NM UNIT AGREEMENT

THIS NM UNIT AGREEMENT (Agreement), is made this 23rd day of November, 2015, between the UNITED STATES OF AMERICA, acting through the Secretary of the Interior, and the NM CAP ENTITY formed under the Joint Powers Agreement titled "Joint Powers Agreement New Mexico CAP Entity" and dated July 27,2015.

WITNESSETH, THAT:

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

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 (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 times 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 Western Regional Office
Bureau of Indian Affairs
2600 North Central Avenue
Fourth Floor Mailroom
Phoenix, Arizona 85001

Regional Director
Bureau of Reclamation Lower Colorado Region
P.O. Box 61470
Boulder City, Nevada 89006-1470

(b) As to the NM CAP Entity

1. C/o The New Mexico Interstate Stream Commission
   Special Projects Bureau Chief
   P.O. Box 25102
   Santa Fe, NM 87504-5102
   (505) 827-6103

2. C/o Pete Domenici, Attorney at Law
   or his subsequent designee
   The Domenici Law Office
   320 Gold Avenue SW, Suite 1000
   Albuquerque, NM 87102
   (505) 883-6250

9.0 Supplemental Terms

9.1 Recognition of Future Contracting between the NM CAP Entity and the Secretary

9.1.1 The NM CAP Entity and the Secretary recognize that following the execution of this Agreement, the Parties will need to negotiate other agreements in good faith regarding the following matters if a NM Unit is to be constructed:

a. Construction and Construction Funding Contracts;

b. Water Service Contracts;

c. Water Delivery Contracts; and

d. An OM&R Transfer Contract, if the NM CAP Entity requests that the Secretary as NM Unit transfer operation and maintenance responsibilities for the NM Unit to the NM CAP Entity;

9.1.2 In addition, the United States Bureau of Reclamation ("Reclamation") and the New Mexico Interstate Stream Commission ("ISC") will negotiate one or more separate agreements to address environmental compliance roles and responsibilities and the ISC's advance funding of the environmental compliance. The environmental compliance will include an analysis of alternatives consistent with the Federal Principles, Requirements, and Guidelines for Water and Land Related Resources Implementation Studies.

9.2 Construction and Construction Funding Contracts

9.2.1 The NM CAP Entity, the ISC, and the Secretary as NM Unit shall negotiate one or more Construction and Construction Funding Contract(s) prior to the expenditure of funds by the Secretary as NM Unit for the purpose of planning, design, and construction of the NM Unit or related activities.

9.2.2 The Construction and Construction Funding Contracts shall provide a mechanism for the advance funding on a construction schedule basis of all construction costs to be incurred by the Secretary as NM Unit for NM Unit activities as agreed to by the Parties in excess of the funding made available under Section 403(f)(2)(D)(ii) of the Colorado River Basin Project Act, as amended by Sections 107(a) of the Arizona Water Settlements Act, and under Section 212(j) of the Arizona Water Settlement Act. The Construction and Construction Funding Contract(s) shall also specify that the NM CAP Entity is not precluded from seeking funding from the federal government under any program or statute other than the Arizona Water Settlements Act and that all costs incurred in excess of the funding made available as referenced above shall be the responsibility of the NM CAP Entity.

9.2.3 Prior to the execution of any Construction and Construction Funding Contracts, the Parties shall negotiate and agree on an objective standard to determine what shall constitute financial viability of the NM CAP Entity. The NM CAP Entity shall demonstrate financial viability prior to execution of any Construction and Construction Funding Contracts based on the negotiated standard.

9.2.4 Any Construction and Construction Funding Contracts shall address liability, indemnification, and any other construction issues related to any request by the NM CAP Entity to assume responsibility for the planning, design and/or construction of the NM Unit pursuant to Section 212(c)(3) of the Arizona Water Settlements Act.

9.3 Water Service Contracts

9.3.1 The NM CAP Entity and the Secretary shall negotiate a Water Service Contract prior to the commencement of deliveries of NM CAP Water made available pursuant to Section 304(f)(1) of the Colorado River Basin Project Act, as amended by Section 212(d) of the Arizona Water Settlements Act, to address issues relating to the delivery of NM CAP

Water and the operation and maintenance of the NM Unit. Negotiation and execution of this Water Service Contract shall not prevent or delay the ability of the NM CAP Entity to call for credits to be accumulated into the NM CAP Water Bank through the delivery of NM CAP Water pursuant to Article 6 of the NM Consumptive Use and Forbearance Agreement, subject to completion of all necessary environmental compliance related to delivery of NM CAP Water for credit accumulation purposes.

