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COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CALPINE CONSTRUCTION FINANCE COMPANY, a Delaware limited liability partnership,

Plaintiff/Appellant,

v.

ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona, MOHAVE COUNTY, a political subdivision of the State of Arizona,

Defendants/Appellees.

No. 1 CA-TX 07-0012

Arizona Tax Court No. TX 2004-000696

OPENING BRIEF OF APPELLANT

FENNEMORE CRAIG, P.C. (No. 00022300)
Paul J. Mooney (No. 006708)
Jim L. Wright (No. 010531)
3003 North Central Avenue, Suite 2600
Phoenix, AZ 85012-2913
Telephone (602) 916-5000

Attorneys for Appellant

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Paul J. Mooney (No. 006708)
Jim L. Wright (No. 010531)
3003 North Central Avenue, Suite 2600
Phoenix, AZ 85012-2913
Telephone (602) 916-5000

Attorneys for Appellant

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ABBREVIATIONS AND CITATIONS TO THE RECORD

Plaintiff-Appellant Calpine Construction Finance Company will be referred to hereinafter as "Calpine." The Fort Mohave Indian Tribe will be referred to as "the Tribe." Defendant-Appellee the Arizona Department of Revenue will be referred to hereafter as "the Department." The lease agreement between Calpine and the Tribe will be referred to as "the Lease" and the power plant which is the subject of the Lease will be referred to as "the Facility."

The pleadings and documents filed with the Tax Court will be referenced by the Clerk's Index of Record ("IR"), the item number identifying the document in the Clerk's Index of Record and the particular page or paragraph of the document, if needed.

Attached to this brief are the following: **Appendix One** is the Tax Court's ruling on the merits. **Appendix Two** is the Memorandum Decision of this Court in *State of Arizona ex rel., Arizona Dep't of Revenue v. Pima Grande Development II/Vestar*, 1 CA-TX 97-0013 (June 2, 1998). **Appendix Three** is the Memorandum Decision of this Court in *Allied-Signal, Inc. v. Arizona Dep't of Revenue*, 1 CA-TX 96-0018 (Aug. 14, 1997). **Appendix Four** is a photograph of the property at issue. **Appendix Five** is the Lease.

STATEMENT OF THE CASE

The issue in this appeal concerns whether the real and personal property comprising the South Point Energy Center, (referred to herein as the Facility), is "owned" by the Tribe for Arizona property tax purposes. Under well established case law, the answer is yes. On October 29, 2004, Calpine filed a complaint pursuant to A.R.S. § 42-11005 against the Department and Mohave County in the Arizona Tax Court seeking a refund of property taxes paid for tax years 2003 and 2004. This case concerns the taxation of the Facility which operates as an electrical generation power plant that was built and is operated by Calpine on land leased from the Tribe. Pursuant to the terms of the Lease, Calpine was required to build the Facility to the specifications of the Tribe, and, at the end of the lease term, Calpine must "leave all Improvements in place on the Leased Land in good repair and in a safe condition . . .." (IR – 20, Exhibit 1, § 4.3)

For tax years 2003 and 2004, the Department valued the Facility at a full cash value of $88,000,0000 and $122,576,000, respectively, for Arizona property tax purposes. (IR - 20, ¶ 13) Calpine, in turn, was assessed and it has paid property taxes to Mohave County based on those assessed values. (*Id.*)

Calpine brought this action challenging the imposition of the tax on this property pursuant to 42-11005. It claimed that the Facility is owned by the

Tribe and therefore not taxable under the well-established principles set forth in a long line of Arizona appellate decisions, including: *Maricopa County v. Fox Riverside Theatre Corporation*, 57 Ariz. 407, 412, 114 P.2d 245 (1941); *Havasu Springs Resort Co. v. La Paz County,* 199 Ariz. 349, 18 P.3d 143 (Ct. App. 2001); *Airport Properties v. Maricopa County*, 195 Ariz. 89, 985 P.2d 574 (Ct. App. 1999); *Cutter Aviation v. Maricopa County*, 191 Ariz. 485, 958 P.2d 1 (App. 1997); *Maricopa County v. Novasic,* 12 Ariz. App. 551, 473 P.2d 476 (Ct. App. 1970); and two unpublished decisions that incorporate these decisions by reference[1]—*State of Arizona ex rel., Arizona Dep't of Revenue v. Pima Grande Development II/Vestar*, 1 CA-TX 97-0013 (June 2, 1998); and *Allied-Signal, Inc. v. Arizona Dep't of Revenue*, 1 CA-TX 96-0018 (Aug. 14, 1997).

The parties filed cross-motions for summary judgment. (IR – 21, 27) In addition, the Department filed a motion to strike the memorandum decisions of this Court which Calpine submitted with its motion for summary judgment and which it has attached hereto as Appendix Two and Appendix Three. (IR – 26) The Department also moved to strike a photograph of the property at issue which Calpine submitted with its combined response to the Department's cross-

[1] As discussed in more detail below, Calpine believes that citation to these decisions is appropriate in this case under ARCAP 28. Copies of both decisions are included in the Appendix to this brief.

motion for summary judgment and its reply memorandum in support of its own motion for summary judgment. (IR – 33, 42) That photograph is attached hereto as Appendix Four.

The Tax Court ruled in favor of the Department and entered a judgment incorporating its rationale as set forth in its minute entry attached hereto as Appendix One. (IR – 53, 55) In the same ruling, the Tax Court granted the Department's motions to strike. (*Id.*) Calpine filed a timely Notice of Appeal. (IR – 57) This Court has jurisdiction pursuant to A.R.S. § 12-2101(B).[2]

Prior to Calpine filing this action, the Tribe had brought an action against the Department in federal court relating to the taxability of the same property, identified by cause number CIV 02-1212 PCT-MHM. (IR – 53) The Tribe brought this action in part because it believed the Department was infringing on its sovereign power by imposing the tax at issue on Calpine.[3]

Calpine was not a party to the federal action. (*Id.*) The District Court initially allowed Calpine to intervene into the federal action, but later granted

---

[2] There was a delay from the date the Tax Court ruled on the parties' cross-motions for summary judgment to the date the Tax Court entered judgment due to an automatic stay resulting from Calpine filing for Chapter 11 bankruptcy protection. (IR – 47)

[3] Under the terms of the Lease, Calpine pays a "possessory interest" tax to the Tribe, the amount of which was directly affected by any *ad valorem* tax payments made by Calpine to the State of Arizona.

the Department's motion to dismiss Calpine as an intervenor, ruling that Calpine lacked standing to do so under the federal Tax Injunction Act, 28 U.S.C. § 1341. (*Id.*) The Department argued below that Calpine should be collaterally estopped from pursuing this action, but the Tax Court properly ruled that the District Court never reached the merits of the issue presented in this case. (*Id.*) As the Tax Court stated:

> The only issue decided by the District Court with finality was whether it possessed subject matter jurisdiction. . . . No other issue was, or could have been, decided by the District Court. There is therefore no issue preclusion in this action.

(*Id.*) Thus, the Tax Court found that issue preclusion did not apply to the issue raised in this case. (*Id.*) The Department has not filed an appeal from that portion of the Tax Court's ruling.

STATEMENT OF FACTS

Calpine and the Tribe entered into an amended and restated lease agreement, approved by the Bureau of Indian Affairs, dated August 4, 1999, Lease No. 640-050-99 (the "Lease"). (IR - 20, ¶ 1, Exhibit 1) The Lease was for an initial term of 50 years, with the option to extend the term. (*Id.*, ¶ 3) The Lease was amended once on May 24, 2001 and again on October 17, 2001. (*Id.*, ¶ 4). Pursuant to the terms of the Lease, Calpine leased certain trust land belonging to the Tribe for the purpose of constructing and operating an electric power generating facility with its related improvements, referred to herein as the "Facility." (*Id.*, ¶ 5)

Specifically, the Lease defined the improvements to be constructed and specified that the property had to be used for the "development, construction and operation of an electric generation power plant . . .." (*Id.* ¶ 8)

> 1.8 "Improvements" means **all buildings, structures, improvements comprising the electric generation power plant specified in Section 5.1 and other improvements now existing or hereafter constructed on the Leased Land and any and all betterments thereof, including, without limitation, the Infrastructure Improvements.**
>
> * * *
>
> 1.21 "Property" means the Leased Land and any and all Improvements now or hereafter located thereon.

* * *

5.1 Electric Generation Power Plant. The Leased Land shall be used **for the development, construction and operation of an electric generation power plant** (which phrase shall include a co-generation power plant) and all other ancillary facilities, including but not limited to **pipelines, transmission lines and other structures necessary for the production, transmission and sale of electric power, as well as all streets and roads within the Leased Land necessary for the full development of the Leased Land** (the "Project"). The megawatt capacity of the Project shall be enumerated in Exhibit H [to the Lease].

