

TOHONO O'ODHAM
SETTLEMENT AGREEMENT

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EXHIBITS

EXHIBIT 1.4

CHRONOLOGY OF SOUTHERN ARIZONA WATER
RIGHTS LITIGATION AND SETTLEMENT EVENTS

| | |
|-----------------|---|
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AGREEMENT

THIS AGREEMENT, restated from the Agreement dated April 30, 2003 and revised to eliminate any conflicts with Public Law 108-451, 118 Stat. 3478, is executed by each party on the date shown next to the party's signature, among the United States of America, the State of Arizona, the Tohono O'odham Nation, the City of Tucson, Asarco Incorporated, Farmers Investment Co., and two Allottee Classes in the Consolidated Litigation.

1. RECITALS

1.1. Proceedings to determine the nature and extent of the rights to water of the Nation, allottees, the United States in all its capacities, and other claimants are pending in the Gila River Adjudication Proceedings.

1.2. Recognizing that final resolution of these and other pending proceedings may take many years, entail great expense, prolong uncertainty concerning the availability of water supplies, and seriously impair the long-term economic well-being of all parties, the Tohono O'odham Nation, its neighboring non-Indian communities and others have agreed to settle permanently the disputes as provided in this Agreement and to seek funding, in accordance with applicable law, for the implementation of this settlement.

1.3. In keeping with its trust responsibility to Indian tribes and to promote tribal sovereignty and economic self-sufficiency, it is the policy of the United States to settle whenever possible water rights claims of Indian tribes without lengthy and costly litigation.

1.4. A chronology of events leading up to this Agreement can be found in Exhibit 1.4.

NOW, THEREFORE, the Parties agree as follows:

2. DEFINITIONS

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

- 2.1. "Acre-foot" means the quantity of water necessary to cover one acre of land to a depth of one foot.
- 2.2. "Act" means the Arizona Water Settlements Act of 2004.
- 2.3. "After-Acquired Trust Land" means land that is located within the State, but outside the exterior boundaries of the Nation's Reservation, and is taken into trust by the United States for the benefit of the Nation after the Enforceability Date.
- 2.4. "Agreement" or "Tohono O'odham Settlement Agreement" means the Agreement, restated from the Agreement dated April 30, 2003 and revised to eliminate any conflicts with Public Law 108-451, 118 Stat. 3478 (including all the exhibits of and attachments to the Agreement).
- 2.5. "Agreement of December 11, 1980" means the contract entered into by the United States and the Nation on December 11, 1980.
- 2.6. "Agreement of October 11, 1983" means the contract entered into by the United States and the Nation on October 11, 1983.
- 2.7. "Allottee" means a person that holds a beneficial real property interest in an Indian allotment that is located within the San Xavier Reservation and is held in trust by the United States.

2.8. "Allottee Class" means an applicable plaintiff class certified by the court of jurisdiction in the Alvarez Case or the Tucson Case.

2.9. "Alvarez Case" means the first through third causes of action of the third amended complaint in *Alvarez v. City of Tucson* (Civ. No. 93-039 TUC FRZ (defined as Civ. No. 93-09039 in Public Law 108-451, 118 Stat. 3478)(D. Ariz., filed April 21, 1993)).

2.10. "*Alvarez v. Tucson* Named Plaintiff Allottees" means the Allottees who are named plaintiffs in the Alvarez Case.

2.11. "*Alvarez v. Tucson* Plaintiff Class" means a class of plaintiff Allottees certified for the first through third causes of action in the Alvarez Case.

2.12. "Applicable Law" means any applicable federal, State, tribal, or local law.

2.13. "Arizona Department of Water Resources" or "ADWR" means the entity established pursuant to Title 45 of the Arizona Revised Statutes, or its successor agency or entity.

2.14. "Arizona Water Banking Authority" means the entity established pursuant to Chapter 14 of Title 45 of the Arizona Revised Statutes, or its successor agency or entity.

2.15. "Asarco" means Asarco Incorporated, a New Jersey corporation of that name, and its subsidiaries operating mining operations in the State.

2.16. "Asarco Agreement" means the agreement by that name attached to this Agreement as Exhibit 13.1.

2.17. "Available CAP Supply" means for any given Year any Fourth Priority Water available for delivery through the CAP System, water available from CAP dams

and reservoirs other than Modified Roosevelt Dam, and return flows captured by the Secretary for CAP use.

2.18. "CAP" or "Central Arizona Project" means the 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.).

2.19. "CAP Contract" means a long term contract, as that term is used in the CAP Repayment Stipulation, between any person or entity and the United States for delivery of water through the CAP System.

2.20. "CAP Contractor" means any person or entity that has entered into a long-term contract (as that term is used in the CAP Repayment Stipulation) with the United States for delivery of water through the CAP system.

2.21. "CAP Indian Irrigation Water" means water allocated as Indian irrigation water pursuant to the Secretarial Record of Decision of March 24, 1983 published in the Federal Register at volume 48, number 58, pages 12446 through 12452.

2.22. "CAP Indian Priority Water" means that water having an Indian delivery priority.

2.23. "CAP Link Pipeline" or "Central Arizona Project Link Pipeline" means the pipeline extending from the Tucson Aqueduct of the CAP to Station 293+36.

2.24. "CAP M&I Priority Water" or "M&I Priority Water" means CAP water that has municipal and industrial priority.

2.25. "CAP NIA Priority Water" or "NIA Priority Water" means CAP water that has non-Indian agricultural priority.

2.26. "CAP Operating Agency" means the entity or entities authorized to assume responsibility for the care, operation, maintenance and replacement of the CAP System. As of the date of this Agreement, CAWCD is the CAP Operating Agency.

2.27. "CAP Repayment Contract" means the contract dated December 1, 1988 (Contract No. 14-06-W-245, Amendment No. 1 (defined as Contract No. 14-0906-09W-09245, Amendment No. 1 in Public Law 108-451, 118 Stat. 3478) between the United States and the CAWCD for the delivery of water and the repayment of costs of the CAP. The term includes all amendments to and revisions of that contract.

2.28. "CAP Repayment Stipulation" means the "Stipulation Regarding a Stay of Litigation, Resolution of Issues During the Stay, and for Ultimate Judgment Upon the Satisfaction of Conditions," filed with the United States District Court for the District of Arizona on May 3, 2000, 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) (defined as No. CIV 95-09625-09TUC-09WDB(EHC), No. CIV 95-091720-09PHX-09EHC (Consolidated Action) in Public Law 108-451, 118 Stat. 3478), including all amendments to and revisions of that Stipulation.

2.29. "CAP Service Area" or "Central Arizona Project Service Area" means the geographical area comprised of Maricopa, Pinal, and Pima Counties, Arizona, in which the CAWCD delivers CAP water; and any expansion of that area under Applicable Law.

2.30. "CAP Subcontract" means a long term subcontract, as that term is used in the CAP Repayment Stipulation, between any person or entity and the United States for delivery of water through the CAP System.

2.31. "CAP Subcontractor" means a person or entity that has entered into a long-term subcontract (as that term is used in the CAP Repayment Stipulation) with the United States and the CAWCD for the delivery of water through the CAP System.

2.32. "CAP System" means the Mark Wilmer Pumping Plant, the Hayden-Rhodes Aqueduct, the Fannin-McFarland Aqueduct, the Tucson Aqueduct, and associated pumping plants, and appurtenant works of the Central Arizona Project aqueduct system that are associated with the features described herein and any extensions of, additions to, or replacements for the features described herein.

2.33. "CAWCD" or the "Central Arizona Water Conservation District" means the political subdivision of the State that is the contractor under the CAP repayment contract.

2.34. "Community" means the Gila River Indian Community, a government composed of members of the Pima Tribe and the Maricopa Tribe and organized under section 16 of the Act of June 18, 1934 (25 U.S.C. 476).

2.35. "Consolidated Litigation" means the consolidated Tucson Case and Alvarez Case.

2.36. "Cooperative Farm" means the farm on land served by an irrigation system and the extension of the irrigation system provided for under paragraphs (1) and (2) of section 304(c) of the SAWRSA Amendments.

2.37. "Cooperative Fund" means the cooperative fund established by section 313 of the 1982 Act and reauthorized by section 310 of the SAWRSA Amendments.

2.38. "Deferred Pumping Storage Credit" means a pumping credit recoverable as authorized by section 308(f)(1)(B) of the SAWRSA Amendments and accounted for under paragraph 8.6.2 of this Agreement.

2.39. "Deficiency Year" means a Year in which the Secretary is unable to fulfill the obligations of the Secretary under sections 304(a) and 306(a) of the SAWRSA Amendments.

2.40. "Delivery And Distribution System" means the CAP aqueduct, the CAP Link Pipeline and the pipelines, canals, aqueducts, conduits, and other necessary facilities for the delivery of water under the CAP. The term includes pumping facilities, power plants, and electric power transmission facilities, external to the boundaries of any farm to which the water is distributed.

2.41. "Direct Storage and Recovery Project" means a facility that uses CAP water or effluent for underground storage or that recovers stored water.

2.42. "eastern Schuk Toak District" means the portion of the Schuk Toak District (1 of 11 political subdivisions of the Nation established under the constitution of the Nation) that is located within the Tucson Management Area.

