and Forbearance Agreement as depriving the NM CAP Entity of its material benefits under said agreement, the Secretary shall seek its release from said agreement pursuant to subparagraph 8.4 thereof.
- 8.6** Nothing herein shall affect, alter or diminish rights to use of waters of the Gila River system within New Mexico, or the authority of the State of New Mexico to administer such rights for use within the state, including rights decreed by article IV of the decree of the United States Supreme Court in *Arizona v. California*, 376 U.S. 340.
- 8.7** This Agreement and each of its provisions are to be construed fairly and reasonably, and neutrally, and there shall be no presumption of construction for or against any Party. The Paragraph and Subparagraph titles and numbering used in this Agreement are for convenience only and shall not be considered in the construction of this Agreement.
- 8.8** Each of the terms and conditions of this Agreement shall be binding on and inure to the benefit of the Parties and their successors and assigns.
- 8.9** No member or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this Agreement or to any benefit that may arise here from. This shall not be construed to extend to this Agreement if made with a corporation or company for its general benefit.
- 8.10** This Agreement is the entire agreement between the Parties. All previous agreements, statements, contracts and representations by or among the Parties and their agents

relating to the subject matter of this Agreement are hereby merged into this Agreement and no evidence of any such agreement, contract, representation or statement shall be admissible to interpret this Agreement. The Parties warrant that they are not relying on any such agreement, contract, representation or statement as a reason for entering this Agreement. Any modification of this Agreement shall be void unless it is in writing and signed by all the Parties.

8.11 This Agreement may be executed in multiple counterparts, each of which shall be considered an original and all of which, taken together, shall constitute one agreement.

8.12 Service of process shall be by Certified U.S. Mail, as provided under Federal Rules of Procedure 4(d), using the addresses specified in Subparagraph 8.13 regarding notices.

8.13 Any notice to be given or payment to be made under this Agreement shall be properly given or made when received or when deposited in the United States mail, certified or registered, return receipt requested, postage prepaid, addressed as follows, or addressed to such other address as the Party to receive such notice shall have designated by written notice given as required by this Subparagraph 8.13. Notice or payment shall be deemed to have been received at the earlier of (a) actual delivery or (b) the first business day that is at least four (4) calendar days after the notice or payment has been deposited in the United States mails in accordance with this Subparagraph 8.13:

(a) As to the United States:
The Secretary of the Interior
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Regional Director
Southwest Regional Office
Bureau of Indian Affairs
P.O. Box 10
Phoenix, Arizona 85001

Regional Director
Bureau of Reclamation
Lower Colorado Region
P.O. Box 427
Boulder City, Nevada 89005

(b) As to the NM CAP Entity
c/o the New Mexico Interstate Stream Commission

Attachment 3.1 to NM Unit Agreement

TERMS OF NEW MEXICO DIVERSIONS

A. Definitions.

Capitalized terms in this Exhibit that are not expressly defined herein shall have the same meaning as in the NM Consumptive Use and Forbearance Agreement. The following terms shall have the following meanings when capitalized in this Exhibit. In the event of a conflict, the definition in this Exhibit shall control for purposes of interpreting this Exhibit.