Id., ¶¶ 6-8

In addition to these provisions,

- Calpine was required to present to the Tribe a "Planned Area Development Plan" for the Tribe's approval and no construction could begin until the Tribe approved of such a plan. (IR – 20, Exhibit 1, at § 8.2.1)

- Calpine was also required to submit to the Tribe "Construction Plans and Specifications" which were required to be "comprehensive" and "include a site plan, grading plans and detailed drawings." (*Id.* at § 8.2.1, 8.2.3)

- Calpine was required to construct the power plant, *i.e.*, the Facility. (IR – 20, Exhibit 1, § 8.1)

- Calpine was required to post a performance bond. (*Id.* at § 6.4)

- Calpine was required to maintain insurance on the Facility and both Calpine and the Tribe were required to be named as insureds. (*Id.* at §§ 12.1, 12.1.2)

- Calpine could not sublease the Facility without the Tribe's approval. (*Id.* at § 26.4)

- Calpine could not transfer any interest in the leasehold, including improvements, without lessor's consent. (*Id.*)

Significantly, Calpine is required to maintain and repair the Facility throughout the term of the Lease to assure that it remains in good working condition. Specifically, the Lease provides:

> 14.1 Calpine's Duty to Maintain. Throughout the term of this Lease, Calpine shall, at Calpine's sole cost and expense, maintain the Property and all Improvements thereon in proper working condition and repair (including landscaping and parking), making all necessary substitutions and replacements.
>
> 14.2 Calpine's Duty to Repair. If any Improvements on the Leased Land shall be damaged or destroyed by any cause whatsoever during the term of this Lease, Calpine shall, subject to Section 8 hereof, with reasonable promptness rebuild, repair or restore the same, to at least substantially the condition existing immediately prior to such damage or destruction.

IR – 20, Exhibit 1, § 14.1, 14.2 (emphasis added).

Calpine is expressly prohibited from removing or demolishing any of the Facility "without written approval of the Tribe and the Secretary [of the Interior of the United States or his authorized representative.]" (*Id.* § 8.2.5) Most importantly, consistent with its duty to maintain an operating power plant, the

Lease specifically provides that Calpine must turn over the Facility to the Tribe at the end of the term of the Lease.

> 4.3 Surrender of Premises. Upon the expiration or earlier termination of the Lease Term, **Calpine shall leave all Improvements in place on the Leased Land in good repair and in a safe condition; provided,** however, that Calpine shall remove equipment, supplies and other personal property, including trade fixtures, which have no economic value to the Tribe from the Leased Land within sixty (60) days after the expiration or termination of the Lease Term upon the written request of the Tribe given any time prior to the expiration or termination of the Lease Term.

(*Id.*, §4.3)[4] As noted above, the "Improvements" include "all buildings, structures, improvements comprising the electric generation power plant . . .." (*Id.*, §1.8)

For tax years 2003 and 2004, the Department valued the Facility at a full cash value of $88,000,0000 and $122,576,000, respectively for Arizona property tax purposes. (*Id.*, ¶ 13) Calpine, in turn, was assessed and it paid property taxes to Mohave County based on those values. (*Id.*) By so doing, the Department ignored the facts and Arizona law that dictate that Calpine is not the

[4] As noted in this provision of the Lease, Calpine is permitted to remove equipment, supplies, tools and other small items of personal property "which have no economic value to the Tribe," but only upon the Tribe's written approval. (*Id.*)

"owner" of the Facility for property tax purposes and, therefore, may not be taxed as such.

The primary issue for determination is whether the terms of the Lease, when read as a whole, dictate that the Tribe is the owner of the Facility under Arizona property tax law. Applying settled Arizona case law, if the Lease is read "as a whole" it is clear that the Tribe, and not Calpine, is the "owner" of the Facility for property tax purposes. Consequently, the Facility is not taxable to Calpine. Similarly, the Facility is not taxable to the Tribe because the Tribe is a sovereign nation and its real and personal property is exempt from Arizona's property tax.[5] Thus, the property taxes assessed to Calpine for the Facility are illegal under Arizona law.

[5] As noted earlier, Calpine is still taxed annually by the Tribe on its leasehold interest in the Facility.

ISSUES PRESENTED FOR REVIEW

1. Whether, for Arizona property tax purposes, the Facility is deemed to be owned by the Tribe and therefore not subject to Arizona property taxation?

2. Whether the Tax Court erred by assuming certain facts that are not in the record to reach its decision?

3. Whether the Tax Court erred by assuming that Calpine would breach the implied covenant of good faith and fair dealing in its Lease with the Tribe by turning over to the Tribe a worthless or non-functioning power plant at the end of the Lease term?

4. Whether the Tax Court erred by interpreting the Lease with the Tribe in a manner contrary to Arizona law?

5. Whether the Tax Court erred by striking from the record the unpublished decisions of this Court and a photograph of the Subject Property?

6. Whether Calpine is entitled to an award of its attorneys' fees incurred on appeal and in the Tax Court?

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for a grant of summary judgment is de novo as to both factual and legal determinations of the trial court. *Blum v. State,* 171 Ariz. 201, 829 P.2d 1247 (App. 1992). In reviewing a summary judgment, this Court views the facts and evidence in the light most favorable to the party against whom summary judgment was granted and draws all reasonable inferences in favor of that party. *West v. Salt River Agricultural Improvement & Power District,* 179 Ariz. 619, 623, 880 P.2d 1165, 1169 (Ct. App. 1994). Summary judgment is inappropriate where the facts, even if undisputed, would allow reasonable minds to differ. *Orme School v. Reeves,* 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (App. 1990). This Court may uphold the ruling of the trial court only if there is no genuine issue of material fact, the undisputed material facts support but one inference, and the moving party is entitled to judgment under the substantive law. *Taft v. Ball,* 169 Ariz. 173, 176, 818 P.2d 158, 161 (App. 1991); Rule 56(c), Arizona Rules of Civil Procedure.

In addition, there are certain principles relating to statutory construction that this Court should apply when reviewing the Tax Court's ruling. First, any ambiguities in tax statutes are to be resolved in favor of the taxpayer. *People's Choice TV Corporation, Inc. v. City of Tucson,* 202 Ariz. 401, 46 P.3d 412

(2002). Second, tax statutes are interpreted liberally in favor of the taxpayer and strictly against the state. *Wilderness World, Inc. v. Department of Revenue,* 182 Ariz. 196, 895 P.2d 108 (1995). Finally, the words of a statute should not be read to gather new objects of taxation "by strained construction or implication." *Arizona State Tax Commission v. Staggs Realty,* 85 Ariz. 294, 337 P.2d 281 (1959). Applying these principles and the proper standard of review should result in this Court reversing the decision of the Tax Court.

II. SUMMARY OF CURRENT ARIZONA LAW

Article IX, Section 2 of the Arizona Constitution provides that property of governmental entities is exempt from property tax. This exemption is further codified in Arizona Revised Statutes § 42-11102. It applies equally to property of an Indian Tribe, whose reservation lands are held in trust by the federal government and are, therefore, considered to be "federal" property.

Arizona appellate courts have consistently and repeatedly held that, where an improvement is constructed on land leased from a governmental entity and there are substantial restrictions in the lease on the control and disposition of the improvement by the lessee, the improvement is treated as if owned by the governmental entity for property tax purposes. *Maricopa County v. Fox Riverside Theatre Corporation*, 57 Ariz. 407, 412, 114 P.2d 245

(1941); *Havasu Springs Resort Co. v. La Paz County,* 199 Ariz. 49, 18 P.3d 143 (Ct. App. 2001); *Airport Properties v. Maricopa County*, 195 Ariz. 89, 985 P.2d 574 (Ct. App. 1999); *Cutter Aviation v. Maricopa County*, 191 Ariz. 485, 958 P.2d 1 (Ct. App. 1997); *Maricopa County v. Novasic,* 12 Ariz. App. 551, 473 P.2d 476 (1970); *State of Arizona ex rel., Arizona Dep't of Revenue v. Pima Grande Development II/Vestar*, 1 CA-TX 97-0013 (Ct. App. June 2, 1998); and *Allied-Signal, Inc. v. Arizona Dep't of Revenue*, 1 CA-TX 96-0018 (Ct. App. Aug. 14, 1997).

These cases further recognize that, as a general rule in Arizona, a lessor, as the owner of the land, owns all permanent improvements on the land because permanent structures placed by a tenant upon leased premises and attached to the realty are deemed to be real property and belong to the lessor. This general rule is subject to the exception that the parties, by express agreement, may treat the building or improvements as belonging to the tenant, in which case the right to remove the building at the termination of the lease is incidental to that ownership. *Novasic, supra,* 12 Ariz. App. at 553, 473 P.2d at 479.