2.43. "eastern Schuk Toak District Maximum Demand" means the largest total quantity of water (i) delivered by the Secretary to the eastern Schuk Toak District for any use (other than direct groundwater recharge) and (ii) pumped from groundwater for beneficial use in the eastern Schuk Toak District, during any of the five most recent Years that are not Deficiency Years (exclusive of water pumped from Exempt Wells).

2.44. "Enforceability Date" means the date on which Title III of the Act (defined herein as the SAWRSA Amendments) takes effect as defined in section 302(b) of the SAWRSA Amendments.

2.45. "Exempt Well" means a water well, the maximum pumping capacity of which is not more than 35 gallons per minute and the water from which is used for the supply, service, or activities of households or private residences; landscaping; livestock watering; or the irrigation of not more than two acres of land for the production of one or more agricultural or other commodities for sale; human consumption; or use as feed for livestock or poultry.

2.46. "Fee Owner of Allotted Land" means a person that holds fee simple title in real property on the San Xavier Reservation that, at any time before the date on which the person acquired fee simple title, was held in trust by the United States as an Indian allotment.

2.47. "Fourth Priority Water" means Colorado River water available for delivery within the State for satisfaction of entitlements: (1) pursuant to contracts, Secretarial reservations, perfected rights and other arrangements between the United States and water users in the State entered into or established subsequent to September 30, 1968 for use on federal, State or privately owned lands (for a total quantity not to exceed 164,652 acre-feet of diversions annually); and (2), after first providing for delivery of water under 43 U.S.C. § 1524(e), pursuant to the CAP Master Repayment Contract for the delivery of Colorado River water for the Central Arizona Project, including use of Colorado River water on Indian lands.

2.48. "Gila River Adjudication Court" means the Superior Court of the State of Arizona in and for the county of Maricopa exercising jurisdiction over the Gila River Adjudication Proceedings.

2.49. "Gila River Adjudication Proceedings" means the action pending in the Superior Court of the State of Arizona in and for the County of Maricopa styled *In Re the General Adjudication of All Rights To Use Water In The Gila River System and Source*, W-1 (Salt), W-2 (Verde), W-3 (Upper Gila), W-4 (San Pedro) (Consolidated).

2.50. "Indian Tribe" means that term as used in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

2.51. "Injury To Water Quality" means any contamination, diminution, or deprivation of water quality under Applicable Law.

2.52. "Injury To Water Rights" means an interference with, diminution of, or deprivation of water rights under Applicable Law. The term includes a change in the underground water table and any effect of such a change. The term does not include Subsidence Damage or Injury to Water Quality.

2.53. "Interim Allottee Water Rights Code" means the code described in section 308(b) of the SAWRSA Amendments.

2.54. "Irrigation System" means canals, laterals, ditches, sprinklers, bubblers, and other irrigation works used to distribute water within the boundaries of a farm. The term, with respect to the Cooperative Farm, includes activities, procedures, works, and devices for rehabilitation of fields; remediation of sinkholes, sinks, depressions, and fissures; and stabilization of the banks of the Santa Cruz River.

- 2.55. "Lower Colorado River Basin Development Fund" means the fund established by section 403 of the Colorado River Basin Project Act (43 U.S.C. 1543).
- 2.56. "Marketable Credit" means a storage credit that can be transferred for use outside the Nation's Reservation if the transfer is authorized by State law.
- 2.57. "Nation" means the Tohono O'odham Nation (formerly known as the Papago Tribe) organized under a constitution approved in accordance with section 16 of the Act of June 18, 1934 (25 U.S.C. 476).
- 2.58. "Nation's Reservation" means all land within the exterior boundaries of (A) the Sells Tohono O'odham Reservation established by the Executive order of February 1, 1917, and the Act of February 21, 1931 (46 Stat. 1202, chapter 267); (B) the San Xavier Reservation established by the Executive order of July 1, 1874; (C) the Gila Bend Indian Reservation established by the Executive order of December 12, 1882, and modified by Executive order of June 17, 1909; (D) the Florence Village established by Public Law 95-361 (92 Stat. 595); (E) all land acquired in accordance with the Gila Bend Indian Reservation Lands Replacement Act (100 Stat. 1798) if title to the land is held in trust by the Secretary for the benefit of the Nation; and all other land to which the United States holds legal title in trust for the benefit of the Nation and that is added to the Nation's Reservation or granted reservation status in accordance with applicable federal law before the Enforceability Date.
- 2.59. "Net Irrigable Acres" means, with respect to a farm, the acreage of the farm that is suitable for agriculture, as determined by the Nation and the Secretary.
- 2.60. "Non-Exempt Well" means any well that is not an Exempt Well.

2.61. "Party" means any signatory to this Agreement; the State's participation as a Party shall be as described in paragraph 18.4.

2.62. "Qualified Entity" means any CAP Contractor or CAP Subcontractor within the Tucson Management Area, any municipal provider that has a member service area in the Central Arizona Groundwater Replenishment District within the Tucson Management Area, or any other entity that agrees to use the leased water within the Tucson Management Area and demonstrates the financial and physical ability to utilize that water.

2.63. "San Xavier Allottees Association" means the nonprofit corporation established under State law for the purpose of representing and advocating the interests of Allottees .

2.64. "San Xavier Cooperative Association" means the entity chartered under the laws of the Nation (or a successor of that entity) that is a lessee of land within the Cooperative Farm.

2.65. "San Xavier District" means the district of that name, 1 of 11 political subdivisions of the Nation established under the constitution of the Nation.

2.66. "San Xavier District Council" means the governing body of the San Xavier District, as established under the constitution of the Nation.

2.67. "San Xavier District Maximum Demand" means the largest total quantity of water (i) delivered by the Secretary to the Reservation for any use (other than direct groundwater recharge or use by Asarco), and (ii) pumped from groundwater for beneficial use on the Reservation, during any one of the five most recent Years that are not Deficiency Years (exclusive of water pumped from Exempt Wells).

- 2.68. "San Xavier Reservation" or "Reservation" means the San Xavier Indian Reservation established by the Executive Order of July 1, 1874.
- 2.69. "SAWRSA Amendments" means the Southern Arizona Water Rights Settlement Amendments Act of 2004, Title III of the Act.
- 2.70. "Schuk Toak Farm" means a farm constructed in the eastern Schuk Toak District served by the irrigation system provided for under section 304(c)(4) of the SAWRSA Amendments.
- 2.71. "Secretary" means the Secretary of the Interior.
- 2.72. "State" means the State of Arizona.
- 2.73. "Subjugate" means to prepare land for agricultural use through irrigation.
- 2.74. "Subsidence Damage" means injury to land, water or other real property, resulting from the settling of geologic strata or cracking in the surface of the earth of any length or depth, which settling or cracking is caused by the pumping of water.
- 2.75. "Surface Water" means all water that is appropriable under State law.
- 2.76. "Transaction Date" means the date designated by the Nation on which the Nation intends to enter into an assignment, exchange, lease, option to lease or temporary disposal of water pursuant to section 309(c) of the SAWRSA Amendments.
- 2.77. "Tucson Case" means *United States et al. v. City of Tucson, et al.* (Civ. No. 75-39 TUC consol. with Civ. No. 75-51 TUC FRZ (defined as Civ. No. 75-0939 TUC consol. With Civ. No. 75-0951 TUC-FRZ in Public Law 108-451, 118 Stat. 3478) (D. Ariz., filed February 20, 1975)).

2.78. "Tucson Interim Water Lease" means the lease, and any pre-2004 amendments and extensions of the lease, approved by the Secretary, between the City of Tucson, Arizona, and the Nation, dated October 24, 1992.

2.79. "Tucson Management Area" means the area in the State comprised of (A)(i) the area designated as the Tucson Active Management Area under the Arizona Groundwater Management Act of 1980 (1980 Ariz. Sess. Laws 1); and (A)(ii) subsequently divided into the Tucson Active Management Area and the Santa Cruz Active Management Area (1994 Ariz. Sess. Laws 296); and (B) the portion of the Upper Santa Cruz Basin that is not located within the area described in (A)(i) above.

2.80. "Turnout" means a point of water delivery on the CAP aqueduct.

2.81. "Underground Storage" means storage of water accomplished under a project authorized under section 308(e) of the SAWRSA Amendments.

2.82. "United States" or "United States of America" in any given reference herein means the United States acting in the capacity as set forth in said reference. When the term "United States" or "United States of America" is used in reference to a particular agreement or contract, the term shall mean the United States acting in the capacity as set forth in such agreement or contract.

2.83. "*United States v. Tucson* Named Plaintiff Allottees" means the Allottees who are named plaintiffs in the Tucson Case.

2.84. "*United States v. Tucson* Plaintiff Class" means a class of plaintiff Allottees certified in the Tucson Case.

2.85. "Value" means the value attributed to water based on the greater of (A) the anticipated or actual use of the water; or (B) the fair market value of the water.

2.86. "Water Code" means the comprehensive water code described in section 308(b) of the SAWRSA Amendments.

2.87. "Water Right" means any right in or to groundwater, Surface Water, or effluent under Applicable Law.

2.88. "Year" means a calendar year; when not capitalized, the term "year" shall have the meaning set forth in the paragraph in which the term is used.

2.89. "1982 Act" means the Southern Arizona Water Rights Settlement Act of 1982 (96 Stat. 1274; 106 Stat. 3256), as in effect on the day before the Enforceability Date.