9.3.2 The Water Service Contract shall address issues of liability and indemnification. The Water Service Contract shall also address the issue of annual advance funding for all operations and maintenance costs of the NM Unit, including the funding of environmental mitigation costs, and the CAP Fixed OM&R Charges and the CAP Pumping Energy Charges associated with the delivery of CAP water to develop credits for the diversion of Gila River or San Francisco River water under the terms of the NM Consumptive Use and Forbearance Agreement and this Agreement.

9.3.3 Prior to the execution of the Water Service Contract, the Parties shall negotiate and agree on an objective standard to determine what shall constitute financial viability of the NM CAP Entity. The NM CAP Entity shall demonstrate financial viability prior to execution of any Water Service Contract based on the negotiated standard.

9.3.4 The Water Service Contract shall be consistent with the terms of the NM Consumptive Use and Forbearance Agreement and its attachments.

9.4 Water Delivery Contracts

9.4.1 The NM CAP Entity and the Secretary as NM Unit shall negotiate a procedure relating to the execution of Water Delivery Contracts with end users prior to the delivery of any AWSA Water to any end user and, as appropriate, may develop form contracts for such purposes. To the extent permitted by Federal Reclamation law, and taking into account the necessity for financial stability of the NM Unit, such procedures shall allow for flexibility with respect to the term of the Water Delivery Contracts. "AWSA Water" is defined as water from the Gila River, its tributaries, including the San Francisco River, and underground water sources in amounts that will permit consumptive use of water in New Mexico of not to exceed an annual average in any period of 10 consecutive years of 14,000 acre-feet, including reservoir evaporation, over and above the consumptive uses provided for by article IV of the decree of the Supreme Court of the United States in *Arizona v. California* (376 U.S. 340) as described in Section 304(f) of the Colorado River Basin Project Act of 1968, as amended by Section 212(d) of the Arizona Water Settlements Act.

9.4.2 Water Delivery Contracts shall address issues of liability and indemnification between the NM CAP Entity and the Secretary.

9.5 O&M Transfer Contract

9.5.1 If the NM CAP Entity requests the Secretary as NM Unit to transfer operation and maintenance responsibilities for the NM Unit to the NM CAP Entity, the Secretary and the NM CAP Entity shall negotiate an O&M Transfer Contract prior to the transfer of operation and maintenance responsibilities for the NM Unit to the NM CAP Entity.

9.5.2 The O&M transfer Contract shall address among other things, issues of liability and indemnification.

9.5.3 Prior to the execution of any O&M Transfer Contract, the Parties shall negotiate and agree on an objective standard to determine what shall constitute financial viability of the NM CAP Entity. The NM CAP Entity shall demonstrate financial viability prior to execution of any O&M Transfer Contract based on the negotiated standard.

9.6 Environmental Compliance

9.6.1 Reclamation and the ISC are joint lead agencies for the purposes of environmental compliance for the planning, design, construction, operation, and maintenance of the NM Unit. Environmental compliance includes, but is not limited to, the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA).

9.6.2 Nothing in this Agreement shall be construed to require the Secretary to take any action inconsistent with applicable federal environmental laws or to prohibit the Secretary from taking any action required by the NEPA, ESA, or other environmental compliance processes.

9.7 Reclamation Standards

9.7.1 The Parties recognize that the NM Unit, if constructed, will be an authorized feature of the Central Arizona Project, a federal Reclamation project. The Parties also recognize that, upon construction of the NM Unit, the NM CAP Entity shall own and hold title to the NM Unit as provided in Section 212(c)(5) of the Arizona Water Settlements Act.

9.7.2 The planning, design, construction, operation and maintenance of a NM Unit shall be in accordance with, at a minimum, applicable Reclamation standards, as determined by Reclamation, including without limitation Bureau of Reclamation Design Standards, without regard to whether the responsibility for design, construction, operation and maintenance is carried out by the Secretary as NM Unit or transferred to the NM CAP Entity.