The parties to a lease can treat improvements as the lessee's by granting control over the improvements to the lessee. Even if this is done, as it is in this case, "[t]he *sine qua non* of ownership is the right to control and dispose of the

asset." *Cutter, supra,* 191 Ariz. at 490-91, 958 P.2d at 6-7. Therefore, "where the putative taxpayer leases property and the lease significantly restricts the lessee's authority to control and dispose of the improvements thereon, the lessee should not be considered to be the 'owner' of the improvements." *Id.* at 491, 958 P.2d at 7; *accord Airport Properties, supra,* 195 Ariz. at 93-97, 985 P.2d at 578-82). This Court has found, in circumstances similar to those present here:

> The contract which, on the one hand, "transfers and assigns" an estate in property, and on the other hand withholds from the transferee or assignee all right of control over the property, and all right of disposal of the property, is lacking in the elements of a sale or transfer of title, and vests no rights of ownership of title in the transferee, for the reason one who has no right to control, handle or dispose of a thing cannot be considered its owner, for the essential attributes of ownership of property, real and personal, are the rights in the owner to control, handle and dispose of the thing owned. (Citations omitted.)
>
> **These authorities thereby instruct that the *sine qua non* of ownership is the right to control and dispose of the asset.**

Cutter, 191 Ariz. at 490, 958 P.2d at 6 (emphasis added).

Based on the Arizona case law and the facts of this case, the Tax Court erred in entering judgment in favor of the Department.

III. THE *NOVASIC* LINE OF CASES DEMONSTRATES THAT THE TRIBE OWNS THE FACILITY FOR ARIZONA PROPERTY TAX PURPOSES.

The facts and law establish that—for Arizona property tax purposes—Calpine is not the owner of the Facility. The Lease provision prohibiting

Calpine from disposing of the Facility, and several other provisions in the Lease, demonstrate that the Tribe owns the Facility. Each of the relevant Arizona cases will be discussed briefly below.

A. *Novasic*

In *Novasic*, this Court relied upon the general principles set forth in the preceding section, together with the lease provisions at issue therein to determine that a building being leased from a governmental entity should be treated as a leasehold, rather than an ownership interest. *Novasic*, *supra,* 12 Ariz. App. at 553-555, 473 P.2d at 478-480. This was true even though the tenant had built the building and had control over the building during the lease term, and, as in this case, the improvements "became" the property of the lessor only upon termination of the lease. *Id.* In *Novasic*, this Court rejected the notion that the lessee "owned" the improvements simply because the lease provided that at the end of the lease, the improvements "become" the property of the lessor.

The facts in *Novasic* are remarkably similar to those here. In *Novasic*, the taxpayer's predecessor-in-interest had entered into a lease with the City of Phoenix for certain unimproved real property at Phoenix Sky Harbor Airport. *Id.* The term of the lease was for fifty-two years and the lease required the

lessee to erect, at his own expense, an office building on the site. *Id.* at 552; 473 P.2d at 477. These improvements were constructed and later taxed by Maricopa County. *Id.*

The taxpayer brought an action claiming that he did not own the improvements erected upon land he leased from the City of Phoenix and, therefore, the building was not subject to property taxation. This Court articulated the parties' contentions as follows:

> The contention of the parties is relatively simple. The plaintiff contends the building is real property belonging to the City of Phoenix and therefore exempt from taxation . . .. Defendant contends that upon completion of the building, title thereto vested in plaintiff and title would not be vested in the City of Phoenix until the happening of certain contingencies and therefore, the building is taxable. Both parties agree the terms of the lease are controlling of this question as a matter of law.

Id. at 553; 473 P.2d at 478. The taxing authority contended that the taxpayer owned the building while the lease was in effect, based upon three provisions of the lease: (1) the lease provided that in the event of a default by the lessee, "the office building, all improvements and fixtures, on said premises shall be retained by and belong to the said lessor;" (2) upon termination of the lease, all improvements on the property "shall thereupon become the property of the lessor without compensation by him to the lessee;" and (3) in the event of

bankruptcy of the lessee, the lessor could terminate the lease and "the title to the building shall then vest in the lessor." *Id.*

The Court rejected the government's reliance upon these three provisions, reasoning:

> A careful reading of the lease leads to only one conclusion—that the drafter of the lease agreement was attempting to foreclose the possibility that any right of third persons could intervene to defeat lessor's paramount title, or as was stated in *People ex rel. International Navigation Co. v. Barker*, 153 N.Y. 98, 47 N.E. 46 (1897):
>
> > When the lease in question provides that the sheds are to become the property of the city at its expiration, the language does not warrant the inference of an intermediate ownership, unless we attach an undue significance to the word "become" . . . its use was evidently to prevent any misunderstanding as to a right of removal. . . . It was to make the city's ownership definite. The provision followed naturally, and not without some degree of pertinence, upon the obligation imposed upon the lessee to erect the shed. 47 N.E. at 47.

Id. at 554; 473 P.2d at 479.

The Court analyzed several provisions of the lease, concluding that "the lease intended ownership of all the improvements in the lessor as real property during the term of the lease." *Id.* at 555; 473 P.2d at 480. For example, the lease required the lessee to erect the improvements and to post a performance bond. *Id.* at 554; 473 P.2d at 479. The lease also restricted the use the tenant

could make of the improvements. *Id.* The monthly rental was for the "ground and premises" and was the greater of a fixed sum or a percentage of the rentals received by the lessee from the building itself. *Id.* The lessor had the right to approve all building plans prior to construction. *Id.* The lessee was required to provide fire insurance, the amount of which was the full replacement cost of the improvements. *Id.* Moreover, the lessee was required to provide insurance for the benefit of the lessor and to name both the lessee and lessor as insureds. *Id.* Further, the lease provided that the lessee "shall not sublease any portion of the premises without the written consent of the lessor." *Id.*

Based upon its reading of these and other provisions of the lease, the Court held:

> We therefore hold that from a reading of the entire lease it is apparent that the parties intended that the title acquired by the tenant in the office building was of a leasehold interest only, rather than total ownership of the building or personal property.

Id. As discussed below, application of the principles articulated by this Court in *Novasic* to the facts of this case make it clear that Calpine does not own the Facility here.

B. *Havasu Springs*

The result is the same under the reasoning in *Havasu Springs Resort Co. v. La Paz County,* 199 Ariz. 349, 18 P.3d 143 (Ct. App. 2001). In that case,

taxpayer, as in this case, had constructed improvements on the government's land. La Paz County imposed a tax on the improvements as though the taxpayer owned them. The Tax Court granted the taxing authorities summary judgment and this Court reversed. The Court framed the issue, which is identical to the issue here, as follows:

> The appeal requires us to determine whether [taxpayer] is the owner of improvements it constructed on land leased from the United States Bureau of Land Management ("BLM"). If [taxpayer] is not the owner, and its interest instead is merely possessory, that interest is not subject to the tax. The undisputed facts show that [taxpayer] is not the owner. Accordingly, we reverse and remand for the entry of judgment in [taxpayer's] favor.

Id. at 350, 18 P.3d at 144. The Tax Court had relied upon a provision of the lease allowing the taxpayer, in the Tax Court's view, to "remove the improvements at the termination of the lease, as long as [it] restore[s] the land." *Id.* at 351, 18 P.3d at 145.

This Court reviewed additional provisions of the lease and found that the taxpayer's rights could hardly be deemed to constitute "'full authority to ... destroy' or dispose of the improvements." *Id.* The Court also reviewed each of the provisions relied upon by the taxing authorities and concluded:

> Viewed as a whole, the lease does not bear out the tax court's conclusion that [taxpayer] owned the improvements it constructed on BLM land. On the contrary, both the general rule that a lessee does not own improvements and the terms of the lease

> lead inexorably to the conclusion that [taxpayer] has only possessory interest in the improvements, which are owned by the Government. Accordingly, [taxpayer] and not the County is entitled to judgment as a matter of law.

Id. at 352, 18 P.3d at 146.

C. ***Cutter Aviation***

Similarly, under *Cutter Aviation, Inc. v. Arizona Department of Revenue*, 191 Ariz. 485, 958 P.2d 1 (Ct. App. 1997), Calpine does not own the Facility. In *Cutter,* the Court considered the dispositive criteria for determining ownership of lessee-constructed improvements on land owned by a public body, the City of Phoenix. Cutter Aviation and Southwest Airlines both leased land from the City of Phoenix at Sky Harbor International Airport. The question before the Court was whether for property tax purposes Cutter and Southwest "owned" the improvements they had built on City land or whether they held only possessory interests in those improvements.

