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15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF ARIZONA**

17 United States of America,

18 **Plaintiff,**

19 v.

20
21 John M. Williams, Jr.; Arizona Public
22 Service Co.; the Salt River Project;
23 Public Service Company of New Mexico;
24 and El Paso Electric Co.,

25 **Defendants.**

Case No. CV 11-00689-PHX-MEA

CONSENT DECREE

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I. BACKGROUND

A. Plaintiff United States of America, on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), has filed a Complaint initiating this action pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended (“CERCLA”), seeking reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the Gila River Indian Reservation Removal Site, also referred to as the Gila River Boundary Site (“the Site”), in Maricopa County, Arizona, against Defendants John M. Williams, Jr., Arizona Public Service Co., the Salt River Project, Public Service Company of New Mexico, and El Paso Electric Co. (“Settling Defendants”), as potentially responsible parties (“PRPs”) at the Site.

B. The Site was the subject of a removal action conducted by EPA in 2004-05 pursuant to Section 104(a) of CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan. In 2002, the Gila River Indian Community, Department of Environmental Quality, requested that EPA assess the Site for contamination. The assessment revealed that the Site soil contained elevated levels of toxaphene, a pesticide historically used on agricultural fields in the vicinity of the Site. EPA undertook a removal action, which successfully brought the toxaphene concentration in the soil down to levels that did not pose a threat to human health and the environment. In the process of conducting the removal action, EPA incurred costs of \$1,000,417.01, and subsequently requested payment of that amount from the PRPs.

C. Defendant John M. Williams, Jr. (“Williams”) served notice of a claim against the United States Department of the Interior, Bureau of Indian Affairs (“Settling Federal Agency”), by letter dated August 6, 2009 (“Claim Letter,” attached as Exhibit B hereto), alleging that Settling Federal Agency is a PRP at the Site and is responsible for reimbursement of response costs incurred at the Site.

1 D. Plaintiff, Settling Defendants, and Settling Federal Agency (“Parties”) enter into
2 this Consent Decree in order to settle the claims for reimbursement of response costs incurred or
3 to be incurred at the Site, as alleged in the Complaint and the Claim Letter, without incurring the
4 further time and expense of litigation.

5 E. By entering into this Consent Decree, Settling Defendants and Settling Federal
6 Agency (“Settling Parties”) do not admit any liability arising out of the transactions or
7 occurrences alleged in the Complaint and Claim Letter.

8 F. Plaintiff and Settling Parties agree, and this Court by entering this Consent Decree
9 finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of
10 this matter will avoid prolonged and complicated litigation between the Parties, and that this
11 Consent Decree is fair, reasonable, and in the public interest.

12 THEREFORE, with the consent of the Parties to this Decree, it is ORDERED,
13 ADJUDGED, AND DECREED:

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15 **II. JURISDICTION AND VENUE**

16 1. This Court has jurisdiction over the subject matter of this action pursuant to 28
17 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607 and 9613(b), and also has personal jurisdiction
18 over Settling Parties. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and
19 1395(a), and 42 U.S.C. § 9613(b), because the events giving rise to this action occurred in this
20 district. Solely for the purposes of this Consent Decree and the underlying complaint, Settling
21 Parties waive all objections and defenses that they may have to jurisdiction of the Court or to
22 venue in this District. Settling Parties shall not challenge the terms of this Consent Decree or
23 this Court’s jurisdiction to enter and enforce this Consent Decree.

24 **III. PARTIES BOUND**

25 2. This Consent Decree is binding upon the United States and upon Settling
26 Defendants and their heirs, successors, and assigns. Any change in ownership or corporate or
27 other legal status, including but not limited to any transfer of assets or real or personal property,
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1 shall in no way alter the status or responsibilities of Settling Defendants under this Consent
2 Decree.

3 **IV. DEFINITIONS**

4 3. Unless otherwise expressly provided herein, terms used in this Consent Decree
5 that are defined in CERCLA or in regulations promulgated under CERCLA shall have the
6 meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are
7 used in this Consent Decree or in any appendix attached hereto, the following definitions shall
8 apply:

9 a. "CERCLA" shall mean the Comprehensive Environmental Response,
10 Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

11 b. "Consent Decree" shall mean this Consent Decree and all appendices
12 attached hereto. In the event of conflict between this Consent Decree and any appendix, the
13 Consent Decree shall control.

14 c. "Day" shall mean a calendar day. In computing any period of time under
15 this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the
16 period shall run until the close of business of the next working day.

17 d. "DOJ" shall mean the United States Department of Justice and any
18 successor departments, agencies or instrumentalities of the United States.