1. "Additional Arizona Daily Demand" means the daily demand of the Additional Arizona Rights as provided by Sub-term 1.3.
2. "Additional Arizona Rights" means the additional Arizona rights to waters of the Gila River and the San Francisco River that satisfy the conditions stated in Sub-term 1.2.
3. "Calls" when used in Sub-term 1.3 means diversions of water made in accordance with a court decree or order pursuant to a decree.
4. "Daily Diversion Basis" is the basis for determining the NM Daily Diversion Right determined in accordance with Sub-term 1.4.
5. "Diversion Point" means a diversion point identified in the table of priorities that begins on page fourteen (14) of the Globe Equity Decree, and or their replacements, whether or not now existing and whether or not shared by one or more Canal Company.
6. "Gila River" means the Gila River, its tributaries and underground water sources at or above Ashurst-Hayden Diversion Dam, other than the San Francisco River, its tributaries and underground water sources.
7. "GX" means the Diversion point located in New Mexico upstream from all Diversion Points at which the Secretary as Authorized Diverter may Divert surface water from the Gila River in accordance with the NM Consumptive use Agreement, which point the Secretary as Authorized Diverter must identify before water may be Diverted from the Gila River.
8. "New Mexico" means the State of New Mexico and its designees.
9. "New Mexico Share" means the Secretary as Authorized Diverter's share of the Additional Arizona Daily Demand determined in accordance with Sub-term 1.4.
10. "New Mexico Interstate Stream Commission" means the agency of the State of New Mexico of that name, or any successor agency thereto.

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11. "NM Daily Diversion Right" means the amount of water that the Secretary as Authorized Diverter may Divert determined in accordance with Term 1.

12. "NM Diversion Day" means a calendar day during which the Secretary as Authorized Diverter Diverts water pursuant to the NM Consumptive Use and Forbearance Agreement.

13. "NM Excess" means the portion of the waters flowing in the Gila River and San Francisco River from which the Secretary as Authorized Diverter may Divert water determined in accordance with Sub-term 1.6.

14. "Secretary as Authorized Diverter" means the Secretary of the U.S. Department of the Interior acting solely in the capacity as the official authorized to Divert and responsible for Diversions pursuant to this Agreement for the benefit of the NM CAP Entity and in no other capacity.

15. "Parties" shall be the entities who execute the NM Consumptive Use and Forbearance Agreement.

16. "Secretary's Additional Gila River Diversion Points" means those Diversion points, in addition to or in lieu of GX, located in New Mexico upstream from all the Diversion Points, at which the Secretary as Authorized Diverter, in accordance with the NM Consumptive Use and Forbearance Agreement, may Divert surface water from the mainstem of the Gila River as further provided in Sub-term 1.10.

17. "Secretary's Additional San Francisco River Diversion Points" means those Diversion points, in addition to or in lieu of SY, located in New Mexico, at which the Secretary as Authorized Diverter, in accordance with the NM Consumptive Use and Forbearance Agreement, may Divert surface water from the mainstem of the San Francisco River as further provided in Sub-term 1.11.

18. "Secretary's Remote Diversion Points" means those Diversion points, located in New Mexico, at which the Secretary as Authorized Diverter, in accordance with the NM Consumptive Use and Forbearance Agreement, may Divert water from the Gila River, the San Francisco River, or both, regardless of whether the Diversions are from the surface waters of those rivers, as further provided in Sub-term 1.12.

19. "San Francisco River" means the San Francisco River, its tributaries and underground water sources. The San Francisco is a tributary of the Gila River at or above Ashurst-Hayden Diversion Dam, but is not included in the definition of "Gila River" for purposes of this Agreement.

20. "Sub-term" means a sub-term of the Terms of New Mexico Diversion.

21. "Sum of the Available Flows" has the meaning set forth in Sub-term 1.6.

22. "SY" means the Diversion point located upstream from the Arizona/New Mexico boundary at which the Secretary as Authorized Diverter may Divert surface water from the mainstem of the San Francisco River in accordance with the NM Consumptive Use and Forbearance Agreement, which point the Secretary as Authorized Diverter must identify before water may be Diverted from the San Francisco River.

23. "Terms of New Mexico Diversion" shall be the terms, stated in section B of this Exhibit, governing the conditions and requirements for the Secretary as Authorized Diverter's Diversions of water pursuant to and in accordance with the NM Consumptive Use and Forbearance Agreement. "Term" shall be one such term.

24. "Upper Valleys Daily Demand" means the daily demand in CFS of diversion rights pursuant to the Globe Equity Decree with Diversion Points upstream from the San Carlos Reservoir, including the daily demand of the San Carlos Apache Tribe, all as determined in accordance with Sub-term 1.1.