3. EXHIBITS

3.1. The following is a list of Exhibits attached to this Agreement and incorporated herein by this reference:

| 3.2 | <u>Exhibit/Paragraph No.</u> | <u>Description of the Exhibit</u> |
|-----|------------------------------|--|
| | 1.4 | A Chronology of Events Leading up to the Tohono O'odham Settlement Agreement |
| | 5.2 | The Tohono O'odham Nation's CAP Contract, as amended under this Agreement |
| | 5.3.4.1 | Secretary's Shortage Sharing Approach Under the 1980 Contract |
| | 8.6 | Storage Account Form |
| | 8.7 | Examples of Calculations for Additional Groundwater Pumping |
| | 8.8 | Concept for Groundwater Protection Program |
| | 11.3 | Standard Form of CAP Subcontract for CAP M&I Use |
| | 12.1 | Tucson Agreement |
| | 13.1 | Asarco Agreement |
| | 14.1 | FICO Agreement |

| 3.2 | <u>Exhibit/Paragraph No.</u> | <u>Description of the Exhibit</u> |
|-----|------------------------------|---|
| | 16.2 | Stipulation and Form of Conditional Order of Dismissal with Prejudice |
| | 17.1 | Stipulation and Form of Judgment by Gila River Adjudication Court |

4. NATION'S WATER RIGHTS

4.1. The Nation shall have the following rights to water in the Tucson Management Area, which shall be held in trust by the United States on behalf of the Nation and the Allottees :

| <u>SOURCE</u> | <u>AMOUNT</u> | <u>REFERENCE</u> |
|---|-----------------------------|-------------------|
| <u>Underground water</u> | <u>13,200 Acre-feet/yr*</u> | |
| San Xavier Reservation | 10,000 Acre-feet/yr* | Paragraph 8.1.1 |
| eastern Schuk Toak District | 3,200 Acre-feet/yr* | Paragraph 8.1.2 |
| <u>Total CAP Indian Priority Water</u> | | |
| <u>Currently Under Contract</u> | <u>37,800 Acre-feet/yr</u> | |
| San Xavier Reservation | 27,000 Acre-feet/yr | Paragraph 5.1.1.1 |
| eastern Schuk Toak District | 10,800 Acre-feet/yr | Paragraph 5.1.1.2 |
| <u>Total New CAP NIA Priority Water</u> | <u>28,200 Acre-feet/yr</u> | |
| San Xavier Reservation | 23,000 Acre-feet/yr | Paragraph 5.1.2.1 |
| eastern Schuk Toak District | 5,200 Acre-feet/yr | Paragraph 5.1.2.2 |
| TOTAL | <u>79,200 Acre-feet/yr*</u> | |

*The availability of groundwater is subject to the provisions of paragraph 8.6.

4.2. The Nation may use water listed in paragraph 4.1 for any use.

4.3. Except as provided in Section 309(b)(1)(C) of the SAWRSA Amendments, the Nation may use water listed in paragraph 4.1 at any location within the Nation's Reservation.

4.4. The Nation may use water listed in paragraph 4.1 outside the Nation's Reservation and within the State as follows:

4.4.1. Groundwater supplies may be used pursuant to the Asarco Agreement;

4.4.2. CAP water may be used within the CAP service area; and

4.4.3. Water derived from Marketable Credits may be used only in accordance with State law.

4.5. No CAP water may be leased, exchanged, forborne or otherwise transferred by the Nation for any direct or indirect use outside the State.

5. WATER DELIVERY

5.1. The Secretary's Obligation to Acquire and Deliver Water.

5.1.1. Pursuant to section 304(a) of the SAWRSA Amendments and the Agreement of December 11, 1980, as amended, and this Agreement, the Secretary shall deliver 37,800 Acre-feet per Year of CAP water suitable for agriculture to the Cooperative Farm and the eastern Schuk Toak District Turnouts and to any other point of delivery agreed to by the Secretary and the Nation, of which:

5.1.1.1. 27,000 Acre-feet per Year shall be deliverable to the San Xavier Reservation or in accordance with section 309 of the SAWRSA Amendments; and

5.1.1.2. 10,800 Acre-feet per Year shall be deliverable to the eastern Schuk Toak District or in accordance with section 309 of the SAWRSA Amendments.

5.1.2. Pursuant to section 306(a) of the SAWRSA Amendments, the Secretary shall deliver 28,200 Acre-feet per Year of CAP NIA Priority Water suitable for agriculture to the Cooperative Farm and the eastern Schuk Toak District Turnouts and to

any other point of delivery agreed to by the Secretary, CAWCD and the Nation, of which:

5.1.2.1. 23,000 Acre-feet per Year shall be deliverable to the San Xavier Reservation or in accordance with section 309 of the SAWRSA Amendments; and

5.1.2.2. 5,200 Acre-feet per Year shall be deliverable to the eastern Schuk Toak District or in accordance with section 309 of the SAWRSA Amendments.

5.1.3. Pursuant to section 305 of the SAWRSA Amendments, the Secretary shall deliver the 66,000 Acre-feet per Year of CAP water described above, or an equivalent quantity of water from a source identified in section 305(b)(1) of the SAWRSA Amendments, notwithstanding any declaration by the Secretary of a water shortage on the Colorado River or any other occurrence described in section 305(a)(2)(B) of the SAWRSA Amendments.

5.1.4. In accordance with the provisions of section 305(d) of the SAWRSA Amendments, the Secretary shall provide compensation if the Secretary is unable to acquire and deliver sufficient quantities of water under sections 304(a) and 306(a) of the SAWRSA Amendments.

5.2. CAP Contract Amendments. The Nation's CAP Contract shall be amended to conform to the provisions of section 309(g) of the SAWRSA Amendments. The form of the Nation's CAP contract as amended is set forth in Exhibit 5.2.

5.3. Shortage Sharing Criteria

5.3.1. On or before June 1 of each Year beginning in the Year following the Year in which the Enforceability Date occurs, the Secretary shall announce the Available CAP Supply for the following Year in a written notice to the CAP Operating Agency and to each CAP Contractor.

5.3.1.1. Prior to January 1, 2044, a time of shortage shall exist in any Year in which the Available CAP Supply for that Year is insufficient to satisfy all of the entitlements set forth in paragraphs 5.3.1.1.1 through 5.3.1.1.3 below:

5.3.1.1.1. Three hundred forty-three thousand seventy-nine (343,079) Acre-feet of CAP Indian Priority Water;

5.3.1.1.2. Six hundred thirty-eight thousand eight hundred twenty-three (638,823) Acre-feet of CAP M&I Priority Water; and

5.3.1.1.3. Up to one hundred eighteen (118) Acre-feet of CAP M&I Priority Water converted from CAP NIA Priority Water under the San Tan Irrigation District's CAP Subcontract.

5.3.1.2. On or after January 1, 2044, a time of shortage shall exist in any Year in which the Available CAP Supply for that Year is insufficient to satisfy all of the entitlements as set forth in paragraphs 5.3.1.2.1 through 5.3.1.2.4 below:

5.3.1.2.1. Three hundred forty-three thousand seventy-nine (343,079) Acre-feet of CAP Indian Priority Water;

5.3.1.2.2. Six hundred thirty-eight thousand eight hundred twenty-three (638,823) Acre-feet of CAP M&I Priority Water;

5.3.1.2.3. Up to forty-seven thousand three hundred three (47,303) Acre-feet of CAP M&I Priority Water converted from CAP NIA Priority Water pursuant to the Hohokam Agreement; and

5.3.1.2.4. Up to one hundred eighteen (118) Acre-feet of CAP M&I Priority Water converted from CAP NIA Priority Water under the San Tan Irrigation District's CAP Subcontract.

5.3.2. Initial Distribution of Water in Time of Shortage.

5.3.2.1. If the Available CAP Supply is equal to or less than eight hundred fifty-three thousand seventy-nine (853,079) Acre-feet, then 36.37518% of the Available CAP Supply shall be available for delivery as CAP Indian Priority Water and the remainder shall be available for delivery as CAP M&I Priority Water.

5.3.2.2. If the Available CAP Supply is greater than eight hundred fifty-three thousand seventy-nine (853,079) Acre-feet, then the quantity of water available for delivery as CAP Indian Priority Water shall be determined in accordance with the following equation and the remainder shall be available for delivery as CAP M&I Priority Water:

$$I = \{ [32,770 \div (E - 853,079)] \times W \} + (343,079 - \{ [32,770 \div (E - 853,079)] \times E \})$$

Where

I = the quantity of water available for delivery as CAP Indian Priority Water

E = the sum of the entitlements to CAP Indian Priority Water and CAP M&I Priority Water as described in paragraphs 5.3.1.1 or 5.3.1.2, whichever is applicable; and

W = the Available CAP Supply

Examples:

A. If, before January 1, 2044, the sum of the entitlements to CAP Indian Priority Water and CAP M&I Priority Water as described in paragraph 5.3.1.1 were nine

hundred eighty-one thousand nine hundred two (981,902) Acre-feet, then the quantity of water available for delivery as CAP Indian Priority Water would be ninety-three thousand three hundred three (93,303) Acre-feet plus 25.43800% of the Available CAP Supply.