19 e. "Defendant Williams" shall mean John M. Williams, Jr.

20 f. "Defendant Utilities" shall mean Arizona Public Service Co., the Salt
21 River Project, Public Service Company of New Mexico, and El Paso Electric Co.

22 g. "EPA" shall mean the United States Environmental Protection Agency
23 and any successor departments, agencies or instrumentalities of the United States.

24 h. "EPA Hazardous Substance Superfund" shall mean the Hazardous
25 Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

26 i. "Interest" shall mean interest at the rate specified for interest on
27 investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507,
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1 compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The
2 applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of
3 interest is subject to change on October 1 of each year.

4 j. "Paragraph" shall mean a portion of this Consent Decree identified by an
5 Arabic numeral or an upper or lower case letter.

6 k. "Parties" shall mean the United States and Settling Defendants.

7 l. "Plaintiff" shall mean the United States.

8 m. "Section" shall mean a portion of this Consent Decree identified by a
9 Roman numeral, unless used in the context of a statutory or regulatory citation or with reference
10 to a work unit of DOJ.

11 n. "Settling Defendants" shall mean Defendant Williams and Defendant
12 Utilities.

13 o. "Settling Federal Agency" shall mean the United States Department of the
14 Interior.

15 p. "Settling Parties" shall mean Defendant Williams, Defendant Utilities,
16 and Settling Federal Agency.

17 q. "Site" shall mean the Gila River Indian Reservation Removal Site, also
18 referred to as the Gila River Boundary Site, comprised of approximately 18 acres of land,
19 primarily within the Gila River Indian Community ("GRIC"), and located in Maricopa County,
20 Arizona, as shown on the map included in Appendix A.

21 r. "United States" shall mean the United States of America and each of its
22 departments, agencies and instrumentalities, including EPA and Settling Federal Agency.

23 **V. STATEMENT OF PURPOSE**

24 4. By entering into this Consent Decree, the mutual objective of Plaintiff and the
25 Settling Parties is for Settling Parties to make a cash payment to resolve their alleged civil
26 liability for the Site under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, as
27 provided in the Covenant by Plaintiff in Section VIII, subject to the Reservations of Rights by
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1 United States in Section IX, and as provided in the Covenants by Settling Defendants and
2 Settling Federal Agency in Section X.

3 **VI. REIMBURSEMENT OF RESPONSE COSTS**

4 5. Within 30 days of the effective date of this Consent Decree, Defendant Williams
5 agrees to pay a total of \$145,000, plus accrued Interest for the period from the date the Court
6 enters the Consent Decree through the date of payment, to the United States.

7 6. Within 30 days of the effective date of this Consent Decree, Defendant Utilities
8 agree to pay a collective total of \$172,500, plus accrued Interest for the period from the date the
9 Court enters the Consent Decree through the date of payment, to the United States. Defendant
10 Utilities shall be jointly and severally liable for payment of the collective payment amount of
11 \$172,500 plus accrued Interest.

12 7. Settling Defendants shall make payment at <https://www.pay.gov> to the U.S.
13 Department of Justice account, in accordance with instructions provided to Settling Defendants
14 by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the District
15 of Arizona after the date of entry of the Consent Decree. The payment instructions provided by
16 the FLU shall include a Consolidated Debt Collection System (“CDCS”) number, which shall be
17 used to identify all payments required to be made in accordance with this Consent Decree. The
18 FLU shall provide the payment instructions to: Bradley J. Glass, Esq., Gallagher & Kennedy,
19 P.A., 2575 East Camelback Rd., Phoenix, Arizona 85016, (602)530-8000,
20 brad.glass@gknet.com, on behalf of Defendant Williams; and Karilee S. Ramaley, SRP Legal
21 Services Dept., Salt River Project, PAB-300/ P.O. Box 52025, Phoenix, Arizona 95072-2025,
22 (602) 236-2228, Karilee.ramaley@srpnet.com, on behalf of Defendant Utilities. Settling
23 Defendants may change the individual to receive payment instructions on their behalf by
24 providing written notice of such change in accordance with Section XIII (Notices and
25 Submissions).

1 8. At the time of payment, Settling Defendants shall also send notice that payment
2 has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions), and
3 to the EPA Cincinnati Finance Office by email at acctsreceivable.cinwd@epa.gov, or by mail to:

4 EPA Cincinnati Finance Office

5 26 Martin Luther King Drive

6 Cincinnati, Ohio 45268

7 Such notice shall reference the EPA Region and Site/Spill ID Number 09-63, DOJ case number
8 90-11-3-09420, and the civil action number.