B. Terms.

1. The NM Daily Diversion Right on a NM Diversion Day shall be determined as follows:

1.1 The Upper Valleys Daily Demand shall, at the option of the Secretary as Authorized Diverter, be either the amount in the table in Term 1.1.1 or the amount calculated in accordance with Sub-term 1.1.2.

1.1.1 Table of the Upper Valleys Daily Demand.

For NM Diversion Days in the month of:	Upper Valleys Daily Demand (CFS)
January	82.5
February 1-13	137.5
February 13-28/29	215.0
March	292.5
April	432.5
May	437.5
June	442.5
July	442.5
August	442.5

September	442.5
October	267.5
November	152.5
December	75.5

- 1.1.2** The Upper Valleys Daily Demand shall be the sum of the following calls, in the amounts as called as of 8:00 am Arizona time on the NM Diversion Day:
- 1.1.2.1** The call under the Globe Equity Decree for the Duncan-Virden Valley for the day following the NM Diversion Day; plus
 - 1.1.2.2** The call under the Globe Equity Decree for the Safford Valley for the day two days following the NM Diversion Day; plus
 - 1.1.2.3** The call under the Globe Equity Decree for the San Carlos Apache Tribe for the day two days following the NM Diversion Day.
- 1.2** The Additional Arizona Rights shall be all rights that satisfy all of the following conditions:
- 1.2.1** such rights must be to appropriable water of the Gila River and the San Francisco River in Arizona that have been adjudicated by a court decree;
 - 1.2.2** such rights must not be rights that have been adjudicated by Globe Equity Decree as of the date of enactment of the Arizona Water Settlements Act;
 - 1.2.3** such rights must not be the rights of Phelps Dodge to divert up to 3,000 acre feet of surface water in Arizona from the San Francisco River or Eagle Creek as described in Sub-terms 1.9.3.1 through 1.9.3.4.
 - 1.2.4** the priority of such rights must be earlier than September 30, 1968; and,
 - 1.2.5** the holders of such rights must, absent the provisions of the NM Consumptive Use and Forbearance Agreement, be in position, directly or indirectly, to require that the Secretary as Authorized Diverter not Divert water from the Gila River and/or San Francisco River at locations GX, SY, the Secretary's Additional Gila River Diversion Points, the Secretary's Additional San Francisco Diversion Points and the Secretary's Remote Diversion Points to the extent such Diversions by the Secretary as Authorized Diverter would interfere with such rights.

- 1.3 The additional Arizona daily demand (the "Additional Arizona Daily Demand") shall be the sum of the following:
 - 1.3.1 The Calls for water made pursuant to the Additional Arizona Rights for the day following the NM Diversion Day for such rights located upstream of gage station No. USGS 09448500 located on the Gila River at the head of Safford Valley, near Solomon, or upstream from gage station No. USGS 09444500 on the San Francisco River at Clifton, Arizona, and
 - 1.3.2 The Calls for water made pursuant to the Additional Arizona Rights for the day two days following the NM Diversion Day for such rights located downstream of gage station No. USGS 09448500 located on the Gila River at the head of Safford Valley, near Solomon, or downstream from gage station No. USGS 09444500 on the San Francisco River at Clifton, Arizona.
- 1.4 The New Mexico Share shall be fifty percent (50%) of the Additional Arizona Daily Demand, but not more than forty (40) CFS; provided that the New Mexico Share shall not include any demand associated with water rights created by a settlement that were not previously recognized by a court decree. This Sub-term does not apply to the severance and transfer of decreed water rights not resulting from a settlement.
- 1.5 The Daily Diversion Basis shall be the sum of (a) the New Mexico Share and (b) the Upper Valleys Daily Demand, calculated on a daily basis for each NM Diversion Day.
- 1.6 If the sum of the flows as of 8:00 a.m. on the NM Diversion Day at gage station No. USGS 09430500 on the Gila River above Gila, New Mexico, and gage station No. USGS 09444500 on the San Francisco River at Clifton, Arizona, (the "Sum of the Available Flows") exceeds the Daily Diversion Basis (the "NM Excess"), the NM Daily Diversion Right, subject to the conditions stated in Sub-term 1.8, shall be the amount calculated in accordance with Sub-term 1.7; otherwise the NM Daily Diversion Right shall be zero (0) CFS.
- 1.7 For the months of January, February, March, April, October, November, and December, the NM Daily Diversion Right shall be computed by multiplying the NM Excess by 0.80. For the months of May, June, July, August, and September, the NM Daily Diversion Right shall be computed by multiplying the NM Excess by 0.75.
- 1.8 Notwithstanding any calculation made pursuant to Sub-term 1.7, the NM Daily Diversion Right shall not be exercised so as to cause the Secretary as Authorized Diverter to Consumptively Use more than one hundred forty (140,000) acre-feet of water in any period of ten (10) consecutive Years.