B. If, after January 1, 2044, the sum of the entitlements to CAP Indian Priority Water and CAP M&I Priority Water as described in paragraph 5.3.1.2 were one million twenty-nine thousand three hundred twenty-three (1,029,323) Acre-feet (343,079 + 638,823 + 43,303 + 118), then the quantity of water available for delivery as CAP Indian Priority Water would be one hundred fifty-one thousand six hundred ninety-one (151,691) Acre-feet plus 18.59354% of the Available CAP Supply.

5.3.3. Redistribution of Unscheduled Water in Time of Shortage.

In time of shortage unscheduled CAP Water shall be distributed as follows:

5.3.3.1. Any water available for delivery as CAP Indian Priority Water that is not scheduled for delivery pursuant to contracts, leases or exchange agreements for the delivery of CAP Indian Priority Water shall become available for delivery as CAP M&I Priority Water.

5.3.3.2. CAP M&I Priority Water shall be distributed among those entities with contracts for the delivery of CAP M&I Priority Water in a manner determined by the Secretary and the Operating Agency in consultation with CAP M&I water users to fulfill all delivery requests to the greatest extent possible. Any water available for delivery as CAP M&I Priority Water that is not scheduled for delivery pursuant to contracts, leases or exchange agreements for the delivery of CAP M&I Priority Water shall become available for delivery as CAP Indian Priority Water.

5.3.3.3. Any water remaining after all requests for delivery of CAP Indian Priority Water and CAP M&I Priority Water have been satisfied shall become available for delivery as CAP NIA Priority Water.

5.3.3.4. Nothing in this paragraph 5.3 shall be construed to allow or authorize any CAP Contractor or CAP Subcontractor to receive, pursuant to such contracts, CAP water in amounts greater than such CAP contractor's entitlement.

5.3.4. Distribution of CAP Indian Priority Water among CAP Indian Priority Water Users.

5.3.4.1. In consideration of the agreement by the Community to incur additional shortages beyond those that it would have incurred under the approach described in Exhibit 5.3.4.1, the Secretary shall first make available to the Community any water made available for delivery as CAP Indian Priority Water under paragraph 5.3.3.2, to the extent necessary in any Year, to offset the additional shortages borne by the Community. After the additional shortages borne by the Community have been fully offset, the Secretary shall then make any remaining water available in accordance with all CAP Contracts and CAP Subcontracts for the delivery of CAP Indian Priority Water in proportion to their contractual entitlements to CAP Indian Priority Water.

5.3.4.2. If the Available CAP Supply is greater than eight hundred fifty-three thousand seventy-nine (853,079) Acre-feet but less than the sum of the entitlements described in paragraphs 5.3.2.1 or 5.3.2.2, as applicable, then, to the extent that sufficient quantities of CAP water, including all CAP M&I Priority Water available for delivery as CAP Indian Priority Water in accordance with paragraph 5.3.3.2, are not available to meet orders for CAP Indian Priority Water, the Nation shall incur the portion of such shortage of CAP Indian Priority Water determined under the formula stated in Exhibit 5.3.4.1.

5.3.4.3. If the Available CAP Supply is greater than eight hundred one thousand five hundred seventy-four (801,574) Acre-feet but less than eight hundred fifty-three thousand seventy-nine (853,079) Acre-feet, up to fifty-one thousand five hundred five (51,505) Acre-feet of the shortage of CAP Indian Priority Water shall be shared among the Community, the Ak-Chin Indian Community, the Salt River Pima-Maricopa Indian Community, the Nation and the San Carlos Apache Tribe. During a time of shortage described in this paragraph 5.3.4.3, the CAP Indian Priority Water available to the Nation shall be determined pursuant to the formula attached as Exhibit 5.3.4.1, and the CAP Indian Priority Water available to the tribes referenced above, other than the Community and the Nation, shall be determined in accordance with the provisions of their respective CAP Contracts and any amendments thereto.

5.3.4.4. If the Available CAP Supply is less than eight hundred one thousand five hundred seventy-four (801,574) Acre-feet, then the CAP Indian Priority Water determined to be available pursuant to paragraph 5.3.2.1 shall be distributed to the Nation by the Secretary based on the ratio of the amount of water delivered pursuant to the Nation's CAP Contract in the latest non-shortage Year relative to the total quantity of water delivered to all CAP Contractors for CAP Indian Priority Water in that same Year. However, if during the last non-shortage Year the Nation had not completed construction of the distribution system necessary to take and use its CAP entitlement, the Secretary will impute in the calculation the quantity of CAP water that the Nation would have been expected to take had the distribution system, as it exists at the time of the shortage, been in place during such non-shortage Year. For example, if the Secretary determines that: (1) in the last non-shortage Year the Nation used only

fifteen thousand (15,000) Acre-feet of its entitlement because the Nation's CAP distribution system was only partially completed and would permit the delivery of only fifteen thousand (15,000) Acre-feet of its entitlement; (2) as of the then current Year, additional construction of the Nation's CAP distribution system has been completed; and (3) the Nation can take and use, and has ordered for delivery, thirty thousand (30,000) Acre-feet of CAP water; then the Secretary shall use an imputed quantity of thirty thousand (30,000) Acre-feet for the Nation when pro-rating the available water supply among the CAP Contractors for CAP Indian Priority Water.

5.3.4.5. If any Indian Tribe, other than the Community and the Nation, enters into a new contract or amends the term or quantity of water in an existing contract for the delivery or exchange of CAP water, then the Secretary shall require such Indian tribe to include in such new contract or amendment, a provision to share, on a proportional basis¹ with the Community and the Nation, the additional shortage that the Community and Nation are bearing pursuant to paragraphs 5.3.4.2 and 5.3.4.3; provided, however, that no tribe shall bear more shortage than it would have borne under its existing contract at a CAP water supply of 801,574 acre-feet. In that event, the Nation and the Secretary shall modify the Nation's CAP Contract to reflect such sharing of shortages by the other Indian tribes. This subparagraph 5.3.4.5 shall not apply to the renewal of any contract existing on December 10, 2004 with an Indian Tribe that the

1. The proportion shall be based on a ratio with the numerator being the amount of such tribe's entitlement to CAP Indian Irrigation Water and the denominator being the sum of the amounts of all tribes' entitlements to CAP Indian Irrigation Water.

Secretary entered into pursuant to an Indian water settlement approved by an Act of Congress.

5.3.4.6. The shortage sharing criteria in subparagraph 5.3.4 shall not apply to water acquired from the Yuma-Mesa Division of the Gila Project pursuant to the Ak-Chin Indian Community water Rights Settlement Act, Pub. L. 98-530, or water acquired from the Welton-Mohawk Irrigation and Drainage District pursuant to the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. 100-512, both of which have a higher priority than Fourth Priority Water.

5.4. Distribution of CAP NIA Priority Water. If the available CAP Supply is insufficient to meet the fixed quantity water service contracts or subcontracts for the delivery of CAP NIA Priority Water, then the Secretary and the CAP Operating Agency shall pro-rate the CAP NIA Priority water to the CAP Contractors and CAP Subcontractors holding such entitlements on the basis of the quantity of CAP NIA priority water used by each such CAP Contractor or CAP Subcontractor in the last Year in which the Available CAP Supply was sufficient to fill all orders for CAP NIA priority water. However, if during the last such Year the Nation had not completed construction of the distribution system necessary to take and use its entire entitlement to CAP NIA Priority Water, the Secretary shall impute in the calculation the quantity of CAP NIA Priority Water that the Nation would have been expected to take had the distribution system, as it exists in the then current Year, been in place during the last Year in which the Available CAP Supply was sufficient to fill all orders for CAP NIA Priority Water.

5.5. The Secretary and the CAP Operating Agency shall not unreasonably withhold permission or authorization to construct Turnouts on the CAP System to deliver

the Nation's CAP water that are necessary for the Nation either to use its water on or off the Nation's Reservation or to implement leases of or options to lease, exchanges or options to exchange the Nation's CAP water.

5.6. Pursuant to section 314(a) of the SAWRSA Amendments, for purposes of determining the allocation and repayment of costs of any stages of the CAP, the costs associated with the delivery of the Nation's CAP water, whether such water is delivered for use by the Nation or is delivered pursuant to any leases or options to lease, exchanges or options to exchange the Nation's CAP water entered into by the Nation shall be nonreimbursable, and such costs shall not be included in the CAWCD's repayment obligation.

5.7. Pursuant to section 314(b) of the SAWRSA Amendments, the costs associated with the construction of the CAP shall be nonreimbursable by the Nation and no CAP water service capital charges shall be due or payable for the Nation's CAP water, whether such water is delivered for use by the Nation or is delivered pursuant to any leases of or options to lease, exchanges or options to exchange the Nation's CAP water.

5.8. The Nation shall be entitled to enter into contracts for excess CAP water as provided in the CAP Repayment Stipulation.

5.9. Nothing in this Agreement shall be construed as a limitation on the Nation's ability to enter into any agreement with the Arizona Water Banking Authority, or its successor agency or entity, in accordance with State law.

5.10. Firming.

5.10.1. The Secretary shall firm 28,200 Acre-feet per Year of CAP NIA Priority Water for the benefit of the Nation, to the equivalent of CAP M&I Priority Water

for a period of 100 Years after the Enforceability Date, as provided in section 105 of the Act.

5.10.2. The State shall assist the Secretary in firming the 28,200 Acre-feet as provided in section 306(b) of the SAWRSA Amendments.