The Court observed that "[f]or taxation purposes, 'ownership' has traditionally meant ownership in fee, which includes the rights of control and disposal. [Citations omitted]." *Cutter,* 191 Ariz. at 491, 958 P.2d at 7. The Court prefaced this comment by stating that "one who has no right to control, handle or dispose of a thing cannot be considered its owner, for the essential attributes of ownership of property, real and personal, are the rights in the owner

to control, handle and dispose of the thing owned." *Cutter,* 191 Ariz. at 490, 958 P.2d at 6. The Court noted that in determining whether the property was subject to the possessory interest tax then in place, it must look to the legislative intent behind the statute imposing the tax, stating:

> The legislature's purpose in enacting the possessory interest taxation scheme was to extend property taxation to property interests that previously had not been taxed. Accordingly, its exclusion of ownership interests in the possessory interest definition, A.R.S. § 42-681(3), was intended to exclude property already subject to property taxation. **In this context, ownership should be interpreted to mean the type of property interest that has traditionally been subject to taxation, *i.e.*, fee interests with the authority to control and dispose of the property, rather than leasehold interests.**
>
> Improvements that a lessee has full authority to control or destroy need not be made subject to the possessory interest tax because they are already taxable. **On the other hand, where the putative taxpayer leases property and the lease significantly restricts the lessee's authority to control and dispose of the improvements thereon, the lessee should not be considered to be the "owner" of the improvements.**

191 Ariz. at 491, 958 P.2d at 7 (emphasis added).

The *Cutter* Court went on to recite the factors that led it to its conclusion, many of the same factors present in *Novasic* and also present in the Lease at issue here. The Court noted that the leases with Cutter and Southwest mandated the improvements were to be built and dictated the uses to which they could be put, as well as required the city's approval of the building specifications. The leases

also required Southwest and Cutter to maintain full replacement cost insurance on the leasehold improvements. The interests in the leaseholds could not be transferred, including any interest in the improvements, without the city's prior written consent. Additionally, upon termination of the leases, the improvements could neither be removed nor destroyed by Southwest or Cutter, but became the City's property. 191 Ariz. at 491, 958 P.2d at 7. The Court concluded that on these facts, "Southwest and Cutter did **not** enjoy traditional rights of control and disposition of the improvements" and they were **not** owners of the improvements for the possessory interest tax. *Id.* (emphasis added).

D. ***Airport Properties***

This Court confirmed these principles in *Airport Properties v. Maricopa County*, 195 Ariz. 89, 985 P.2d 574 (Ct. App. 1999). *Airport Properties* was a virtual mirror image of the *Cutter* case. The Court performed the now routine analysis of the lease provisions and determined that the plaintiff in *Airport Properties* did not own the improvements for property tax purposes. A significant additional holding in *Airport Properties* was the Court's ruling that the Legislature had the legal authority to repeal the prior tax on leasehold or "possessory" interests, which it did in 1995.

E. *Pima Grande*

Consistent with these cases and lending further support to Calpine's position is this Court's memorandum decision in *State of Arizona ex rel., Arizona Dep't of Revenue v. Pima Grande Development II/Vestar*, 1 CA-TX 97-0013 (June 2, 1998), a copy of which is attached as Appendix Two. *Pima Grande* concerned improvements (the "Scottsdale Pavilions" shopping center) constructed on the Salt River Pima-Maricopa Indian Reservation. There, the putative taxpayers, leased the land from the Indian tribe and constructed various improvements, such as a Target and Mervyns department store.[6]

In particular, *Pima Grande* involved the construction of two leases with the tribe, one of which provided that: (1) the lessee held title to any buildings or improvements it constructed on the property during the term of the lease; and (2) the lessor had no right, title or interest in such property "of any nature" during the term of the lease; and (3) the "Lessee shall be solely entitled to any rights or benefits associated with **its ownership** of and title to such improvements . . .." (Appendix Two at 8) These facts, the Department contended, rendered the *Novasic* line of cases inapplicable.

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[6] Citation to *Pima Grande* is proper, as discussed below, in part because the Department is a party to both cases and the doctrine of collateral estoppel is implicated by its argument here about one of the provisions in the Calpine Lease that is identical to the argument the Department made and lost in *Pima Grande.*

This Court rejected this argument, stating:

> We do not agree with [the Department's] analysis. The provision quoted above may "clearly and unambiguously" state that the taxpayers hold title to the improvements during the terms of their leases. However, the provision, when viewed within the context of the entire lease does not support the proposition that the lease grants Pima Grande II true "ownership" of the improvements.
>
> * * *
>
> As we held in *Cutter Aviation,* a lessee whose lease substantially restricts his right to control and dispose of the leasehold improvements is not considered the owner. 243 Ariz. Adv. Rep. at 56. Under the foregoing language, the right to control and dispose of the improvements belongs to the lessor, not the lessee.

Id. at 9.

Similarly here, the Lease provides that: "Throughout the Lease Term, all buildings, improvements fixtures . . . at any time constructed, placed or maintained on any part of the Leased Land shall be the property of Calpine." (IR – 20, Exhibit 1, § 8.6) *Pima Grande* makes it clear, however, that this provision does not confer ownership of the Facility upon Calpine and it does not alter the legal analysis that applies to taxation of possessory interests.

F. ***Allied-Signal***

There is one additional unpublished decision of which Calpine is aware that bears on the issue presented here, although its resolution was dictated by the language of a different statute that specifically required the government lessor to

acquire title to the leased improvements at the end of the lease term in order to qualify for a favorable tax classification (assessment at 1% of value). That case, *Allied-Signal, Inc. v. Arizona Dep't of Revenue*, 1 CA-TX 96-0018 (Aug. 14, 1997), like *Cutter* discussed herein, also involved a lease of land located at Sky Harbor airport by Allied-Signal. Because the terms of its lease allowed Allied-Signal to remove the improvements it constructed at the end of the lease term, this Court ruled that Allied-Signal's lease did not qualify for the favorable tax treatment. A copy of the *Allied-Signal* case is included as Appendix Three. Again, for the reasons discussed below, the Department was a party to that case, so citation to it is proper here.

G. Summary of Arizona Case Law.

Summarizing the holdings of these cases, if the control and disposal of the improvements is significantly restricted, and there is no express language in the lease indicating an intent by the parties to treat the improvements as belonging to the lessee, the improvements are the property of the land owner/lessor. Here, the Lease must also be read as a whole and "each part must be read in light of all other parts of the lease." *Novasic*, 12 Ariz. App. at 553; 473 P.2d at 478. A careful reading of the Lease leads to only one conclusion – "that the parties intended that the title acquired by the tenant in the [improvements] was of a

leasehold interest only rather than total ownership of the [improvements]." *Id.* at 554; 473 P.2d at 479.

Set forth below is a summary of the specific types of lease provisions analyzed by this Court in the *Novasic* line of cases. Citation to the relevant provisions in the Lease between Calpine and the Tribe are also provided.

- The leases required that the lessee construct specified improvements. (IR – 20, Exhibit 1, §§ 8.1, 5.1)
- The leases specified the use of the leased property. (*Id.* at § 5.1)
- The lessee was required to post a performance bond. (*Id.* at § 6.4)
- The lessee was required to maintain insurance on the improvement and both the lessor and lessee were required to be named as the insured. (*Id.* at §§ 12.1. 12.1.2)
- The lessee could not sublease the improvement without the lessor's approval. (*Id.* at § 26.4)
- The lessor had the right to approve any building plans. (*Id.* at § 8.2.3)
- The lessee could not transfer any interest in the leasehold, including improvements, without lessor's consent. (*Id.* at § 26.4)
- **Upon termination of the lease, the improvements are not subject to removal by the lessee.** (*Id.* at § 4.3)

As the cited Lease provisions show, all of the above enumerated lease provisions are incorporated into the Lease between Calpine and the Tribe. With an even more complete array of lease provisions in the Lease than in any of the

reported cases, the only possible conclusion is that the Facility at issue here is not subject to Arizona property tax because the Tribe is the "owner" under settled Arizona law. The Tax Court's contrary ruling here was erroneous and it should be reversed.

IV. THE TAX COURT'S RULING IS FLAWED.

A. The Tax Court Ignored The Relevant Terms Of The Lease And Arizona Case Law.

In its ruling, the Tax Court recognized that: (1) "The lease requires Calpine to maintain the improvements in good repair;" (2) Calpine had no authority to destroy the Facility during the term of the Lease; and (3) Calpine was required to turn over the Facility to the Tribe at the end of the lease term in good working condition. (IR – 53) Notwithstanding its recognition that this Court held in *Cutter* that "the right to destroy the property demonstrates ownership," the Tax Court first ruled that Calpine's failure to possess such a right was of little relevance. It stated:

> While the *Cutter* court stated that the right to destroy the property demonstrates ownership, *supra* at 491, it did not expressly state the converse, that absence of the power to destroy proves lack of ownership. The right to destroy is a right which holds more significance in property law theory than its relevance in real life can justify: no rational economic actor would destroy a multi-million dollar industrial facility merely because he has the right to do so. Therefore, the absence of that right weighs but little in the balance.

IR – 53 (Appendix One). In essence, the Tax Court either ignored or misconstrued the holdings of this Court in the *Novasic* line of cases. Those cases are not distinguishable from this one and the Tribe should be deemed to own the Facility when the Lease is read "as a whole."

Next, the Tax Court ignored the importance of the Tribe's reversionary interest in the Facility. The Tax Court found that interest was "of little significance" because it presumed—without any support—that the Facility would have little or no value when it was eventually turned-over to the Tribe at the end of the Lease term.