9.8 Lower Colorado River Basin Development Fund

9.8.1 The Parties recognize that the availability of $34 million, as indexed, in the Lower Colorado River Basin Development Fund to meet additional construction costs of the NM Unit, as authorized under Section 212(j) of the Arizona Water Settlements Act, is subject to the completion of environmental compliance, as evidenced by any final agency action(s) by the Secretary, and is subject to the withdrawals from that fund for other authorized purposes, the amount of deposits to that fund, and the return on investments, all in accordance with applicable federal statutes, and is further subject to Section 4 of the Arizona Water Settlements Act. Reclamation shall brief the NM CAP Entity on the status of the Lower Colorado River Development Fund on an annual basis or more frequently as requested by the NM CAP Entity.

9.8.2 To the extent that funds are or become available for withdrawal from the Lower Colorado River Basin Development Fund under the provisions of the Arizona Water

Settlements Act, the Secretary shall adhere to the provisions of Section 212(j) of the Arizona Water Settlements Act to pay for an additional portion of the costs of constructing the NM Unit, subject to the requirements of the Arizona Water Settlements Act, including completion of environmental compliance, including but not limited to NEPA, ESA, and NHPA compliance.

9.9 Indian Trust Assets

9.9.1 The Parties recognize that the United States is bound by its Indian trust responsibility, which includes an obligation to protect Indian trust assets and to consult with affected Tribes on a government-to-government basis.

9.9.2 The Parties recognize that Title IV of the Arizona Water Settlements Act and the NM Consumptive Use and Forbearance Agreement may affect the diversions which may be made for the NM Unit, if constructed. Nothing in this Agreement precludes the United States from asserting claims to protect Indian trust assets in state or federal court, whether in existing or future litigation, or taking any other action as may be provided by law.

9.10 Clarification and Reconciliation of Terms

If necessary, prior to any diversion made for the benefit of the NM CAP Entity, the Parties shall work to resolve potential inconsistencies or ambiguities in:
(a) Paragraphs 1.0 through 8.0 of this Agreement, (b) in Exhibit 2.47 to the NM Consumptive Use and Forbearance Agreement as compared to Attachment 3.1 to the NM Unit Agreement, and (c) between Exhibit 2.47 to the NM Consumptive Use and Forbearance Agreement as compared to Attachment 3.1 to the NM Unit Agreement, as reconciled, and Exhibit 2.29 to the NM Consumptive Use and Forbearance Agreement.

9.11 Delivery and Use of Water.

9.11.1 The delivery of NM CAP Water as provided for in Section 304(f) of the Colorado River Basin Project Act, as amended by Section 212(d) of the Arizona Water Settlements Act, shall be to the CAP Turnout as agreed by the Gila River Indian Community and the San Carlos Irrigation and Drainage District and CAWCD under the terms of the NM Consumptive Use and Forbearance Agreement.

9.11.2 The consumptive use of AWSA Water shall be in accordance with Section 304(f) of the Colorado River Basin Project Act, as amended by Section 212(d) of the Arizona Water Settlements Act, the terms of the NM Consumptive Use and Forbearance Agreement, this Agreement, the Water Service Contract, and the Water Delivery Contracts, including all exhibits and attachments to such agreements.

9.11.3 Subject to the requirements of the Colorado River Basin Project Act and the Arizona Water Settlements Act, the Parties recognize the desire of the NM CAP Entity to make use of the AWSA Water to engage in business in order to raise the necessary funds in

order to plan, design, construct, operate and maintain the NM Unit and the Secretary shall not unreasonably prohibit the use of the AWSA Water for such purposes.

9.12 Sovereign Immunity

The NM Unit Entity shall not assert sovereign immunity and shall not claim the protections of the 11th Amendment of the United States Constitution in any special action or action for injunctive relief, declaratory relief, mandamus, or damages filed in a court of competent jurisdiction and arising out of the implementation or enforcement of the terms of the NM Consumptive Use and Forbearance Agreement, this Agreement, or any contract entered into with the Secretary for the purpose of implementing the NM Consumptive Use and Forbearance Agreement and this Agreement, including but not limited to the Construction and Construction Funding Contracts, the Water Service Contract, the Water Delivery Contracts, the O&M Transfer Contract, and the environmental compliance agreements.