6. DESIGN AND CONSTRUCTION OF FACILITIES

6.1. The Secretary shall (without cost to the Nation, any Allottee, the San Xavier Cooperative Association, or the San Xavier Allottees Association), as part of the main project works of the CAP, design and construct the Delivery and Distribution System necessary to deliver the water described in paragraph 5.1.

6.2. Pursuant to sections 304(b) and (c) of the SAWRSA Amendments, the Secretary shall complete:

6.2.1. Not later than eight years after the Enforceability Date, the improvements to the irrigation systems that serve the Cooperative Farm and the extension to the Cooperative Farm. On completion of the extension, the extended Cooperative Farm irrigation system shall serve 2,300 Net Irrigable Acres on the San Xavier Reservation, unless the Secretary and the San Xavier Cooperative Association agree to fewer Net Irrigable Acres.

6.2.2. Not later than one year after the Enforceability Date, the design and construction of an irrigation system and Delivery and Distribution System to serve the farm in the eastern Schuk Toak District.

6.3. Pursuant to the provisions of section 304(d) of the SAWRSA Amendments, the Secretary may extend a deadline referred to in paragraphs 6.2.1 and

6.2.2. If the Secretary extends a deadline, the Secretary shall comply with the notice provision of section 304(d)(2) of the SAWRSA Amendments.

7. NEW FARM PROVISIONS

7.1. In accordance with section 304(c)(3) of the SAWRSA Amendments, and in accordance with paragraph 7.2, the Secretary shall either:

7.1.1. Pay to the San Xavier District \$18,300,000 (adjusted as provided in section 317(a)(2) of the SAWRSA Amendments) in lieu of designing and constructing the canals, laterals, farm ditches and irrigation works for a new farm within the San Xavier Reservation; or

7.1.2. Design and construct within the San Xavier Reservation such additional canals, laterals, farm ditches, and irrigation works as are necessary for the efficient distribution for agricultural purposes of that portion of the 27,000 acre-feet of water that is not required for the irrigation systems that serve the Cooperative Farm and the extension to the Cooperative Farm.

7.2. The San Xavier District Council may make a nonrevocable election whether to receive the benefits described under paragraphs 7.1.1 or 7.1.2 by notifying the Secretary after the Enforceability Date, but not later than 180 days thereafter or January 1, 2010, whichever is later, by written and certified resolution of the San Xavier District Council. If the Secretary does not receive such a resolution by the deadline specified herein, the Secretary shall pay the \$18,300,000 (adjusted as provided in section 317(a)(2) of the SAWRSA Amendments) to the San Xavier District in lieu of constructing the new farm.

7.2.1. Payment of the \$18,300,000 (adjusted as provided in section 317(a)(2) of the SAWRSA Amendments) shall be made by the Secretary from the Lower Colorado River Basin Development Fund:

7.2.1.1. Not later than 60 days after the election described in paragraph 7.2, but in no event earlier than the enforceability date or January 1, 2010, whichever is later, or

7.2.1.2. If no timely election is made, then not later than 240 days after the Enforceability Date or January 1, 2010, whichever is later.

7.2.2. Payment of amounts necessary to design and construct such additional canals, laterals, farm ditches and irrigation works as described in section 304(c)(3)(A)(i) shall be made by the Secretary from the Lower Colorado River Basin Development Fund, if the election is to receive the benefits under paragraph 7.1.2.

7.3. Pursuant to section 304(f) of the SAWRSA Amendments, the San Xavier District Council shall hold the funds in trust in interest bearing deposits and securities and may expend the principal and interest in accordance with a budget authorized by the San Xavier District Council and approved by the Nation's Legislative Council and for the purposes specified in section 304(f)(1)(C) of the SAWRSA Amendments.

8. USE OF PUMPED WATER

8.1. Right to Pump Groundwater. The Nation agrees, except as provided in sections 308(e), 308(f), 308(g) and 308(h) of the SAWRSA Amendments:

8.1.1. To limit the quantity of groundwater withdrawn by Non-Exempt Wells from beneath the San Xavier Reservation to not more than 10,000 Acre-feet per Year; and

8.1.2. To limit the quantity of groundwater withdrawn by Non-Exempt Wells from beneath the eastern Schuk Toak District to not more than 3,200 Acre-feet per Year.

8.2. Storage and Recovery Projects. Pursuant to section 308(e) of the SAWRSA Amendments, the Nation may establish and maintain one or more Direct Storage and Recovery Projects within the San Xavier Reservation or the eastern Schuk Toak District.

8.3. [Intentionally omitted.]

8.4. Allocation and Transfer of Storage Credits.

8.4.1. The Nation shall allocate as a first right of beneficial use by Allottees, the San Xavier District, and other persons within the San Xavier Reservation, the storage credits resulting from a project authorized in section 308(e) of the SAWRSA Amendments that cannot be lawfully transferred or otherwise disposed of to persons for recovery outside the Nation's Reservation.

8.4.2. The Nation has the exclusive right, subject to section 308 of the SAWRSA Amendments, to transfer or otherwise dispose of the storage credits that may be lawfully transferred or otherwise disposed of to persons for recovery outside the Nation's Reservation.

8.5. Deferred Pumping.

8.5.1. Pursuant to section 308(f)(1)(B) of the SAWRSA Amendments, within the San Xavier Reservation:

8.5.1.1. All or any portion of the 10,000 Acre-feet of water not pumped under paragraph 8.1.1 in any Year—

8.5.1.1.1. may be withdrawn in any subsequent Year;
and

8.5.1.1.2. shall be accounted for in accordance with
paragraph 8.6.

8.5.1.2. The quantity of water authorized to be recovered as
Deferred Pumping Storage Credits under this section shall not exceed--

8.5.1.2.1. 50,000 Acre-feet for any ten-Year period; or

8.5.1.2.2. 10,000 Acre-feet in any year.

8.5.2. Pursuant to section 308(f)(2)(B) of the SAWRSA Amendments,
within the eastern Schuk Toak District:

8.5.2.1. All or any portion of the 3,200 Acre-feet of water not
pumped under paragraph 8.1.2 in any Year—

8.5.2.1.1. may be withdrawn in any subsequent Year;
and

8.5.2.1.2. shall be accounted for in accordance with
paragraph 8.6.

8.5.2.2. The quantity of water authorized to be recovered as
Deferred Pumping Storage Credits under this section shall not exceed--

8.5.2.2.1. 16,000 Acre-feet for any ten-Year period; or

8.5.2.2.2. 3,200 Acre-feet in any Year.

8.6. Accounting. Attached as Exhibit 8.6 is a form to maintain the Storage
Accounts.

8.6.1. Direct Storage Accounts.

8.6.1.1. For each Direct Storage and Recovery Project an account shall be maintained to credit the quantities of water stored underground and to debit the water recovered.

8.6.1.2. As of the end of the Year that includes the Enforceability Date and as of the end of each Year thereafter, the Nation shall:

8.6.1.2.1. Credit the quantity of water stored underground within the San Xavier Reservation and within the eastern Schuk Toak District during the Year; and

8.6.1.3. Debit the quantity of water recovered from direct storage or transferred as Marketable Credits during the Year.

8.6.2. Deferred Pumping Storage Accounts. Deferred pumping storage accounts shall be established to credit the quantities of water stored underground in lieu of pumping and to debit the water recovered. Such accounts shall be maintained as follows:

8.6.2.1. Within the San Xavier Reservation:

8.6.2.1.1. To initiate the account, the Nation shall credit 50,000 Acre-feet;

8.6.2.1.2. As of the end of the Year that includes the Enforceability Date and as of the end of each Year thereafter, the Nation shall:

8.6.2.1.2.1.1. If the quantity of groundwater withdrawn from all Non-Exempt Wells is less than 10,000 Acre-feet, credit to the account the difference between 10,000 Acre-feet and the quantity of groundwater withdrawn that Year by all Non-Exempt Wells; or

8.6.2.1.2.1.2. If the quantity of groundwater withdrawn from all Non-Exempt Wells is more than 10,000 Acre-feet, debit to the account the difference between the groundwater withdrawn from all Non-Exempt wells and 10,000 Acre-feet.

8.6.2.2. Within the eastern Schuk Toak District:

8.6.2.2.1. To initiate the account, the Nation shall credit 16,000 Acre-feet;

8.6.2.2.2. As of the end of the Year that includes the Enforceability Date and as of the end of each Year thereafter, the Nation shall:

8.6.2.2.2.1.1. If the quantity of groundwater withdrawn from all Non-Exempt Wells is less than 3,200 Acre-feet, credit to the account the difference between 3,200 Acre-feet and the quantity of groundwater withdrawn that Year by all Non-Exempt Wells; or

8.6.2.2.2.1.2. If the quantity of groundwater withdrawn from all Non-Exempt Wells is more than 3,200 Acre-feet, debit to the account the difference between the groundwater withdrawn from all Non-Exempt wells and 3,200 Acre-feet.

8.7. Additional groundwater pumping. Pursuant to section 308(h) of the SAWRSA Amendments and subject to the conditions of this paragraph, in any Deficiency Year, the Nation may, for then existing beneficial uses on the San Xavier Reservation and within the eastern Schuk Toak District, respectively, pump an additional amount of groundwater. Examples of the calculations for additional groundwater pumping pursuant to this paragraph are provided in Exhibit 8.7.