9 9. As soon as reasonably practicable after the date of entry of this Consent Decree,
10 the United States, on behalf of Settling Federal Agency, shall pay to EPA \$145,000. The total
11 amount to be paid by Settling Federal Agency shall be deposited by EPA in the EPA Hazardous
12 Substance Superfund.

13 10. In the event that the payment required by Paragraph 9 is not made within 120
14 days after the date of entry, Interest on the unpaid balance shall be paid at the rate established
15 pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the 121st day after
16 the date of entry and accruing through the date of the payment.

17 11. If the payment to EPA required by Paragraph 9 is not made as soon as reasonably
18 practicable, the appropriate EPA Regional Branch Chief may raise any issues relating to payment
19 to the appropriate DOJ Assistant Chief for the Environmental Enforcement Section. In any
20 event, if this payment is not made within 120 days after the date of entry of this Consent Decree,
21 EPA and DOJ have agreed to resolve the issue within 30 days in accordance with a letter
22 agreement dated December 28, 1998.

23 12. The Parties to this Consent Decree recognize and acknowledge that the payment
24 obligations of Settling Federal Agency under this Consent Decree can only be paid from
25 appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be
26 interpreted or construed as a commitment or requirement that Settling Federal Agency obligate
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1 or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other
2 applicable provision of law.

3 13. Defendant Williams shall not be liable to the United States for Defendant
4 Utilities' payment obligation under this Consent Decree, and Defendant Utilities shall not be
5 liable to the United States for Defendant Williams's payment obligation under this Consent
6 Decree. Failure of either Defendant Williams or Defendant Utilities to satisfy their payment
7 obligation in a timely manner shall be a material breach of this Consent Decree as to that Settling
8 Defendant only, and the United States reserves its rights to pursue any and all available remedies
9 for such a breach.

10 **VII. FAILURE TO COMPLY WITH CONSENT DECREE REQUIREMENTS**

11 14. Interest on Late Payments.

12 a. If Defendant Williams fails to make any payment required under
13 Paragraph 5 by the required due date, Interest shall continue to accrue on the unpaid
14 balance through the date of payment.

15 b. If Defendant Utilities fail to make any payment required under Paragraph
16 6 by the required due date, Interest shall continue to accrue on the unpaid balance through
17 the date of payment.

18 c. Settling Defendants shall make all payments required by this Paragraph in
19 the manner described in Paragraphs 7 and 8 unless otherwise directed in writing by EPA.

20 15. Stipulated Penalty.

21 a. In addition to the Interest required by Paragraph 14 (Interest on Late
22 Payments), any failure by Defendant Williams to make payment when due under Paragraph 5
23 subjects Defendant Williams to stipulated penalties of \$2,500 per day for each day that the
24 payment is late.

25 b. In addition to the Interest required by Paragraph 14 (Interest on Late
26 Payments), any failure by Defendant Utilities to make payment when due under Paragraph 6
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1 subjects Defendant Utilities to stipulated penalties of \$2,500 per day for each day that the
2 payment is late.

3 c. Stipulated penalties are due and payable to the United States within 30
4 days of the date of the demand for payment of the penalties by the United States. All payments
5 to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by
6 FedWire Electronic Funds Transfer to:

7 Federal Reserve Bank of New York

8 ABA = 021030004 Account = WIFT address = FRNYUS33

9 33 Liberty Street

10 New York NY 10045

11 Field Tag 4200 of the Fedwire message should read “D 68010727 Environmental Protection
12 Agency” and shall reference the CDCS Number, Site/Spill ID Number 09-63, and DOJ Case
13 Number 90-11-3-09420.

14 d. At the time of payment, Settling Defendants shall send notice that
15 payment has been made to EPA and DOJ in accordance with Section XIII (Notices and
16 Submissions), and to the EPA Cincinnati Finance Office by email at
17 acctsreceivable.cinwd@epa.gov, or by mail to:

18 EPA Cincinnati Finance Office

19 26 Martin Luther King Drive

20 Cincinnati, Ohio 45268

21 Such notice shall reference the CDCS Number, Site/Spill ID Number 09-63, and DOJ Case
22 Number 90-11-3-09420.

23 e. At the time of payment of any stipulated penalties to the United States,
24 Settling Defendants shall send copies of check(s), and any accompanying transmittal letter(s), to
25 the United States, EPA, and the Regional Financial Management Officer as provided in Section
26 XIII (Notices and Submissions) of this Consent Decree.

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1 f. Penalties shall accrue as provided in this Paragraph regardless of whether
2 EPA has notified Settling Defendants of the violation or made a demand for payment, but need
3 only be paid upon demand. All penalties shall begin to accrue on the day after payment is due
4 and shall continue to accrue through the date of payment. Nothing herein shall prevent the
5 simultaneous accrual of separate penalties for separate violations of this Consent Decree.