> The lease requires Calpine to maintain the improvements in good repair, but all this means is that at the conclusion of the lease the Tribe will have fifty-year-old or sixty-five year-old equipment. . . . Even assuming that the equipment is still functioning, its usefulness would be virtually nil; it would be old and prone to breakdown, spare parts would be difficult if not impossible to obtain, and the cost of operation would be far greater than that of more current equipment in competing facilities.
>
> This distinguishes the present lease from those of buildings in *Novasic* and *Cutter*. Although buildings do lose some of their economic value as they age, the rate of obsolescence is far slower than that of productive facilities, which face the dual assault of wear and tear and technological advance.

IR – 53 (Appendix One). The Tax Court further concluded that "the Tribe's retention of the reversionary right, ordinarily a key indicium of the lessor's

ownership, is so attenuated by the terms of the lease that it is no longer 'significant and genuine.'" (*Id.*)

In reaching this conclusion, the Tax Court not only engaged in admitted speculation, it ignored the express terms of the Lease. Under the Lease, Calpine is required to "maintain" the Facility, "repair" the Facility and turn it over to the Tribe "in good repair" and condition. The Lease provides:

> 14.1 Calpine's Duty to Maintain. Throughout the term of this Lease, Calpine shall, at Calpine's sole cost and expense, maintain the Property and all Improvements thereon in proper working condition and repair (including landscaping and parking), making all necessary substitutions and replacements.
>
> 14.2 Calpine's Duty to Repair. If any Improvements on the Leased Land shall be damaged or destroyed by any cause whatsoever during the term of this Lease, Calpine shall, subject to Section 8 hereof, with reasonable promptness rebuild, repair or restore the same, to at least substantially the condition existing immediately prior to such damage or destruction.

IR – 20, Exhibit 1, § 14.1, 14.2 (emphasis added).

Furthermore, Calpine is expressly prohibited from removing or demolishing any of the Facility "without written approval of the Tribe and the Secretary [of the Interior of the United States or his authorized representative.]" (*Id.* § 8.2.5) Moreover, the Lease specifically provides that Calpine must turn

over the Facility to the Tribe at the end of the term of the Lease "in good repair and in a safe condition." (IR – 20, Exhibit 1, § 4.3)

In addition, the Tax Court ignores that buildings can survive for "hundreds of years" but only if regular repairs are made. For example, the roof on a building will wear out long before the walls and foundation will. The fact that the roof on a structure may have to be replaced or significantly and consistently repaired, however, does not affect the ownership analysis. Indeed, the entire premise of the parties' negotiation of the Lease contemplated that Calpine would turn-over a fully-functioning and well-maintained co-generation power plant when the Lease is over.

Accordingly, when the Lease is viewed "as a whole," it is clear that under the *Novasic* line of cases, the Tax Court erred in its determination here. There is simply no support in the record to support the Tax Court's speculation that Calpine will turn over to the Tribe a worthless power plant at the end of the Lease or, in the words of the Tax Court, "a husk exhausted of all economic potential." IR – 53 (Appendix One).

B. The Tax Court's Ruling Assumes Calpine Will Breach The Implied Covenant of Good Faith And Fair Dealing.

The Tax Court's conclusion and speculation are not only contrary to the express requirements imposed on Calpine by the Lease, they violate basic tenets

of contract construction. In particular, there is in Arizona an implied covenant of good faith and fair dealing in every written contract. *Darner Motor Sales, Inc. v. Universal Underwriters Ins.*, 140 Ariz. 383, 682 P.2d 388 (1984). The Lease—viewed as a whole—clearly contemplates that Calpine will turn over to the Tribe an operating power plant in good repair and in a safe condition. Yet, the Tax Court assumed it would not do so. This assumption is unfounded, and it violates the canons of contract interpretation required under Arizona law.

V. THE DEPARTMENT CANNOT TAX CALPINE'S POSSESSORY INTEREST IN THE FACILITY.

The Arizona Constitution vests the Legislature with all legislative authority in this state. Ariz. Const. Art. IV, Part 1, § 1. It specifically recognizes that the Legislature is vested with sole authority for determining "the manner, method and mode of assessing, equalizing and levying taxes of the State of Arizona" (Ariz. Const. Art. IX, § 11), and that property in Arizona, unless specifically exempted by the Constitution, "shall be subject to taxation to be ascertained **as provided by law.**" Ariz. Const. Art. IX, § 2(6). **"As provided by law"**—that is the only way taxes may be levied, assessed and collected against taxable property in Arizona. The Legislature is the branch of government which must provide the required law.

The Arizona Supreme Court has recognized these principles, holding that while Arizona has the power under its Constitution to tax leasehold interests on government-owned property, where it does not specifically do so by enabling legislation, the interests are not taxable. In *Maricopa County v. Fox Riverside Theatre Corporation*, the Court stated:

> After a careful examination of the statutes from early territorial days to the present time, we can find therein no specific reference to the taxation of leasehold interests of this nature [in public property], nor so far as we have been able to ascertain, have the taxing authorities ever attempted to exercise this power.

57 Ariz. 407, 412, 114 P.2d 245 (1941). In *Fox Riverside,* because there was no reference in the statutes to taxation of leaseholds, and since the Legislature had "not expressly provided that leaseholds of this nature should be taxed, and [had] set up no machinery by which such a taxation could be carried into effect," the Court held that such a tax could not be assessed. *Id.* at 414, 114 P.2d at 248. "If the Legislature desires to change the present law," stated the Court, "it has ample power to do so."[7] *Id.* at 415, 114 P.2d at 248.

Thus, just as the Department may not subject the Facility to property taxation because it is owned by the Tribe, the Department may not subject any

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[7] Arizona's courts have reaffirmed this reasoning in numerous cases since *Fox Riverside* was decided. *See, e.g., Peabody Coal Co. v. Navajo County,* 117 Ariz. 335, 572 P.2d 797 (1977); *Pima County v. ASARCO,* 21 Ariz.App. 406, 520 P.2d 319 (1974); *Airport Properties, supra.*

leasehold interest of Calpine in that Facility to a possessory interest tax, since no such taxing scheme exists.

VI. THE TAX COURT ERRED IN STRIKING THE PRIOR MEMORANDUM DECISIONS OF THIS COURT AND THE PHOTOGRAPH OF THE FACILITY.

A. The Citation Of Unpublished Decisions Is Permitted Here.

As noted above, Calpine attached to its motion for summary judgment this Court's memorandum decisions in *State of Arizona ex rel., Arizona Dep't of Revenue v. Pima Grande Development II/Vestar*, 1 CA-TX 97-0013 (June 2, 1998) and *Allied-Signal, Inc. v. Arizona Dep't of Revenue*, 1 CA-TX 96-0018 (Aug. 14, 1997). Calpine properly submitted those decisions to the Tax Court and it erred in striking them.

Rule 28(c), Arizona Rules of Civil Appellate Procedure, specifically provides:

> Memorandum decisions shall not be regarded as precedent nor cited in any court[8] **except for** (1) the purpose of establishing the defense of res judicata, **collateral estoppel**, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to

[8] Calpine is unaware of any rule prohibiting the citation of unpublished decisions in the trial court. In fact, Rule 1, ARCAP, expressly defines the scope of those rules as applying only to the two divisions of the Court of Appeals and the Supreme Court.

> publish an opinion, grant a motion for reconsideration, or grant a petition for review.

Emphasis added.

The purpose for citing the *Pima Grande* and *Allied-Signal* decisions was to demonstrate to the Tax Court that the very arguments raised by the Department have been specifically rejected by this Court and that collateral estoppel should apply to preclude the Department from arguing to the contrary.

1. Collateral Estoppel Is A Valid Concept In Arizona.

Below, the Department erroneously argued that "offensive collateral estoppel" is prohibited against the Department. The Department is wrong. The United States Supreme Court has opined that "offensive collateral estoppel" is permissible. *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 99 S. Ct. 645 (1979). In *Parklane*, the court discussed the differences in the concepts of offensive and defensive collateral estoppel and stated:

> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Id. at 332, 99 S. Ct. at 652.

Arizona courts have, similarly, declined to bar the use of "offensive collateral estoppel." Although *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 562 P.2d 360 (1977) seemed to disapprove of this concept, based on the holding in *Spettigue v. Mahoney*, 8 Ariz. App. 281, 445 P.2d 557 (1968), this older decision was based on the *Restatement (First) of Judgments, § 93*. After these decisions, the *Restatement (Second) of Judgments § 29* was adopted in 1982. As stated in *Wetzel v. Arizona State Real Estate Department*, 151 Ariz. 330, 727 P.2d 825 (1986):

> The rationale for approving the offensive use of collateral estoppel is explained in the comment to section 29 as follows:
>
> A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process. In the absence of circumstances suggesting the appropriateness of allowing him to relitigate the issue, there is no good reason for refusing to treat the issue as settled...

Id. at 333, 727 P.2d at 828. The *Wetzel* court further stated: "The most important factor, however, is whether the party against whom preclusion is sought had a full and fair opportunity to litigate the issue in the prior proceeding." *Id.* at 334, 727 P.2d at 829.