8.7.1. With respect to the San Xavier Reservation, the additional amount may be equal to the San Xavier District Maximum Demand; less:

8.7.1.1. The quantity of water delivered by the Secretary to the Reservation during the Deficiency Year; and

8.7.1.2. 10,000 Acre-feet (the groundwater referred to in section 307(a)(1)(A) of the SAWRSA Amendments); and

8.7.1.3. All storage credits, except for Marketable Credits; and

8.7.1.4. All Deferred Pumping Storage Credits acquired pursuant to paragraph 8.5.

8.7.2. With respect to the eastern Schuk Toak District, the additional amount may be equal to the eastern Schuk Toak District Maximum Demand; less:

8.7.2.1. The quantity of water delivered to the eastern Schuk Toak District during the Deficiency Year; and

8.7.2.2. 3,200 Acre-feet (the groundwater referred to in section 307(a)(1)(B) of the SAWRSA Amendments); and

8.7.2.3. All storage credits, except for Marketable Credits; and

8.7.2.4. All Deferred Pumping Storage Credits acquired pursuant to paragraph 8.5.

8.7.3. The operation of this paragraph 8.7 shall be subject to the following conditions:

8.7.3.1. As to the San Xavier Reservation:

8.7.3.1.1. Deferred Pumping Storage Credits and storage credits referred to in paragraphs 8.7.1.3 and 8.7.1.4 shall be subtracted to determine the

quantity of groundwater that may be pumped pursuant to paragraph 8.7.1 only to the extent that the total of such credits subtracted for any Year does not exceed 20% of the San Xavier District Maximum Demand; and

8.7.3.1.2. Deferred Pumping Storage Credits that are subtracted as required by this paragraph 8.7.3.1 shall be debited to the San Xavier Reservation account on a one-for-one basis without discount.

8.7.3.2. As to the eastern Schuk Toak District:

8.7.3.2.1. Deferred Pumping Storage Credits and storage credits referred to in paragraphs 8.7.1.3 and 8.7.1.4 shall be subtracted to determine the quantity of groundwater that may be pumped pursuant to paragraph 8.7.2 only to the extent that the total of such credits subtracted for any Year does not exceed 20% of the eastern Schuk Toak District Maximum Demand; and

8.7.3.2.2. Deferred Pumping Storage Credits that are subtracted as required by this paragraph 8.7.3.2 shall be debited to the eastern Schuk Toak account on a one-for-one basis without discount.

8.8. Groundwater Protection Program. The Parties agree to support the enactment of legislation by the State that would implement the groundwater protection program for the San Xavier Reservation as described in Exhibit 8.8.

8.9. Consistent with section 308(f)(3)(B) of the SAWRSA Amendments, the Nation and the United States on behalf of the Nation agree not to assert a reserved right claim for groundwater for the San Xavier District or the eastern Schuk Toak District portion of the Schuk Toak District.

8.10. Exempt Wells may be drilled on the San Xavier Reservation and the eastern Schuk Toak District and their use shall be exempt from pumping limitations in the SAWRSA Amendments and this Agreement.

9. WATER MANAGEMENT PLANS

9.1. Pursuant to section 308(d) of the SAWRSA Amendments, the Secretary shall establish, for the San Xavier Reservation and the eastern Schuk Toak District, water management plans under contracts executed under section 311 of the SAWRSA Amendments between the Secretary and the San Xavier District for the San Xavier Reservation for a sum not to exceed \$891,200, and between the Secretary and the Nation for the eastern Schuk Toak District for a sum not to exceed \$237,200.

10. WATER RIGHTS ALLOCATION; WATER CODE; INTERIM ALLOTTEE
WATER RIGHTS CODE

10.1. The Nation agrees to comply with section 307(a)(1) of the SAWRSA Amendments.

10.2. The Nation shall enact and maintain an interim Allottee water rights code and a comprehensive water code in accordance with section 308(b) of the SAWRSA Amendments.

11. LEASING; ASSIGNMENT OF CREDITS

11.1. With respect to uses outside of the Nation's Reservation, the Nation may, for a term not to exceed 100 years, assign, exchange, lease, provide an option to lease or otherwise temporarily dispose of CAP water and direct storage credits in accordance with section 309(c) of the SAWRSA Amendments.

11.2. Assignment of Credits. Pursuant to section 309(b)(2)(C) of the SAWRSA Amendments, the Nation may assign Marketable Credits only in accordance with State law.

11.3. Leasing of CAP Water.

11.3.1. A lease of CAP water shall be in accordance with the requirements of section 309(c)(4) and section 309(j) of the SAWRSA Amendments.

11.3.2. The Secretary shall deliver leased CAP water to the lessee as further provided herein. The Secretary shall not be obligated to make deliveries to such lessee if, in the judgment of the Secretary, such deliveries would limit deliveries of water to other CAP Contractors or CAP Subcontractors to a degree greater than would deliveries of such CAP water to the Nation's Reservation.

11.3.3. Subject to the provisions of the lease, the Secretary shall deliver CAP water to the lessee in accordance with water delivery schedules provided by the lessee to the Secretary or the CAP Operating Agency. The lease shall include water ordering procedures equivalent to those contained in article 4.4 of the standard form of CAP Subcontract for CAP M&I Use that is attached as Exhibit 11.3.

11.3.4. The CAP water to be delivered to the lessee pursuant to the lease shall be delivered at such Turnouts as are agreed by the Secretary, the CAP Operating Agency and the lessee.

11.3.5. The lessee may not transfer assign or sublease its leased CAP water.

11.3.6. The lease shall impose upon the lessee terms and conditions equivalent to those contained in subarticles 4.3(a), 4.3(b), 4.3(c), 4.5(b), 4.5(c), and

4.5(d), and articles 4.6, 4.10, and 6.9 of the standard form of CAP Subcontract that is attached as Exhibit 11.3. Although Exhibit 11.3 is the standard form of CAP Subcontract for CAP M&I use, nothing in this Agreement is intended to preclude leases of CAP water for irrigation use.

11.3.7. The Nation may enter into leases of CAP water for terms in excess of 25 years subject to the following terms and conditions:

11.3.7.1. The Nation shall initially make an offer for a lease term in excess of 25 years to users within the Tucson Management Area. The offer shall include the substantive terms of the lease.

11.3.7.2. In the event that the Nation receives no proposal for the use of the water within the Tucson Management Area, the Nation's offer may be extended for use of the water outside the Tucson Management Area, subject to the following provisions:

11.3.7.2.1. On or before the 180th day prior to the Transaction Date on which the Nation desires to enter into a transaction under section 309(c)(4) of the SAWRSA Amendments with an entity intending to use the water acquired pursuant to section 304(a) and section 306(a) of the SAWRSA Amendments outside of the Nation's Reservation and the Tucson Management Area, the Nation shall submit to the Secretary, the proposed transaction and all related exhibits and agreements.

11.3.7.2.2. On or before the 150th day prior to the Transaction Date, the Nation, shall provide notice of the proposed transaction by mail to all Qualified Entities and by publication in a newspaper of general circulation in the City of Tucson, Arizona, once a week for two consecutive weeks. The notice shall contain

any changes from the substantive terms of the offer provided in paragraph 11.3.7.1 of this Tohono O'odham Settlement Agreement.

11.3.7.2.3. On or before the 90th day prior to the Transaction Date, any Qualified Entity may submit a counteroffer to the Nation. If the Nation does not receive any counteroffers from a Qualified Entity, it may submit the proposed transaction for approval under section 309(c)(4)(C) of the SAWRSA Amendments.

11.3.7.2.4. If the Nation has received one or more counteroffers from Qualified Entities, the Nation may either select one or more of such counteroffers that match or are superior to the proposed transaction or reject the proposed transaction and all counteroffers. A counteroffer matches or is superior to the proposed transaction if it matches the price and other substantive terms of the proposed transaction.

11.3.7.2.5. If no counteroffer from a Qualified Entity matches or is superior to the proposed transaction, the Nation may either select or reject the proposed transaction.

11.3.7.2.6. The Nation shall notify all parties who submitted a proposed transaction or counteroffer of its selection and shall submit the proposed transaction or counteroffer for approval under section 309(c)(4) of the SAWRSA Amendments.

12. TUCSON AGREEMENT

12.1. The City of Tucson, the Nation, the Allottees and the United States on behalf of the Nation and the Allottees have entered into the Tucson Agreement, an executed copy of which is attached as Exhibit 12.1.

13. ASARCO AGREEMENT

13.1. Asarco, the Nation, the Allottees and the United States on behalf of the Nation and the Allottees have entered into the Asarco Agreement, an executed copy of which is attached as Exhibit 13.1.

14. FICO AGREEMENT

14.1. FICO, the Nation, the Allottees and the United States on behalf of the Nation and the Allottees have entered into the FICO Agreement, an executed copy of which is attached as Exhibit 14.1.