6 16. If the United States brings an action to enforce this Consent Decree, Settling
7 Defendants shall reimburse the United States for all costs of such action, including, but not
8 limited to, costs of attorney time.

9 17. Payments made under this Section shall be in addition to any other remedies or
10 sanctions available to Plaintiff by virtue of Settling Defendants' failure to comply with the
11 requirements of this Consent Decree.

12 18. Notwithstanding any other provision of this Section, the United States may, in its
13 unreviewable discretion, waive payment of any portion of the stipulated penalties that have
14 accrued to the United States pursuant to this Consent Decree. Payment of stipulated penalties
15 shall not excuse Settling Defendants from the payment obligation as required by Section VI or
16 from performance of any other requirements of this Consent Decree.

17 **VIII. COVENANTS BY PLAINTIFF**

18 19. Covenant Not to Sue Settling Defendants by United States. Except as specifically
19 provided in Section IX (Reservation of Rights by United States), the United States covenants not
20 to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and
21 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), with regard to the Site. This covenant not
22 to sue shall take effect with respect to Defendant Williams upon receipt by EPA of the payments
23 required by Paragraph 5 (and Section VII, if applicable), and as to Defendant Utilities upon
24 receipt by EPA of the payments required by Paragraph 6 (and Section VII, if applicable). This
25 covenant not to sue with respect to each Settling Defendant is conditioned upon the satisfactory
26 performance by that Settling Defendant of its obligations under this Consent Decree. These
27 covenants extend only to Settling Defendants and do not extend to any other person.
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1 20. Covenant for Settling Federal Agency by EPA. Except as specifically provided in
2 Paragraph 21 (Reservation of Rights by United States), EPA covenants not to take administrative
3 action against Settling Federal Agency pursuant to Sections 106 and 107(a) of CERCLA, 42
4 U.S.C. §§ 9606 and 9607(a), with regard to the Site. This covenant is conditioned upon receipt
5 by EPA of the payment made on behalf of the Settling Federal Agency pursuant to Paragraph 9.
6 This covenant extends only to Settling Federal Agency and does not extend to any other person.

7 **IX. RESERVATIONS OF RIGHTS BY UNITED STATES**

8 21. The United States reserves, and this Consent Decree is without prejudice to, all
9 rights against Settling Defendants – and EPA and the federal natural resource trustees reserve,
10 and this Consent Decree is without prejudice to, all rights against Settling Federal Agency – with
11 respect to all matters not expressly included within the Covenant by United States in Paragraph
12 19 and the Covenant by EPA in Paragraph 20. Notwithstanding any other provision of this
13 Consent Decree, the United States reserves all rights against Settling Defendants – and EPA and
14 the federal natural resource trustees reserve, and this Consent Decree is without prejudice to, all
15 rights against Settling Federal Agency – with respect to:

16 a. liability for failure of Settling Defendants or Settling Federal Agency to
17 meet a requirement of this Consent Decree;

18 b. criminal liability;

19 c. liability for damages for injury to, destruction of, or loss of natural
20 resources, and for the costs of any natural resource damage assessments;

21 d. liability based on the ownership or operation of the Site by Settling
22 Defendants or Settling Federal Agency when such ownership or operation commences after
23 signature of this Consent Decree by Settling Defendants or by DOJ on behalf of Settling Federal
24 Agency;

25 e. liability based on Settling Defendants' or Settling Federal Agency's
26 transportation, treatment, storage, or disposal, or the arrangement for the transportation,
27 treatment, storage, or disposal of a hazardous substance or a solid waste at or in connection with
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1 the Site, after signature of this Consent Decree by Settling Defendants or by DOJ on behalf of
2 Settling Federal Agency; and

3 f. liability arising from the past, present, or future disposal, release or threat
4 of release of a hazardous substance, pollutant, or contaminant outside of the Site.

5 **X. COVENANT BY SETTLING DEFENDANTS AND**
6 **SETTLING FEDERAL AGENCY**

7 22. Covenants Not to Sue by Settling Defendants. Settling Defendants covenant not
8 to sue and agree not to assert any claims or causes of action against the United States, or its
9 contractors or employees, with respect to the Site and this Consent Decree, including but not
10 limited to:

11 a. any direct or indirect claim for reimbursement from the Hazardous
12 Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C.
13 §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

14 b. any claim arising out of the response actions at or in connection with the
15 Site, including any claim under the United States Constitution, the Constitution of the State of
16 Arizona, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412,
17 as amended, or at common law; or

18 c. any claim against the United States, including any department, agency, or
19 instrumentality of the United States, pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C.
20 §§ 9607 and 9613, Section 7002(a) of the Resource Conservation and Recovery Act, 42 U.S.C. §
21 6972(a), or state or tribal law relating to the Site.