For example, in the case of *Pima Grande*, the Department not only fully litigated the issue in the Arizona Tax Court, it also fully briefed and argued the issue before this Court and it lost. By raising this issue again here, the Department is attempting to get a third bite at the apple, which is the very reason it should be precluded from doing so by collateral estoppel. It is hard to conceive of a factual situation that is more ripe for application of the doctrine of collateral estoppel than the one before this Court.

In fact, *Campbell v. SZL Properties, Ltd*, 204 Ariz. 221, 62 P.3d 966 (Ct. App. 2003) rendered superfluous the distinction between "offensive" and "defensive" collateral estoppel, stating:

> As was the trial court, we would be reluctant to rely on this offensive-defensive dichotomy in determining the applicability of the collateral estoppel doctrine on the facts of this case.

Id. at 223, 62 P.3d at 968. Another Arizona case cited by the Department below, *Hullett v. Cousin*, 204 Ariz. 292, 63 P.3d 1029 (2003), states:

> Collateral estoppel, or issue preclusion, applies when an issue was actually litigated in a previous proceeding, there was a full and fair opportunity to litigate the issue, resolution of the issue was essential to the decision, a valid and final decision on the merits was entered, and there is common identity of the parties.

Id. at 297, 63 P.3d at 1034.

As outlined below, in this case Calpine can demonstrate that all of the elements necessary to invoke collateral estoppel are present.

2. The Ownership Issue Was Litigated In Both Cases.

The heart of the appeal in *Pima Grande* was the very issue which is being litigated in this case. The key issue is described on page 2 of the *Pima Grande* decision, which states:

> Whether the taxpayers "owned" the improvements the taxpayers built **on the leased reservation land.**

(Emphasis added). This phrase could apply directly to describe the issue in this case.

The same is true of *Allied-Signal*. Indeed, the resolution of that case also turned on the issue of "ownership" of the improvements, and the parties' rights upon termination of the lease in that case.

3. There Was A Full And Fair Opportunity To Litigate The Issues In Both Cases.

As is evidenced from this Court's decisions, both the *Pima Grande* and *Allied-Signal* cases proceeded through the Tax Court and both were subject to complete review on appeal. While there are situations where an appeal is not available which could affect this part of the test for collateral estoppel, these two cases are not affected by this part of the collateral estoppel test. *State v. One*

Single Family Residence, 193 Ariz. 1, 969 P.2d 166 (Ct. App. 1997)("The availability of appeal is important in determining whether there has been a full and fair opportunity to litigate."). Obviously, given the fact that both cases were decided on appeal, this element is satisfied here.

4. Resolution Of The Issue Was Essential To The Decisions.

The issue of ownership and application of the decision in *Cutter Aviation, Inc. v. Arizona Dep't of Revenue*, 191 Ariz. 485, 958 P.2d 1 (Ct. App. 1997) was paramount in the *Pima Grande* and *Allied-Signal* decisions. Thus, there can be no serious argument that the resolution of the ownership issue was anything but essential to both decisions. As was summarized on page 12 of the *Pima Grande* decision:

> Pima Grande II has no right to control and dispose of the buildings and improvements on which the County imposed ad valorem personal property taxes. It therefore does not "own" them and is not liable for the assessed taxes.

This is the very ruling that Calpine has sought in this case. Moreover, as noted above, in *Pima Grande* this Court rejected the very argument raised by the Department below regarding the language in the Lease that states that Calpine owns the Facility during the term of the Lease. Such language does not mean that Calpine owns the Facility for property tax purposes.

5. A Valid And Final Decision On The Merits Was Entered.

Like the element above, there can be no serious argument that a valid and final decision was entered by this Court in both cases. Although designated as "Memorandum Decisions," these decisions are just as valid and final as any other appellate decision. The only difference is that memorandum decisions are not published.

6. There Is Common Identity Of The Parties.

The common identify of parties requirement is also met here. As established by the captions in this case and in both *Pima Grande* and *Allied-Signal,* the Arizona Department of Revenue is the party common to both actions and it is the one that should be estopped from asserting an argument that it has already lost, even though Calpine was not a party to those cases.[9]

This Court has issued six separate decisions on the issue presented, all of which are consistent with each other and all of which rely on each other. The citation of these two memorandum decisions is yet further confirmation of the consistent trend of analysis on this issue by the Arizona appellate courts. It also confirms that the Lease at issue here must be read in its entirety, without placing

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[9] Arizona specifically recognizes the collateral estoppel doctrine known as "virtual representation" in tax cases involving the Department *See, El Paso Electric Co. v. Ariz. Dep't of Revenue,* 171 Ariz. 489, 831 P.2d 865 (1992). All of the policy reasons underlying that doctrine are equally applicable here.

total reliance on a single statement or clause in order to determine the ownership issue. Accordingly, it is proper for the Court to review these decisions in resolving Calpine's motion for summary judgment. Therefore, the Tax Court erred in striking them.

B. The Photograph Of The Facility Was Appropriately Presented To The Tax Court.

The Tax Court also erred when it granted the Department's motion to strike a photograph of the Facility, attached hereto as Appendix Four. The Tax Court gave no rationale for doing so in its ruling.

The Tax Court should have taken judicial notice of the photograph because it is "so notoriously true as not to be subject to reasonable dispute" and "capable of immediate accurate demonstration." *State v. Lynch,* 115 Ariz. 19, 22, 562 P.2d 1386, 1389 (Ct. App. 1977) (Judicial notice of a fact is proper if the fact is "so notoriously true as not to be subject to reasonable dispute."); *Bade v. Drachman*, 4 Ariz. App. 55, 68-69, 417 P.2d 689, 702-03 (1966) (holding that court may take judicial notice of facts that are indisputable and "capable of immediate accurate demonstration"); *see also Jarvis v. State Land Dept.*, 104 Ariz. 527, 530, 456 P.2d 385, 388 (1969) (taking judicial notice of an official act of the State Land Department); *Bolin v. Superior Court*, 85 Ariz. 131, 136, 333

P.2d 295, 299 (1958) (Arizona courts will take judicial notice of records on file in the office of secretary of state).

Moreover, the Department has never disputed the accuracy of the photograph, which is nothing more than a pictorial description of the assets that the Department valued at over $122 million in tax year 2004. The photograph itself came from Calpine's website and it can easily be authenticated. The same photograph was also provided to the U.S. District Court in the federal action where the Department did not object to it. Unfortunately, the District Court never ruled on Calpine's motion for summary judgment in that case due to its order dismissing Calpine from that action as an intervenor.

Finally, the Department's motion to strike the photograph was never responded to due to the timing of its filing. The motion to strike was filed separately from the other motion to strike the memorandum decisions, on December 20, 2005. (IR-42) This was the same date on which the Department filed its reply memorandum. (IR-41). Nine days later, Calpine gave notice of its bankruptcy petition and this case, which had been scheduled for oral argument on the cross-motions for summary judgment was automatically stayed. (IR-47) Nearly nine months later, the stay was lifted to allow the cross-motions to be argued, but no further briefing was allowed. (IR-51) Four days after oral

argument, the Tax Court issued its ruling herein. (IR-53) Simply put, Calpine never had any opportunity to provide a response to the Department's motion to strike the Appendix Four photograph of the Facility.

For the foregoing reasons, the Tax Court should have taken judicial notice of the photograph or, at the very least, given Calpine an opportunity to provide authentication of the photograph that shows the Facility that is the focus of the arguments herein. Its failure to do so constitutes an abuse of discretion. Hence, its ruling striking this photograph should be reversed.

REQUEST FOR ATTORNEY'S FEES

Pursuant to ARCAP Rule 21, and A.R.S. § 12-348(B), Calpine requests an award of its attorney's fees incurred on appeal.

CONCLUSION

The legal principle at issue is simple and it is settled law in Arizona: If improvements are constructed on land of an entity that is exempt from property tax, such as an Indian Tribe, and the lease imposes restrictions on the use or disposition of those improvements, then the improvements are treated as if owned by the tax exempt entity, and are thereby exempt themselves.

In this case, the undisputed facts show that: (1) the land on which the Facility was constructed is owned by the Tribe; (2) the Tribe is a tax-exempt entity; and (3) there are restrictions in the Lease on the use or disposition of the

Facility; specifically, the Facility becomes the Tribe's property at the end of the Lease. Based on these undisputed facts and well-established Arizona case law, the Facility is owned by the Tribe and it is not subject to Arizona's property tax.

RESPECTFULLY SUBMITTED this 17th day of January, 2008.

FENNEMORE CRAIG, P.C.