15. WAIVERS OF CLAIMS.

15.1. Waiver of claims by the Nation.

15.1.1. Except as provided in paragraph 15.4, the Nation hereby waives and releases:

15.1.1.1. Any and all past, present, and future claims for Water Rights (including claims based on aboriginal occupancy) arising from time immemorial and, thereafter, forever, and claims for Injury to Water Rights arising from time immemorial through the Enforceability Date, for land within the Tucson Management Area, against the State (or any agency or political subdivision of the State), any municipal corporation; and any other person or entity;

15.1.1.2. Any and all claims for Water Rights arising from time immemorial and, thereafter, forever, claims for Injury to Water Rights arising from time immemorial through the Enforceability Date, and claims for failure to protect, acquire, or develop Water Rights for land within the San Xavier Reservation and the eastern Schuk Toak District from time immemorial through the Enforceability Date, against the United

States, in any capacity, (including any agency, officer, and employee of the United States);

15.1.1.3. Any and all claims for Injury to Water Rights arising after the Enforceability Date for land within the San Xavier Reservation and the eastern Schuk Toak District resulting from the off-Reservation diversion or use of water in a manner not in violation of this Agreement or State law against the United States, in any capacity, the State (or any agency or political subdivision of the State), any municipal corporation, and any other person or entity; and

15.1.1.4. Any and all past, present, and future claims arising out of or relating to the negotiation or execution of this Agreement, or the negotiation or enactment of the SAWRSA Amendments against the United States, in any capacity, the State (or any agency or political subdivision of the State), any municipal corporation; and any other person or entity.

15.1.2. The waiver and release of claims described in paragraph 15.1 shall become effective upon the Enforceability Date.

15.2. Waiver of Claims by the Allottee Classes.

15.2.1. Each Allottee Class hereby waives and releases:

15.2.1.1. Any and all past, present, and future claims for Water Rights (including claims based on aboriginal occupancy) arising from time immemorial and, thereafter, forever, claims for Injury to Water Rights from time immemorial through the Enforceability Date, and claims for future Injury to Water Rights for land within the San Xavier Reservation, against the State (or any agency or political subdivision of the State), any municipal corporation; and any other person or entity (other than the Nation);

15.2.1.2. Any and all claims for Water Rights arising from time immemorial and, thereafter, forever, claims for Injury to Water Rights arising from time immemorial through the Enforceability Date, claims for failure to protect, acquire, or develop Water Rights for land within the San Xavier Reservation from time immemorial through the Enforceability Date, against the United States, in any capacity, (including any agency, officer, and employee of the United States);

15.2.1.3. Any and all claims for Injury to Water Rights arising after the Enforceability Date for land within the San Xavier Reservation resulting from the off-Reservation diversion or use of water in a manner not in violation of this Agreement or State law against the United States, in any capacity, the State (or any agency or political subdivision of the State), any municipal corporation, and any other person or entity; and

15.2.1.4. Any and all past, present, and future claims arising out of or relating to the negotiation or execution of this Agreement or the negotiation or enactment of the SAWRSA Amendments, against the United States, the State (or any agency or political subdivision of the State), any municipal corporation; and any other person or entity; and

15.2.1.5. Any and all past, present, and future claims for Water Rights arising from time immemorial and, thereafter, forever, and claims for Injury to Water Rights arising from time immemorial through the Enforceability Date, against the Nation (except that under subsection 307(a)(1)(G) and subsections (a) and (b) of section 308 of the SAWRSA Amendments, the Allottees and Fee Owners of Allotted Land shall retain rights to share in the water resources granted or confirmed under the SAWRSA

Amendments and this Agreement with respect to uses within the San Xavier Reservation).

15.2.2. The waiver and release of claims described in paragraph 15.2 shall become effective upon the Enforceability Date.

15.3. Waiver of Claims by the United States on behalf of the Nation and the Allottees.

15.3.1. Except as provided in paragraph 15.4, the United States, on behalf of the Nation and the Allottees, hereby waives and releases:

15.3.1.1. Any and all past, present, and future claims for Water Rights (including claims based on aboriginal occupancy) arising from time immemorial and thereafter, forever, and claims for Injury to Water Rights arising from time immemorial through the Enforceability Date, for land within the Tucson Management Area, against the Nation, the State (or any agency or political subdivision of the State), any municipal corporation, and any other person or entity;

15.3.1.2. Any and all claims for Injury to Water Rights arising after the Enforceability Date for land within the San Xavier Reservation and the eastern Schuk Toak District resulting from the off-Reservation diversion or use of water in a manner not in violation of this Agreement or State law against the Nation, the State (or any agency or political subdivision of the State), any municipal corporation, and any other person or entity;

15.3.1.3. On and after the Enforceability Date, any and all claims on behalf of the Allottees for Injury to Water Rights against the Nation (except that under section 307(a)(1)(G) and subsections (a) and (b) of section 308 of the SAWRSA

Amendments, the Allottees shall retain rights to share in the water resources granted or confirmed under the SAWRSA Amendments and this Agreement with respect to uses within the San Xavier Reservation); and

15.3.1.4. Contingent on the effectiveness of a waiver of such claims as are provided for in the Asarco Agreement, claims against Asarco on behalf of a plaintiff class comprised of plaintiff allottees in the fourth cause of action of the third amended complaint in *Alvarez v. City of Tucson* (Civ. No. 93-039 TUC FRZ (D. Ariz., filed April 21, 1993)).

15.4. Claims Related to Groundwater Protection Program -- The Nation and the United States, on behalf of the Nation, shall:

15.4.1. Have the right to assert any claims provided for in the State legislation implementing the groundwater protection program described in paragraph 8.8 of this Agreement; and

15.4.2. If after the Enforceability Date the State legislation implementing the groundwater protection program described in Exhibit 8.8 is changed so as to have a material adverse effect upon the Nation, assert a claim in the Gila River Adjudication Court against an owner of any non-exempt well drilled after such change becomes effective if the well actually and substantially interferes with groundwater pumping occurring on the San Xavier Reservation for the incremental effect of such pumping that exceeds that which would have been allowable had the State legislation not changed. It is agreed that the remedy upon proof of such a claim would be damages or any other remedy then permitted under State law for a similar claim.

16. PROCEDURES FOR DISMISSAL OF TUCSON CASE AND ALVAREZ CASE

16.1. After the deadline for opting out of the *United States v. Tucson* Plaintiff Class and the *Alvarez v. Tucson* Plaintiff Classes has passed, the Parties, including the United States in all its capacities except as trustee for Indian tribes other than the Nation, agree to seek approval of this Agreement by the Court in the Tucson Case and the Alvarez Case.

16.2. After the Court has approved this Agreement, the Parties, including the United States in all its capacities except as trustee for Indian tribes other than the Nation, the *United States v. Tucson* Named Plaintiff Allottees as representatives of the *United States v. Tucson* Plaintiff Class and the *Alvarez v. Tucson* Named Plaintiff Allottees as representatives of the *Alvarez v. Tucson* Plaintiff Class agree to join in a stipulation for dismissal of the Tucson Case and the Alvarez Case conditioned solely on the Secretary publishing findings under section 302 of the SAWRSA Amendments. A copy of the stipulation and form of judgment are attached as Exhibit 16.2

17. APPROVAL OF THE SETTLEMENT AGREEMENT BY THE GILA RIVER ADJUDICATION COURT

17.1. All of the Parties, including the United States in all of its capacities except as trustee for Indian tribes other than the Nation, agree to seek approval of this Agreement by the Gila River Adjudication Court. The Parties shall file a stipulation and form of judgment and decree in the Gila River Adjudication Proceedings in the form of Exhibit 17.1.

17.2. The Parties, other than the United States in any capacity, agree to support the enactment of legislation by the State to confirm the jurisdiction of the Gila River

Adjudication Court to carry out the provisions of sections 312(d) and 312(h) of the SAWRSA Amendments.

18. OTHER PROVISIONS

18.1. Nothing in this Agreement shall be construed as establishing any standard to be used for the quantification of Federal reserved rights, aboriginal claims or any other Indian claims to water in any judicial or administrative proceeding.

18.2. This Agreement constitutes the entire understanding among the Parties and supercedes the Agreement of October 11, 1983. Evidence of conduct or statements made in the course of negotiating this Agreement, including but not limited to previous drafts of this Agreement is inadmissible in any legal proceedings other than for approval or confirmation of this Agreement.

18.3. Each Party to this Agreement shall have the obligation to work in good faith as provided in paragraphs 8.8, 16.1, 17, and 18.4 in order to satisfy the conditions set forth in Section 302 of the SAWRSA Amendments. Except as provided in the preceding sentence, no Party, by reason of its execution of this Agreement, shall be required to perform any of the obligations or be entitled to receive any of the benefits under this Agreement until the Enforceability Date.

18.4. No modification of this Agreement shall be effective unless it is in writing, signed by all Parties, and is approved by the Gila River Adjudication Court. Notwithstanding the foregoing, Exhibits to this Agreement may be amended by the Parties to such Exhibits in accordance with their terms, without court approval, unless such approval is required in the Exhibit or by law; provided, however, that no amendment of any Exhibit may violate any provisions of the SAWRSA Amendments or this

Agreement, or adversely affect the rights under this Agreement of any Party who is not a signatory of such an amendment.

18.5. Execution of this Agreement by the Governor of the State constitutes a commitment to use good faith efforts to work with the State legislature to enact legislation necessary to carry out the provisions of paragraphs 5.10.2, 8.8 and 17.2 of this Agreement. These provisions will not be binding upon the State until the State legislation is enacted and the SAWRSA Amendments are effective as provided in the SAWRSA Amendments. It is not intended that this Agreement shall be determinative of any decision to be made by any State agency in any administrative adjudicatory, rule making, or other proceeding or matter. Except as provided in this Agreement, nothing herein shall be construed as a waiver of any rights that the State has to its natural resources.

18.6. By signing this Agreement each person represents that he or she has the authority to execute it.

18.7. This Agreement shall be construed in accordance with applicable State and Federal law.

18.8. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties.