22 23. Nothing in this Consent Decree shall be deemed to constitute approval or
23 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or
24 40 C.F.R. 300.700(d).

25 24. Settling Defendants agree not to assert any claims and to waive all claims or
26 causes of action (including but not limited to claims or causes of action under Sections 107(a)
27 and 113 of CERCLA) that they may have for all matters relating to the Site against each other or
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1 any other person who is a potentially responsible party under CERCLA at the Site. This waiver
2 shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant
3 may have against any person if such person asserts a claim or cause of action relating to the Site
4 against such Settling Defendant.

5 25. Covenant by Settling Federal Agency. Settling Federal Agency agrees not to
6 assert any direct or indirect claim for reimbursement from the Hazardous Substance Superfund
7 (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA
8 Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law with respect to the Site and
9 this Consent Decree. This covenant does not preclude demand for reimbursement from the
10 Superfund of costs incurred by Settling Federal Agency in the performance of its duties (other
11 than pursuant to this Consent Decree) as lead or support agency under the National Contingency
12 Plan (40 C.F.R. Part 300).

13 26. Except as provided in Paragraph 24 (claims against other PRPs) and Paragraph 30
14 (res judicata and other defenses), the covenants in this Section shall not apply in the event the
15 United States brings a cause of action or issues an order pursuant to any of the reservations in
16 Section IX (Reservations of Rights by United States), other than in Paragraph 21.a (claims for
17 failure to meet a requirement of the Settlement Agreement) or 21.b (criminal liability), but only
18 to the extent that Settling Defendants' claims arise from the same response action or response
19 costs that the United States is seeking pursuant to the applicable reservation.

20 **XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

21 27. Except as provided in Paragraph 24 (claims against other PRPs), nothing in this
22 Consent Decree shall be construed to create any rights in, or grant any cause of action to, any
23 person not a Party to this Consent Decree. Except as provided in Paragraph 24 (claims against
24 other PRPs), the Parties expressly reserve any and all rights (including, but not limited to, any
25 rights pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and
26 causes of action that each Party may have with respect to any matter, transaction, or occurrence
27 relating in any way to the Site against any person not a Party hereto. Nothing in this Consent
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1 Decree diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of
2 CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response
3 costs or response action and to enter into settlements that give rise to contribution protection
4 pursuant to Section 113(f)(2).

5 28. The Parties agree, and by entering this Consent Decree this Court finds, that this
6 settlement constitutes a judicially-approved settlement for purposes of Section 113(f)(2) of
7 CERCLA, 42 U.S.C. § 9613(f)(2), and that Settling Defendants and Settling Federal Agency are
8 entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or
9 claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), or as may be
10 otherwise provided by law, for “matters addressed” in this Consent Decree. The “matters
11 addressed” in this Consent Decree are all response actions taken or to be taken and all response
12 costs incurred or to be incurred, at or in connection with the Site, by the United States or any
13 other person, except for the State of Arizona and the Gila River Indian Community; provided,
14 however, that if the United States exercises rights under the reservations in Section IX
15 (Reservations of Rights by United States), other than in Paragraph 21.a (claims for failure to
16 meet a requirement of the Decree) or 21.b (criminal liability), the “matters addressed” in this
17 Consent Decree will no longer include those response costs or response actions that are within
18 the scope of the exercised reservation.

19 29. Each Settling Defendant shall, with respect to any suit or claim brought by it for
20 matters related to this Consent Decree, notify EPA and DOJ in writing no later than 60 days prior
21 to the initiation of such suit or claim. Each Settling Defendant also shall, with respect to any suit
22 or claim brought against such Settling Defendant for matters related to this Consent Decree,
23 notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In
24 addition, each Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt
25 of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court
26 setting a case for trial, for matters related to this Consent Decree.

1 30. In any subsequent administrative or judicial proceeding initiated by the United
2 States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling
3 Defendants shall not assert, and may not maintain, any defense or claim based upon the
4 principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other
5 defenses based upon any contention that the claims raised by the United States in the subsequent
6 proceeding were or should have been brought in the instant case; provided, however, that nothing
7 in this Paragraph affects the enforceability of the Covenants by Plaintiff set forth in Section VIII.
8 Nothing in this Paragraph obviates the covenant not to sue afforded by Section VIII,
9 Covenants by Plaintiff.