9.13 Legal Status of NM CAP Entity

To the extent the powers of the NM CAP Entity are modified or terminated by amendment to the Joint Powers Agreement creating the NM CAP Entity or by act of the New Mexico State Legislature in a manner which may impair the ability of the Parties to perform or secure the benefit of their respective rights, obligations, privileges, and duties under this Agreement, the Construction and Funding Contract, the Water Service Contract, the Water Delivery Contracts, or the O&M Transfer Contract, the Secretary as NM Unit reserves the right, in his or her sole discretion, to pursue such legal remedies as are available with respect to the impairment of contracts, including but not limited to termination of any or all of these contracts after providing written notice to the NM CAP Entity and the other parties to such contracts. Each such contract shall include terms recognizing the Secretary as NM Unit's right to so terminate.

9.14 Lack of Financial and Tort/Legal Liability of JPA Members

9.14.1 Financial Liability: The individual entities that are parties to the New Mexico CAP Entity Joint Powers Agreement ("JPA Members") are not individually parties to this NM Unit Agreement, and nothing in this Agreement shall be construed as creating financial obligations or financial liability on the part of the JPA Members or for the actions or decisions of the NM CAP Entity made pursuant or in relation to this Agreement.

9.14.2 Tort/Legal Liability: The individual entities that are parties to the New Mexico CAP Entity Joint Powers Agreement ("JPA Members") are not individually parties to this NM Unit Agreement, and nothing in this Agreement shall be construed as creating liability or a duty to indemnify on the part of JPA Members for the actions or decisions of the NM CAP Entity made pursuant to, or in relation to, this Agreement.

9.15 Remedies

Nothing in this Agreement limits the authority of any of the Parties hereto to pursue any legal remedy available to them under the Arizona Water Settlements Act, or other applicable law, or under any existing or future contracts to be entered into by and between the Parties to this Agreement. To the extent allowed by applicable federal law, New Mexico state law will supply the rule of decision.

9.16 Understanding of the Parties

The Secretary's execution of the NM Unit Agreement is not a determination by the Secretary that a NM Unit shall be constructed.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement the day and year first above-written.

Approved as to legal sufficiency:

By: Katherine Ott Verburg
Office of the Solicitor

THE UNITED STATES OF AMERICA

By: Jennifer Simbel

Attest: _____
Secretary

NM CAP ENTITY

By: _____
Chairperson

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.

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 (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 (1000) 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 (1 0) 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 094305o 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 8:00a.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;

1.10.2 The flow on the NM Diversion Day as of 8:00 a.m. at the Secretary's Additional Gila River Diversion Point closest to the Diversion Points may not be less than one hundred thirty-five (135%) of the flow on the NM Diversion Day as of 8:00 a.m. at gage station No. USGS 09430500 on the Gila River above Gila, New Mexico;

1.10.3 On any NM Diversion Day, the sum of the Secretary as Authorized Diverter's Diversions at all the Secretary's Additional Gila River Diversion Points and GX may not exceed what the Secretary as Authorized Diverter could have Diverted at GX if the Secretary as Authorized Diverter were not Diverting at the Secretary's Additional Gila River Diversion Points;

1.10.4 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 the Secretary's Additional Gila River Diversion Points, may not be less than one hundred twenty percent (120%) of the call under the Globe Equity Decree for the Duncan-Virden Valley for the day following the NM Diversion Day; and

1.10.5 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.

1.11 On any NM Diversion Day, the Secretary as Authorized Diverter may Divert surface water at the Secretary's Additional San Francisco 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:

1.11.1 At least 90 days before Diverting at any of the Secretary's Additional San Francisco 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;

1.11.2 On any NM Diversion Day, the sum of the Secretary as Authorized Diverter's Diversions at all the Secretary's Additional San Francisco River Diversion Points and SY may not exceed what the Secretary as Authorized Diverter could have Diverted at SY if the Secretary as Authorized Diverter were not diverting at the Secretary's Additional San Francisco River Diversion Points;

1.11.3 The Secretary as Authorized Diverter may not Divert at any of the Secretary's Additional San Francisco River Diversion Points if Sub-Term 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.