- 1.9** The Secretary as Authorized Diverter may Divert surface water from the Gila River at GX and from the San Francisco River at SY, subject to all of the following conditions:
- 1.9.1** The sum of the Diversions at GX and SY may not exceed the NM Daily Diversion Right.
- 1.9.2** The water flow in the Gila River, as measured at gage station No. USGS 09432000 located on the Gila River Below Blue Creek, Near Virden, New Mexico, following the Diversion at GX, may not be less than 120% of the call under the Globe Equity Decree for the Duncan-Virden Valley for the day following the NM Diversion Day.
- 1.9.3** The water flow in the San Francisco River, computed as the sum of the flow as measured at gage station No. USGS 09444000 located on the San Francisco Near Glenwood, New Mexico, and the flow as measured at gage station No. USGS 09444200 located on the Blue River Near Clifton, Arizona, may not, on any day when the Secretary as Authorized Diverter is Diverting water from the San Francisco River at SY, be less than 120% multiplied by the following: (i) three (3) CFS during any day in April through October, or (ii) thirty (30) CFS during any day in any other month. The condition in this Sub-term 1.9.3 will not apply under the following circumstances:
- 1.9.3.1** In any April, May, June, July, August, September, or October, to the extent that Phelps Dodge has previously Diverted sixty (60) acre-feet of water from the San Francisco River in Arizona or Eagle Creek, or any combination thereof, exclusive of Phelps Dodge's Diversions from Eagle Creek of imported groundwater or exchange water, during such month.
- 1.9.3.2** In any November or March, to the extent that Phelps Dodge has previously Diverted six hundred (600) acre-feet of water from the San Francisco River in Arizona or Eagle Creek, or any combination thereof, exclusive of Phelps Dodge's Diversions from Eagle Creek of imported groundwater or exchange water, during such month.
- 1.9.3.3** In any December, January, or February, to the extent that Phelps Dodge has previously Diverted one thousand (1,000) acre-feet of water from the San Francisco River in Arizona or Eagle Creek, or any combination thereof, exclusive of Phelps Dodge's Diversions from Eagle Creek of imported groundwater or exchange water, during such month.