10 **XII. RETENTION OF RECORDS**

11 31. Until 5 years after the entry of this Consent Decree, each Settling Defendant shall
12 preserve and retain all records, reports, or information (hereinafter referred to as "records") now
13 in its possession or control, or which come into its possession or control, that relate in any
14 manner to response actions taken at the Site or the liability of any person under CERCLA with
15 respect to the Site, regardless of any corporate retention policy to the contrary.

16 32. After the conclusion of the 5-year document retention period in the preceding
17 Paragraph, each Settling Defendant shall notify EPA and DOJ at least 90 days prior to the
18 destruction of any such records, and, upon request by EPA or DOJ, the individual Settling
19 Defendant shall deliver any such records to EPA. A Settling Defendant may assert that certain
20 records are privileged under the attorney-client privilege or any other privilege recognized by
21 federal law. If a Settling Defendant asserts such a privilege, that Settling Defendant shall
22 provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the
23 name, title, affiliation (e.g., company or firm), and address of the author of the record; 4) the
24 name and title of each addressee and recipient; 5) a description of the subject of the record; and
25 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record
26 shall be provided to Plaintiff in redacted form to mask the privileged information only. A
27 Settling Defendant shall retain all records that it claims to be privileged until the United States
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1 has had a reasonable opportunity to dispute the privilege claim and any such dispute has been
2 resolved in the Settling Defendant's favor. However, no records created or generated pursuant to
3 the requirements of this or any other settlement with the EPA pertaining to the Site shall be
4 withheld on the grounds that they are privileged.

5 33. Each Settling Defendant hereby certifies individually that, to the best of its
6 knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed
7 or otherwise disposed of any records, reports, or information relating to its potential liability
8 regarding the Site since notification of potential liability by the United States or the State or the
9 filing of suit against it regarding the Site and that it has fully complied with any and all EPA
10 requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§
11 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6972.

12 34. The United States acknowledges that Settling Federal Agency 1) is subject to all
13 applicable Federal record retention laws, regulations, and policies; and 2) has certified that it has
14 fully complied with any and all EPA requests for information pursuant to Sections 104(e) and
15 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. §
16 6927.

17 35. Except as expressly provided in this Consent Decree, the obligations within
18 Section XII, Retention of Records, are severable. The failure of one or more Settling Defendants
19 to fulfill the obligations under Section XII, Retention of Records, under this Consent Decree
20 does not prejudice the rights of any other Settling Defendant under this Consent Decree.

21 **XIII. NOTICES AND SUBMISSIONS**

22 36. Whenever, under the terms of this Consent Decree, notice is required to be given
23 or a document is required to be sent by one party to another, it shall be directed to the individuals
24 at the addresses specified below, unless those individuals or their successors give notice of a
25 change to the other Settling Defendants in writing. Written notice as specified herein shall
26 constitute complete satisfaction of any written notice requirement of the Consent Decree with
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1 respect to the United States, EPA, DOJ, Settling Federal Agency, and Settling Defendants,
2 respectively.

3 **As to the United States:**

4 As to DOJ and Settling Federal Agency:

5 Chief, Environmental Enforcement Section
6 Environment and Natural Resources Division
7 U.S. Department of Justice (DJ # 90-11-3-09420)
8 P.O. Box 7611
9 Washington, D.C. 20044-7611

10 As to EPA:

11 Assistant Director, Superfund Emergency Response Section
12 United States Environmental Protection Agency
13 Region IX
14 75 Hawthorne St.
15 San Francisco, CA 94105
16 Re: Gila River Indian Reservation Site

17 David Wood, Chief, Cost Accounting
18 United States Environmental Protection Agency
19 Region IX
20 75 Hawthorne St.
21 San Francisco, CA 94105
22 Re: Gila River Indian Reservation Site

23 **As to Settling Defendants:**

24 As to Defendant Williams:

25 Bradley J. Glass, Esq.
26 Gallagher & Kennedy, P.A.
27 2575 East Camelback Rd.
28 Phoenix, AZ 85016

As to Defendant Utilities:

Karen Gaylord
Salmon, Lewis & Weldon
2850 East Camelback Road, Suite 200
Phoenix, AZ 85016

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XIV. RETENTION OF JURISDICTION

37. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XV. INTEGRATION/APPENDICES

38. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Defendants with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the map of the Site

“Appendix B” is the letter from Defendant Williams asserting his claim for contribution against Settling Federal Agency.

XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

39. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

40. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVII. SIGNATORIES/SERVICE

41. Each undersigned representative of Settling Defendants, and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice, or her delegate, certifies that he or she is authorized to enter into the terms

1 and conditions of this Consent Decree and to execute and bind legally such Party to this
2 document.