By _____
Paul J. Mooney
Jim L. Wright
Attorneys for Appellant

CERTIFICATE OF SERVICE

Paul J. Mooney, being first duly sworn upon his oath, states that on January 17, 2008, he caused the original and six copies of the foregoing Opening Brief of Appellant to be mailed via the United States Postal Service, with proper postage prepaid, for filing to:

Clerk
Arizona Court of Appeals
Division One
1501 West Washington, Room 203
Phoenix, AZ 85007

and that he caused two copies of the foregoing to likewise be mailed to:

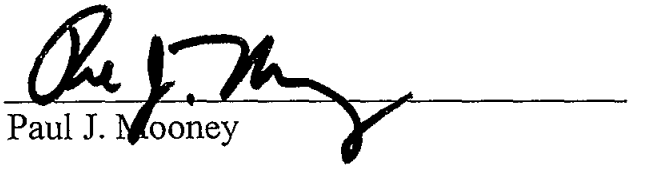
Jay C. Jacobson
SANDERS & PARKS, P.C.
3030 North Third Street, Suite 1300
Phoenix, AZ 85012-3099
Attorney for Defendants

Paul J. Mooney

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, Arizona Rules of Civil Appellate Procedure, the undersigned counsel certifies that this brief uses a proportionately spaced typeface of Times New Roman at 14 points. According to the Microsoft Word word count function, this brief contains 9,978 words excluding the Tables of Contents, Table of Authorities, Abbreviations and Citations to the Record, Certificate of Service, this Certificate of Compliance, and any Appendix.

RESPECTFULLY SUBMITTED: January 17, 2008.



Paul J. Mooney

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APPENDICES

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/16/2006 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2004-000696 08/11/2006

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

CALPINE CONSTRUCTION FINANCE COMPANY — PAUL J MOONEY

v.

ARIZONA STATE DEPARTMENT OF REVENUE, et al. — JAY C JACOBSON

UNDER ADVISEMENT RULING

Plaintiffs' Motion for Summary Judgment, Defendants' Cross Motion for Summary Judgment, and Defendant ADOR's Motion for Summary Judgment on its Counterclaim, as well as Defendants' two Motions to Strike have been under advisement. The analysis of all of the motions for summary judgment is identical.

The salient facts are that Plaintiff Calpine Construction Finance Company is the builder and operator of an electrical generating plant constructed on land leased from the Fort Mojave Indian Tribe. All parties acknowledge that the tribal land on which the facility is built is exempt from state taxation by federal law. They differ on the ownership of the improvements. The Arizona Department of Revenue and Mohave County (collectively, the "Defendants") assert that the improvements are the property of Calpine, which itself can lay no claim to the tribal exemption. Calpine contends that the improvements are in fact not its property, but the property of the Tribe and thus beyond the reach of the Defendants.

The District Court decision

As a preliminary matter, the determination of the District Court for the District of Arizona in CIV 02-1212-PCT-MHM that the improvements are Plaintiff's property does not have preclusive effect in this Court. Two elements essential to a claim of collateral estoppel are (1) that there be a final judgment and (2) that the party to be estopped have been a party to that judgment. Neither of those elements is found here.

Under Arizona law, collateral estoppel "attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment." *In re General Adjudication of All Rights to Use Water in the Gila River System & Source*, 212 Ariz. 64, --, 127 P.3d 882, 888 n.8 (2006). A proceeding stopped for whatever reason before a final judgment on the merits lacks preclusive effect. *Id.* The District Court held that it lacked jurisdiction over the Tribe's claim, and therefore was powerless to issue a judgment at all; the question of ownership of the improvements, while necessary to the District Court's analysis of the statutes governing its jurisdiction, was merely ancillary to the ultimate ruling. Issue preclusion exists only when the action of the first court serves as a bar to action by other courts. RESTATEMENT (2D) OF JUDGMENTS § 27, comment n. The only issue decided by the District Court with finality was whether it possessed subject matter jurisdiction. Unlike the federal courts, whose jurisdiction is limited by Article III of the United States Constitution and by federal statute, the Superior Court has jurisdiction in all cases which involve the legality of an Arizona tax. A.R.S. Const. Art. 6 § 14(2). No other issue was, or could have been, decided by the District Court. There is therefore no issue preclusion in this action. The Supremacy Clause of the United States Constitution does not obligate this Court to follow the statutory interpretation of the District Court. "[T]here is no dispute that the Arizona courts are the definitive expositors of Arizona state law." *Yniguez v. State of Arizona*, 939 F.2d 727, 736 (9th Cir. 1991). The Court thus applies its own analysis.

Calpine was not a party to the federal action; its petition to intervene had been denied by the District Court, on the ground that its claim was not cognizable in federal court under the Tax Injunction Act. *See* CIV 02-1212-PCT-MHM, Order filed March 31, 2004, at 3:4-5. The only claim before the District Court, then, was that the improvements were exempt from state taxation because they were owned by the sovereign Tribe, a claim with which Calpine plainly was not in privity. Calpine therefore cannot be estopped by the District Court ruling.

Defendants further seek to invoke against Calpine the theory of virtual representation, as set forth in *El Paso Natural Gas Co. v. State of Arizona*, 123 Ariz. 219 (1979). It is true that the same property was at issue in the federal action as in this one. Defendants argue that, because the District Court found that the Tribe did not own the improvements, Calpine *a fortiori* must. However, virtual representation can create *res judicata* only when there is a final judgment rendered on the merits by a court of competent jurisdiction. *Id.* at 222. Here, there was no final

judgment on the merits and the District Court itself held that it lacked jurisdiction. The requirements of *El Paso Natural Gas* are thus not met, and the doctrine of virtual representation cannot create *res judicata* against Plaintiff.

The lease under Arizona law

The interplay between sovereignty and the power to tax requires careful scrutiny of the property rights of the respective parties. Utilizing the traditional metaphor of property rights as a bundle of sticks is helpful. Initially, the fee simple owner holds all of the sticks, and the ability to tax the property depends entirely on the owner's status: if the owner is exempt, then all the sticks are exempt, otherwise all are taxable. If the owner decides to lease the property, he retains some sticks and transfers others to the lessee. If both parties to the transaction are subject to tax, it does not matter which of the sticks is deemed the critical one, as it will necessarily be held by a taxable party. If one party is exempt from taxation, however, and the tax regime imposes taxes collectively on the entire bundle rather than on each individual stick (as is the situation in Arizona), it will normally be in the interest of both parties that the exempt party retain the stick that establishes him as "owner." This will be true even if the economic context of the transaction requires that the attributes generally associated with the critical stick be transferred.

Arizona case law provides two tests of ownership. The first, enunciated by the Supreme Court in *City of Phoenix v. State ex rel. Harless*, 60 Ariz. 369 (1943), and reaffirmed in *Cutter Aviation, Inc. v. Arizona Dept. of Revenue*, 191 Ariz. 485 (App. 1997), focuses on the attributes. In this analysis, "'ownership' should be given a liberal construction in order to effectuate the legislature's objective. ... 'The word "owner" has no technical meaning, but its definition will contract or expand according to the subject matter to which it is applied. As used in statutes it is given the widest variety of construction, usually guided in some measure by the object sought to be accomplished in the particular instance. [The] cases thus require us to interpret "ownership" by focusing on the context in which the term is used and on the legislature's objective in enacting the subject legislation.'" *Id.* at 490-91 (quoting *Harless, supra* at 377). The other, set forth by the Court of Appeals in *Maricopa County v. Novasic*, 12 Ariz.App. 551 (App. 1970), and also reaffirmed in *Cutter, supra* at 491, focuses on one particular stick, the reversionary right. Absent express language in the lease evidencing the lessee's ownership at the termination of the lease, the lessor is presumptively the owner of all improvements. *Novasic, supra* at 554-55; *Cutter, supra* at 491. Reconciling these two seemingly contradictory lines can be facilitated by the bundle of sticks analysis. Under *Novasic* and *Cutter*, the critical stick is the reversionary right. But under *Harless* and again *Cutter*, the Court must analyze, within the context of each case, what attributes make the reversionary right stick determinative of ownership, and whether those attributes have in fact been transferred from the exempt to the non-exempt party, regardless of the labels attached to each stick by the parties. Here, the Court must determine whether under

the terms of the lease there is a genuine reversionary right in the improvements that is retained by the Tribe.

Calpine's lease with the Tribe has an initial term of fifty years, with Calpine having an option to continue it for another fifteen years. During the lease period, the improvements are the property of Calpine. Calpine has the right to transfer the improvements and the water rights to another party; the Tribe is obligated not to unreasonably withhold its consent thereto. There are thus no significant restrictions on Calpine's right to control and dispose of the improvements for the duration of the lease. Calpine urges that the lease requires it to preserve the improvements in good order, thus denying it the right to destroy the plant. While the *Cutter* court stated that the right to destroy the property demonstrates ownership, *supra* at 491, it did not expressly state the converse, that absence of the power to destroy proves lack of ownership. The right to destroy is a right which holds more significance in property law theory than its relevance in real life can justify: no rational economic actor would destroy a multi-million dollar industrial facility merely because he has the right to do so. Therefore, the absence of that right weighs but little in the balance.