- 1.9.3.4** In any Year to the extent that Phelps Dodge has previously Diverted three thousand (3,000) acre-feet of water from the San Francisco River in Arizona or Eagle Creek, or any combination thereof, exclusive of Phelps Dodge's Diversions from Eagle Creek of imported groundwater or exchange water, during such Year.
- 1.9.4** If the Secretary as Authorized Diverter must reduce its NM Daily Diversion Right from the San Francisco River due to the parameters stated in Sub-term 1.9.3, then fifty percent (50%) of the amount the Secretary as Authorized Diverter is prevented from Diverting under Sub-term 1.9.3, or ten (10) CFS, whichever is less, shall count toward the forty (40) CFS cap in Sub-term 1.4.
- 1.9.5** If GX is located more than fifteen (15) miles downstream from gage station No. USGS 0943050 on the Gila River above Gila, New Mexico, the flow on the NM Diversion Day as of 8:00 a.m. at GX may not be less than one hundred thirty-five percent (135%) of the flow as of 8:00 a.m. at such gage station.
- 1.9.6** The Secretary as Authorized Diverter, in its sole discretion, may Divert any amount of water up to the NM Daily Diversion Right, but is not required to Divert any water.
- 1.9.7** The Secretary as Authorized Diverter shall report on a daily basis its Diversions to the Secretary as CAP Owner and to the Gila River Water Commissioner.
- 1.9.8** The Secretary as Authorized Diverter may not Divert more than four thousand (4,000) acre-feet of water in any Year from the San Francisco River at SY.
- 1.9.9** The Secretary as Authorized Diverter may not Divert either (a) underground water or (b) surface water from locations other than GX and SY unless the Secretary as Authorized Diverter complies with the applicable provisions of Sub-terms 1.10, 1.11, and 1.12.
- 1.10** On any NM Diversion Day, the Secretary as Authorized Diverter may Divert surface water from the mainstem of the Gila River at the Secretary's Additional Gila River Diversion Points subject to such conditions and parameters as may be agreed upon by the Technical Committee, or if the Technical Committee cannot unanimously agree, subject to all of the following conditions:
- 1.10.1** At least ninety (90) days before Diverting at any of the Secretary's Additional Gila River Diversion Points, the Secretary as Authorized Diverter must give written notice to all of the Parties and the Water Commissioner of the location of each such point;

- 1.9.3 would prohibit the Secretary as Authorized Diverter from Diverting at SY; and
- 1.11.4 On any NM Diversion Day, the sum of the Secretary as Authorized Diverter's Diversions at (a) all the Secretary's Additional San Francisco River Diversion Points, (b) all the Secretary's Additional Gila River Diversion Points, (c) GX, and (d) SY may not exceed the NM Daily Diversion Right.
- 1.12 On any NM Diversion Day, the Secretary as Authorized Diverter may Divert at the Secretary's Remote Diversion Points subject to the following conditions:
- 1.12.1 At least one hundred (180) days before seeking to Divert at any of the Secretary's Remote Diversion Points, the Secretary as Authorized Diverter must give written notice to all of the Parties and the Water Commissioner of the location of each such point;
- 1.12.2 Within such one hundred eighty (180) days, the Technical Committee established in Subparagraph 12.4 of the Agreement shall meet and attempt to agree on parameters that would permit the Secretary as Authorized Diverter to Divert water at the Secretary's Remote Diversion Points without putting the Parties (other than the Secretary) in a worse position than they would be if the Secretary as Authorized Diverter were only permitted to Divert surface water from the Gila River at GX and from the San Francisco River at SY; and
- 1.12.3 If the Technical Committee is not, within ninety (90) days, able to determine parameters allowing the Secretary as Authorized Diverter to Divert at the Secretary's Remote Diversion Points, the Secretary as Authorized Diverter or the NM CAP Entity may immediately begin the dispute resolution process set forth in Paragraph 11 of the Agreement, provided that no resolution may put the Parties (other than the Secretary) in a worse position than they would be if the Secretary as Authorized Diverter were only permitted to Divert surface water from the Gila River at GX and from the San Francisco River at SY.
- 1.13 If the Secretary as Authorized Diverter chooses to use the values in Sub-term 1.1.1 as the basis for the Upper Valleys Daily Demand, and is in compliance with all other terms in the NM Consumptive Use and Forbearance Agreement, the Secretary shall not be responsible for any failure to satisfy the Upper Valley Daily Demand.
- 1.14 If the Secretary as Authorized Diverter chooses to compute the Upper Valleys Daily Demand as provided in Sub-term 1.1.2, it shall be the responsibility of the Secretary as Authorized Diverter to bypass sufficient water to satisfy the Upper Valleys Daily Demand.