3 42. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree
4 by this Court or to challenge any provision of this Consent Decree, unless the United States has
5 notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

6 43. Each Settling Defendant shall identify, on the attached signature page, the name
7 and address of an agent who is authorized to accept service of process by mail on behalf of that
8 Party with respect to all matters arising under or relating to this Consent Decree. Settling
9 Defendants hereby agree to accept service in that manner and to waive the formal service
10 requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local
11 rules of this Court, including but not limited to, service of a summons. The Parties agree that
12 Settling Defendants need not file an answer to the complaint in this action unless or until the
13 Court expressly declines to enter this Consent Decree.

14 **XVIII. EFFECTIVE DATE**

15 44. The effective date of this Consent Decree shall be the date upon which this
16 Consent Decree is entered by the Court, except as otherwise provided herein.

17 **XIX. FINAL JUDGMENT**

18 45. Upon approval and entry of this Consent Decree by the Court, this Consent
19 Decree shall constitute the final judgment between and among the United States and the Settling
20 Defendants. The Court finds that there is no just reason for delay and therefore enters this
21 judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

22
23 IT IS SO ORDERED this _____ day of _____, 20____.

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27 _____
United States District Judge

1 For the United States of America:

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ELLEN MAHAN
Deputy Section Chief
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice

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Date: April 7, 2011

/s/ Henry Friedman
HENRY FRIEDMAN
Assistant Section Chief
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice

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Date: 4/7/11

JANE DIAMOND ✓
Director, Superfund Division
U.S. Environmental Protection Agency,
Region IX
San Francisco, CA 94105

Date: March 28, 2011

TALY JOLISH
Assistant Regional Counsel
U.S. Environmental Protection Agency,
Region IX
San Francisco, CA 94105

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For Defendant John M. Williams, Jr:

Date: 2/12/11



1 For Defendant Arizona Public Service Co.:

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Date: 02/25/11

-
Daniel T. Froetscher
Vice President, Energy Delivery

For Defendant Salt River Project:

Date: _____

For Defendant Public Service Company of New Mexico:

Date: _____

For Defendant El Paso Electric Co.:

Date: _____

1 For Defendant Arizona Public Service Co.:

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3

4 Date: _____

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8 For Defendant Salt River Project:

9

10

11 Date: 3/1/11

12

13

Assistant General Manager,
Environmental, Human Resources, Land,
Risk Managment, Sustainability & Telecom

14

15 For Defendant Public Service Company of New Mexico:

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17

18 Date: _____

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22 For Defendant El Paso Electric Co.:

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25 Date: _____

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1 For Defendant Arizona Public Service Co.:

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4 Date: _____

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8 For Defendant Salt River Project:

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11 Date: _____

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15 For Defendant Public Service Company of New Mexico:

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17

18 Date: 3/1/11

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Patrick V. Apodaca
Sr. Vice President & General Counsel

20

21

22

23 For Defendant El Paso Electric Co.:

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26 Date: _____

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1 For Defendant Arizona Public Service Co.:

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8 For Defendant Salt River Project:

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11 Date: _____

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15 For Defendant Public Service Company of New Mexico:

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18 Date: _____

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22 For Defendant El Paso Electric Co.:

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25 Date: 2-25-11

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B.
Wayne E. Kipp, SVP, General Counsel
& Chief Compliance Officer

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Appendix A



Figure 4-1
Excavation Boundaries
Gila River Toxaphene Boundary Site Removal
Gila River Indian Community, Pinal County, Arizona

Appendix B

GALLAGHER & KENNEDY

P.A.

LAW OFFICES

KENNETH VON SCHAUMBURG
OF COUNSEL
KEN.VONSCHAUMBURG@GKNET.COM

1101 PENNSYLVANIA AVE., NW, 6TH FLOOR
WASHINGTON, D.C. 20004
PHONE: (202) 393-0087
FAX: (202) 756-7323
WWW.GKNET.COM

August 6, 2009

VIA US MAIL

Mr. Larry EchoHawk
Assistant Secretary for Indian Affairs
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

Ms. Hilary Tompkins, Solicitor
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

Mr. Jerry Digner, Director
Bureau of Indian Affairs
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

Ms. Cecilia Martinez, Superintendent
Pima Agency, Bureau of Indian Affairs
United States Department of the Interior
P.O. Box 8
Sacaton, AZ 85247

**Re: United States Environmental Protection Agency Demand for
Reimbursement of Costs Expended at Gila River Boundary Site, Gila
River Indian Community, Arizona, Site No. 09-63**