18.9. 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 the authorization of funds therefor. No liability shall accrue to the United States, in any of its capacities, in the event funds are not authorized.

18.10. This Agreement may be executed in duplicate originals, each of which shall constitute an original Agreement.

18.11. No part of this Agreement should be construed, in whole or in part, as providing consent by any of the non-Indian Parties to the legislative, executive or judicial jurisdiction or authority of the Nation in connection with activities, rights, or duties contemplated by the Agreement and conducted by any of those Parties outside the exterior boundaries of the Nation's Reservation. This Agreement should not be construed as a commercial dealing, contract, lease or other arrangement that creates a consensual relationship between any non-Indian Party and the Nation so as to provide a basis for the Nation's legislative, executive or judicial jurisdiction or authority over non-Indian Parties to this Agreement under *Montana v. United States*, 450 U.S. 544 (1981), for activities conducted outside the exterior boundaries of the Nation's Reservation. The activities, rights or duties conducted or undertaken by the non-Indian Parties pursuant to the Agreement outside the exterior boundaries of the Nation's Reservation shall not be construed as conduct that threatens or affects the political integrity, economic security or health and welfare of the Nation so as to provide a basis for the exercise of the Nation's legislative, executive or judicial jurisdiction or authority over the non-Indian Parties to this Agreement under *Montana v. United States*, 450 U.S. 544 (1981). Benefits and rights accruing to the non-Indian Parties to this Agreement are provided as consideration for benefits and rights accruing to the Nation, and shall not be construed as privileges, benefits, tribal services or other advantages of civilized society provided by the Nation that would justify the imposition of the Nation's legislative, executive or judicial authority over those Parties in regard to the activities, rights and duties conducted outside

the exterior boundaries of the Nation's Reservation. The enactment of legislation authorizing or ratifying this Agreement shall not be construed as a congressional delegation of authority to the Nation of legislative, executive or judicial jurisdiction or authority over the non-Indian Parties hereto.

18.12. Nothing in this Agreement shall be construed to quantify or otherwise affect the Water Rights, claims or entitlements to water of the Nation outside the Tucson Management Area.

18.13. Nothing in this Agreement shall be construed to quantify or otherwise affect the Water Rights, claims or entitlements to water of any tribe, band or community other than the Nation.

18.14. Nothing in this Agreement shall affect the rights of the Parties under the Well Site Lease or the New Well Site Lease, as defined in the Asarco Agreement.

18.15. In the event that differences between the language of the SAWRSA Amendments and this Agreement result in ambiguity or confusion or the provisions are inconsistent, the language of the SAWRSA Amendments shall govern.

18.16. The Parties are aware of canons of interpretation whereby ambiguities in contracts are resolved by courts in favor of a party based upon status such as that of an Indian tribe or of a drafter. Notwithstanding such canons, counsel for the parties have negotiated, read and approved the language of this Agreement, which language shall be construed in its entirety according to its fair meaning and not strictly for or against any of the parties who have worked together in preparing the final version of this Agreement.

18.17. Any party shall have the right to petition the Gila River Adjudication Court or a court of the United States having jurisdiction, for such declaratory and

injunctive relief as may be necessary to enforce the terms, conditions and limitations of this Agreement and monetary relief as provided in this Agreement and as limited by section 312(h) of the SAWRSA Amendments. Nothing contained herein shall grant or give the right to any Party to petition any court of the Nation or any state court other than the Gila River Adjudication Court for monetary relief or for any declaratory or injunctive relief to enforce the terms, conditions and limitations provided in this Agreement, except as provided in section 312(i) of the SAWRSA Amendments.

18.18. All notices required to be given hereunder shall be in writing and may be given in person, by facsimile transmission, or by United States mail postage prepaid, and shall become effective at the earliest of actual receipt by the Party to whom notice is given, when delivered to the designated address of the Party, or if mailed, forty-eight (48) hours after deposit in the United States mail addressed as shown below or to such other address as such Party may from time to time designate in writing.

United States of America;

Secretary of the Interior
Department of the Interior
Washington, D.C. 20240

With copies to:

Area Director
Western Regional Office
P.O. Box 10
Phoenix, Arizona 85001

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

Bureau of Indian Affairs
Papago Indian Agency
Sells, Arizona 85634

The State of Arizona:

Office of the Governor
1700 W. Washington Street
Phoenix, Arizona 85007

With a copy to:

Director
Arizona Department of Water Resources
500 North 3rd Street
Phoenix, Arizona 85004

The Tohono O'odham Nation:

Chairperson
Tohono O'odham Nation
P.O. Box 837
Sells, Arizona 85634

With copies to:

Attorney General
Tohono O'odham Nation
P.O. Box 830
Sells, Arizona 85634

Chairperson San Xavier District
San Xavier District
2018 W. San Xavier Road
Tucson, Arizona 85746

Louis W. Barassi
Barassi & Curl PLC
485 South Main Avenue
Tucson, Arizona 85701

Chairperson Schuk Toak District
Schuk Toak District
P.O. Box 368
Sells, Arizona 85634

The City of Tucson:

City Manager
City of Tucson
P.O. Box 27210
Tucson, Arizona 85726-7210

With copies to:

Director
Tucson Water
P.O. Box 27210
Tucson, Arizona 85726-7210

City Attorney
P.O. Box 27210
Tucson, Arizona 85726-7210

Asarco Incorporated:

General Manager
Mission Complex
Asarco Incorporated
P.O. Box 111
Sahuarita, Arizona 85629

With a copy to:

Robert B. Hoffman
Somach Simmons & Dunn
6035 North 45th Street
Paradise Valley, Arizona 85253-4001

Farmers Investment Co.:

Richard S. Walden, President
Farmers Investment Co.
1525 Helmet Peak Road
Sahuarita, Arizona 85629

With a copy to:

Robert B. Hoffman
Somach Simmons & Dunn
6035 North 45th Street
Paradise Valley, Arizona 85253-4001

San Xavier Allottees:

President
San Xavier Allottees Association
2018 W. San Xavier Road
Tucson, Arizona 85746

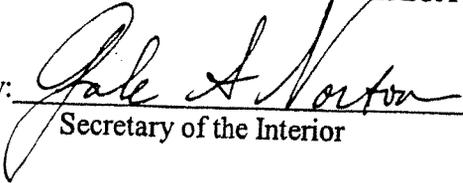
With a copy to:

Thomas E. Luebben
Luebben, Johnson & Barnhouse LLP
211 12th Street NW
Albuquerque, New Mexico 87102

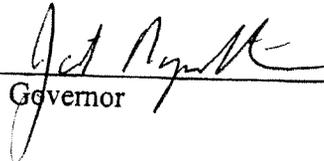
or addressed to such other address as the Party to receive such notice shall have designated by written notice as required by this paragraph 18.18.

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

THE UNITED STATES OF AMERICA

By:  Date: March 28, 2006
Secretary of the Interior

THE STATE OF ARIZONA

By:  Date: 5-5-06
Governor

THE TOHONO O'ODHAM NATION

By: *William J. Anderson* Date: 5/5/06
Chairperson

Approved as to Form: *D. J. [Signature]* Date: 5/5/06
Attorney General

CITY OF TUCSON

By: *[Signature]* Date: 5-5-06
Mayor

Attest: *Kathleen S. [Signature]* Date: 6-12-06
City Clerk

Approved as to Form: *[Signature]* Date: 6/12/06
City Attorney

ASARCO INCORPORATED

By: *D. E. McAllister* Date: 6/12/06
President
Th. J. [Signature]
UP Env. Affairs
6/12/06

FARMERS INVESTMENT CO.

By: *[Signature]* Date: 6/12/2006
President

UNITED STATES V. TUCSON ALLOTTEE CLASS

By: *[Signature]* Date: 5/5/06

By: *[Signature]* Date: 5/5/06

By: Julian Ramon-Perez Date: 5/5/06

By: Conrad T. Smith Date: 5/5/06

By: R. 2 Red Dog Date: 5/5/06

By: Michael H. Sosa Date: 5/5/06

By: Ma. E. Fagan Date: 5/5/06

Its Class Representatives

Approved as to Form: Thomas E. Fuller Date: 5/5/06
Attorney for Certified Class

ALVAREZ V. TUCSON ALLOTTEE CLASS (Causes of Action 1 through 3)

By: [Signature] Date: 5/5/06

By: Rosanna C. Lyk Date: 5/5/06

By: Julian Ramon-Perez Date: 5/5/06

By: Conrad T. Smith Date: 5/5/06

By: R. 2 Red Dog Date: 5/5/06

Its Class Representatives

Approved as to Form: Thomas E. Fuller Date: 5/5/06
Attorney for Certified Class

ALVAREZ V. TUCSON ALLOTTEE CLASS (Causes of Action 1 through 3)

By: Luisa Nuñez Date: 5/5/06
By: Quintanilla Date: 5/5/06
By: Apple Date: 5-5-06
By: Verona O. Higuera Date: 5-5-06
By: Celestine Pablo Date: 5/5/06
By: Dorly A. Ray Date: 5-5-06
By: Jocelyne Bernal Date: 5-5-06
By: Juliana Nuñez Date: 5-5-06
By: Rafael Date: 5/5/06
By: Jose Date: 5/5/06
By: _____ Date: _____
By: _____ Date: _____

Its Class Representatives