- 1.14.1** If the Secretary as Authorized Diverter chooses to compute the Upper Valleys Daily Demand as in Sub-term 1.1.2 during a week, and the Upper Valleys Daily Demand is not met during that week, the Secretary as Authorized Diverter shall during the following week bypass an additional amount equal to the deficit in calls for the previous week (“Make-up Water”).
- 1.14.2** If the Secretary as Authorized Diverter does not bypass sufficient water to comply with Sub-term 1.14.1, the Secretary as Authorized Diverter shall as soon as such water is available, bypass an additional amount of water equal to one-hundred and fifty (150%) of the required Make-up Water (i.e., the Make-up Water plus an additional fifty percent (50%)).
- 1.1.4.3** The remedies provided in this Sub-term 1.14 shall not preclude or limit any other remedies that may be available to any of the Parties to the NM Consumptive Use and Forbearance Agreement or the UVDs.

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Attachment 3.2 to NM Unit Agreement

DESCRIPTION OF THE NM UNIT

[To be developed at the time the NM Unit Agreement is negotiated]

EXHIBIT 6

EXAMPLES OF OPERATION OF NM CAP WATER BANK

Example 1

If the balance in the NM CAP Water Bank is projected to be fifty-five thousand (55,000) acre-feet as of December 31st of any Year, no more than fifteen thousand (15,000) acre-feet of NM CAP Water may be ordered. (The maximum amount of water that may be stored in the NM CAP Water Bank is 70,000 acre-feet. 70,000 acre-feet minus 55,000 acre-feet equals 15,000 acre-feet, which is less than the maximum of 18,000 acre-feet that may be ordered for delivery to downstream users for credit to the NM CAP Water Bank in any one year.). The amount of pre-banked water in the NM CAP Water Bank would be 70,000 acre-feet. The Secretary as Authorized Diverter could Consumptively Use only the annual maximum of sixty-four thousand (64,000) acre-feet in the following Year.

Example 2

If the balance in the NM CAP Water Bank is projected to be seventy thousand (70,000) acre-feet as of December 31st of any Year, no NM CAP Water may be ordered for Delivery to downstream users in the next Year for credit to the NM CAP Water Bank because of the seventy thousand (70,000) acre-feet limit in the NM CAP Water Bank. The Secretary as Authorized Diverter could Consumptively Use sixty-four thousand (64,000) acre-feet in the following Year.

Example 3

If the balance in the NM CAP Water Bank is projected to be two thousand (2,000) acre-feet as of December 31st of any Year, the maximum annual order of eighteen thousand (18,000) acre-feet of NM CAP Water may be ordered for Delivery to downstream users in the next Year for credit to the NM CAP Water Bank. The Secretary as Authorized Diverter could Consumptively Use twenty thousand (20,000) acre-feet in the following Year.

EXHIBIT 7

EXAMPLES OF OPERATION OF NM CAP MITIGATION WATER BANK

Example 1

- a) the NM CAP Entity informs the Secretary as CAP Owner pursuant to Subparagraph 5.3 that it will pay for 18,000 acre-feet of NM CAP Water.
- b) SCIP parties may not purchase NM CAP Water pursuant to Subparagraph 5.12 for the establishment of credits in the NM CAP Mitigation Water Bank because the 18,000 acre-foot annual limit for NM CAP Water deliveries is fully taken up by New Mexico.

Example 2

- a) John Doe receives an enforceable Additional Arizona Right to 300 acre-feet of water from the mainstem of either the Gila River or the San Francisco River.
- b) New Mexico informs the Secretary as CAP Owner pursuant to Subparagraph 5.3 that it will pay for 14,000 acre-feet of NM CAP Water.
- c) SCIP parties have zero (0) credits in the NM CAP Mitigation Water Bank.
- d) SCIP parties may purchase up to fifteen hundred (1,500) acre-feet. (5×300) of NM CAP Water pursuant to Subparagraph 5.12 for the establishment of credits in the NM CAP Mitigation Water Bank because the 18,000 acre-foot annual limit for NM CAP Water deliveries was not fully taken up by New Mexico.