**EXEMPT SETTLEMENT COMMUNICATION PURSUANT TO
SECTION 408 OF THE FEDERAL RULES OF EVIDENCE**

Dear Sirs/Madams:

The United States Environmental Protection Agency ("EPA") is currently pursuing Mr. John M. Williams, Jr., our client, for recovery of costs related to a second remedial action at the Gila River Boundary Site, Gila River Indian Community, Arizona ("Site"). The United States and its departments and agencies, including the Department of Interior, Bureau of Indian Affairs ("DOI"), is a potentially responsible party ("PRP") at the Site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"). Therefore, it is necessary the United States participate in ongoing settlement discussions with EPA in order to avoid litigation in which the United States would be an indispensable party.

Mr. Larry EchoHawk
Mr. Jerry Digner
Ms. Hilary Tompkins
Ms. Cecilia Martinez
August 6, 2009
Page 2

FIRST REMEDIAL ACTION

Beginning in the late 1950's and continuing through the early 1980's, farming operations occurred on the Site. Specifically, an air strip located on the Site was used by crop-dusters as a base of operation for the aerial application of pesticides. During this period, DOI owned the Site and was responsible for its management and leases associated with the Site. Hazardous substances (predominantly toxaphene) associated with aerial pesticide operations allegedly contaminated the Site culminating in a CERCLA remedial action in 1984. The 1984 remedy was conducted by EPA and DOI and included excavation, in-situ treatment of soil, capping, and operation and management ("O&M").

Following the 1984 remedial action, EPA sought recovery of costs in *United States v. South Mountain Farms, Inc., et al* CIV89-1704-PHX-CLH (D. Ariz., 1989). At that time, the United States was identified as a PRP for the contamination and joined in a 1993 Consent Decree settling the matter. Under the Consent Decree, PRPs, including the United States, contributed funds to reimburse EPA's response costs.

SECOND REMEDIAL ACTION

Since the 1984 remedial action, DOI has maintained ownership of the Site and has continued to regulate the use and access of the Site. DOI, as owner and operator of the Site, controlled and had responsibility over the O&M and access to the Site. Despite being responsible for and familiar with the condition of the Site, DOI granted access to the Site by leasing portions to the Yazzie and Thomas families. DOI also allowed the cap to be unearthed through excavation activities that included the installation of water and sewer lines as well as a septic tank. Post holes and evidence of other excavation activity was also found at the Site. The failure to perform the requisite remedial O&M as well as the reentry and subsequent disturbances by the Yazzie and Thomas families, caused the cap, and ultimately the first remedy, to fail. As a direct result, EPA conducted a second remedial action in 2004. EPA now alleges that the 2004 removal action included areas within the area in which the 1984 remedy was conducted as well as areas not addressed by the 1984 remedy, but within the Site boundaries.

CONCLUSION

At all times the Site had been under the ownership, control, and management of DOI. In addition to DOI holding legal title to the Site, DOI demonstrated additional indicia of owner and operator status under CERCLA. Such indicia of ownership and operation include DOI's regulation of the land use at the Site, which involved, among other things, the drafting, negotiating, overseeing, enforcing, and other specific actions regarding leases on behalf of the Gila River Indian Community and individual allottees. Furthermore, as owner and operator of

Mr. Larry EchoHawk
Mr. Jerry Digner
Ms. Hilary Tompkins
Ms. Cecilia Martinez
August 6, 2009
Page 3

the Site after the first removal action, DOI had the responsibility over O&M and power to prevent and abate further damage to the Site and capped remedy.

The 1993 Consent Decree, to which the United States was a party, provided an option for EPA to initiate action to recover subsequent response costs, if incurred. EPA is now seeking subsequent response costs under this option. The United States is liable as the owner and operator of the Site under CERCLA for the recovery of EPA's additional response costs for the contamination within the Site boundaries, which was not addressed by the 1984 remedy, as well as response costs for the additional 2004 remedial activity in the area previously addressed by the 1984 remedy.

Mr. Steven Keller, (202) 514-5465, of the United States Department of Justice is handling this matter on behalf of EPA. I suggest you contact him in regard to coordinating settlement discussions.

Very truly yours,

GALLAGHER & KENNEDY, P.A.

By: / Kenneth von Snaumburg

KVS:pgs
2152223/21484

cc: Ms. Letitia Grishaw, US DOJ, ENRD, EDS
Mr. Steven Keller, US DOJ, ENRD, EES
Ms. Taly Jolish, US EPA, Region IX
Ms. Karen Gaylord, Salmon, Lewis & Weldon, PLC
Mr. John M. Williams, Jr.