Example 3

- a) John Doe receives an enforceable Additional Arizona Right to 300 acre-feet of water from the mainstem of either the Gila River or the San Francisco River.
- b) New Mexico informs the Secretary as CAP Owner pursuant to Subparagraph 5.3 that it will pay for 14,000 acre-feet of NM CAP Water.
- c) SCIP parties have one thousand three hundred (1,300) acre feet of credits in the NM CAP Mitigation Water Bank.
- d) SCIP parties may purchase up to two hundred (200) acre-feet. ($5 \times 300 - 1,300 = 200$) of NM CAP Water pursuant to Subparagraph 5.12 for the establishment of credits in the NM CAP Mitigation Water Bank because the 18,000 acre-foot annual limit for NM CAP Water deliveries was not fully taken up by New Mexico.

Example 4

- a) John Doe receives an enforceable Additional Arizona Right to 300 acre-feet of water from the mainstem of either the Gila River or the San Francisco River.
- b) John Doe receives an enforceable Additional Arizona Right to 300 acre-feet of water from the mainstem of either the Gila River or the San Francisco River.
- c) SCIP parties reduce their call by five (5) CFS for that run of water pursuant to sub-term 1.1 of Exhibit 2.30 (NM Risk Allocation Terms).

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- d) SCIP parties have fifteen hundred (1,500) acre-feet of credits in the NM CAP Mitigation Water Bank.
- e) The Secretary as CAP Owner shall reduce the credits in the NM CAP Mitigation Water Bank by one thousand four hundred ninety and one-tenth (1,490.1) acre-feet of credits (1,500 acre feet of credits minus 5 CFS-day x 1.983471 acre-feet/CFS-day)

Example 5

- a) John Doe has received an enforceable Additional Arizona Right to 300 acre-feet of water from the mainstem of either the Gila River or the San Francisco River.
- b) Mary Poe receives a newly declared enforceable Additional Arizona Right to 11.700 acre-feet of water from the mainstem of either the Gila River or the San Francisco River.
- c) New Mexico informs the Secretary as CAP Owner pursuant to Subparagraph 5.3 that it will pay for 2,000 acre-feet of NM CAP Water.
- d) SCIP parties have fifteen hundred (1,500) acre-feet of credits in the NM CAP Mitigation Water Bank pursuant to earlier purchases as a result of John Doe's Additional Arizona Right.
- e) SCIP parties may purchase up to sixteen thousand (16,000) acre-feet, NM CAP Water pursuant to Subparagraph 5.12 for the establishment of credits in the NM CAP Mitigation Water Bank (18,000 minus 2,000 subject to cap of 20,000 total credits in NM CAP Mitigation Water Bank – the lesser of 20,000 and 5 times 12,000)

EXHIBIT 11.3.1

FORM OF UV NON-SIGNATORY WAIVER

The undersigned, seeking to participate in a dispute, controversy or disagreement arising under that certain New Mexico Consumptive Use and Forbearance Agreement among the Gila River Indian Community, San Carlos Irrigation and Drainage District, the United States, Franklin Irrigation District, Gila Valley Irrigation District, Phelps Dodge Corporation, the Secretary of the Interior, and other parties located in the Upper Valley of the Gila River, dated September 2, 2004, hereby forever waives and permanently agrees not to assert any and all defenses as to the enforceability of such agreement against the undersigned based on the fact that the undersigned has not executed such agreement. The undersigned also hereby agrees to be bound by the terms of the New Mexico Consumptive Use and Forbearance Agreement in the same manner as if the undersigned had executed such agreement as a party thereto.

Dated:

Name and address of person/entity
executing this waiver