The State asserts, and Calpine does not appear to contest, that the improvements have an economic life of some thirty years at most; after fifty years, and certainly after sixty-five, their value will be essentially nil, even if they are kept in good repair and in a safe condition, as the lease requires. The lease requires Calpine to maintain the improvements in good repair, but all this means is that at the conclusion of the lease the Tribe will have fifty-year-old or sixty-five-year-old equipment. To look through the other end of the temporal telescope, it is as if the Tribe today took possession of 1940s or 1950s vintage power generating equipment. Even assuming that the equipment is still functioning, its usefulness would be virtually nil; it would be old and prone to breakdown, spare parts would be difficult if not impossible to obtain, and the cost of operation would be far greater than that of more current equipment in competing facilities. This distinguishes the present lease from those of buildings in *Novasic* and *Cutter*. Although buildings do lose some of their economic value as they age, the rate of obsolescence is far slower than that of productive facilities, which face the dual assault of wear and tear and technological advance. The lease permits Calpine to upgrade the improvements now in place with state of the art equipment as time goes on, and were it to do so that equipment would revert to the Tribe; but the lease does not require such modernization. It is Calpine's option to replace, repair, or simply allow the equipment to decline to a state of minimum functionality, and it must be assumed that Calpine will choose the option that maximizes its own profit, without regard to the future profit of the Tribe once it takes over the improvements. Thus, the possibility that the Tribe might in the end have improvements of a newer generation than the early 2000s cannot be considered an attribute of the Tribe's ownership.

To put the matter succinctly, unless Calpine decides otherwise, the terms of the lease insure that Calpine will receive one hundred percent of the productive value of the improvements over their lifetime. What will revert to tribal ownership at the conclusion of the lease is a husk exhausted of all economic potential. In no real sense does future ownership of this empty husk make the Tribe the owner of a multi-million dollar power generation facility. While the Tribe has formally retained the reversionary "stick," the parties have so structured the lease that this stick has been shaved down to a toothpick, leaving Calpine the rest of the bundle. *Harless* forbids, and *Novasic* and *Cutter* do not require, that the Court ignore the entire economic reality of the transaction and declare the toothpick alone determinative.

The Court finds helpful, though not controlling, the guidance provided by the United States Supreme Court in analyzing leasehold interests in the context of federal tax law. "[S]o long as the lessor retains significant and genuine attributes of the traditional lessor status, the form of the transaction adopted by the parties governs for tax purposes. What those attributes are in any particular case will necessarily depend upon its facts." *Frank Lyon Co. v. United States,* 435 U.S. 561, 584 (1978). Analytically, the Court must determine whether the formal allocation of rights under the lease transaction has economic substance beyond the creation of tax benefits. *Casebeer v. Commissioner of Internal Revenue*, 909 F.2d 1360, 1363 (9th Cir. 1990). The Supreme Court recognized that the structure of the lease may be "impelled by business or regulatory realities," and yet insisted that it be "imbued with tax-independent considerations." *Lyon, supra* at 583-84. This Court also recognizes that bona fide "sharing" of the benefits of a sovereign's tax-exempt status has long been employed in Arizona as a tool of economic development. *See, e.g., Maricopa County v. Fox Riverside Theatre Corp.*, 57 Ariz. 407 (1941). However, while the sticks may legitimately be allocated to take full advantage of the sovereign's tax exemption, the sovereign must preserve enough sticks to retain some significant and genuine attribute of its ownership. It cannot surrender everything but the bare title and use that title to cloak the lessee in its exempt status. Here, for the reasons stated, the Tribe's retention of the reversionary right, ordinarily a key indicium of the lessor's ownership, is so attenuated by the terms of the lease that it is no longer "significant and genuine." Nor has the Tribe retained any other significant attributes of ownership in the improvements.

Therefore, IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment is denied.

2. Defendants' Cross-Motion for Summary Judgment is granted to the extent that they seek a judgment that the improvements are subject to taxation by the State and Mohave County. There is still an issue as to the actual value of the improvements, so full summary judgment is denied.

3. Defendant ADOR's Motion for Summary Judgment on its counterclaim is granted.

Defendants' Motions to Strike

Defendants have filed their Motion to Strike Attachments A and B to Plaintiff's Motion for Summary Judgment and their Motion to Strike Exhibit A to Calpine's Combined Reply and Response. First addressing the former, Attachments A and B to Plaintiff's Motion for Summary Judgment are memorandum decisions of the Court of Appeals. The Arizona rule is that memorandum decisions are not to be cited, save in certain situations, none of which exists here. Ariz.R.Civ.App.P. 28(c); *Walden Books Co. v. Arizona Dept. of Revenue*, 198 Ariz. 584, 589 ¶ 21 (App. 2000). In particular, *Standage Ventures, Inc. v. State of Arizona*, 114 Ariz. 480 (1977), remains controlling with respect to their use to create offensive collateral estoppel. Moreover, Plaintiff's argument that these unpublished decisions create compelling or even binding precedent would hold this Court in every case relating generally to the issue of construction on Indian land to decisions whose holdings the Court of Appeals has not deemed worthy of publication. While this Court naturally welcomes instruction from the higher courts, it does not believe it appropriate to apply to this case analysis which the Court of Appeals chose to apply only to the specific cases before it and to which it may not have intended broader applicability. *See* Donn Kessler, *Memo Decisions: Online and Citable? Con*, ARIZ. ATTORNEY, June 2006, at 15.

Therefore, IT IS ORDERED granting Defendants' Motion to Strike Attachments A and B to Plaintiff's Motion for Summary Judgment.

Exhibit A to Calpine's Combined Reply and Response, a photograph of the South Point Energy Center, is not particularly enlightening, and its persuasive value is *de minimis*. While this attachment does not affect the Court's reasoning one way or the other of the case, Defendants are entitled to have it stricken.

Therefore, IT IS ORDERED granting Defendants' Motion to Strike Exhibit A to Calpine's Combined Reply and Response.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel., ARIZONA DEPARTMENT OF REVENUE, Plaintiff-Appellee, v. PIMA GRANDE DEVELOPMENT II/VESTAR, Defendant-Appellant.	1 CA-TX 97-0013 1 CA-TX 97-0014 1 CA-TX 97-0018 1 CA-TX 97-0021 (Consolidated) DEPARTMENT T
STATE OF ARIZONA ex rel., ARIZONA DEPARTMENT OF REVENUE, Plaintiff-Appellee, v. PIMA GRANDE DEVELOPMENT I/VESTAR, Defendant-Appellant.	MEMORANDUM DECISION (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
STATE OF ARIZONA ex rel., ARIZONA DEPARTMENT OF REVENUE, Plaintiff-Appellee, v. TARGET STORES T-363/DHC PROPERTY TAX DEPARTMENT, Defendant-Appellant.	
STATE OF ARIZONA ex rel., ARIZONA DEPARTMENT OF REVENUE, Plaintiff-Appellee, v. MERVYN'S # 261/DHC PROPERTY TAX DEPARTMENT, Defendant-Appellant.	

Appeal from the Arizona Tax Court

Cause Nos. TX 96-00047, TX 96-00041,
TX 96-00048, and TX 96-00049

The Honorable William J. Schafer, III, Judge

REVERSED WITH DIRECTIONS

Grant Woods, Arizona Attorney General by Patrick Irvine, Assistant Attorney General Attorneys for Plaintiff-Appellee	Phoenix
Marc C. Cavness and Flanagan Bilton Brannigan by John M. Brannigan Attorneys for Defendants-Appellants	Phoenix Chicago

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P A T T E R S O N, Judge

The taxpayers are lessees and sublessees of retail business premises at the Scottsdale Pavilions shopping center on the Salt River Pima-Maricopa Indian Reservation. In these four consolidated appeals, the taxpayers challenge the tax court's determination that Maricopa County lawfully and correctly assessed ad valorem personal property taxes against those portions of the shopping center buildings that the taxpayers occupied under their leases. Their appeals raise these issues:

1. Whether the taxpayers "owned" the improvements the taxpayers built on the leased reservation land;

2. If the taxpayers owned the improvements on their leaseholds, whether Arizona statutory authority existed for the county's levy of personal property taxes on the taxpayers' leasehold improvements;

3. If the taxpayers owned the improvements on their leaseholds, whether the county's personal property tax levy on those improvements extended to the underlying real

property and thereby violated tribal rights; and

4. Whether the tax court erred in assessing interest against taxpayers Pima Grande I and II on personal property tax assessments that the State Board of Equalization reduced to zero before delinquency, but the tax court reinstated on appeal.

We find the first issue dispositive and thus need not address the remaining issues.

FACTS AND PROCEDURAL BACKGROUND

With the approval of the Secretary of the Interior and the Salt River Pima-Maricopa Indian Community, taxpayers Pima Grande I and II leased certain trust lands allotted to individual Indians on the reservation. Pima Grande I subleased a portion of its leased land to taxpayer Target. Pima Grande II subleased a portion of its leased land to taxpayer Mervyn's.

The leases and subleases contained features in common. All required the affected lessee or sublessee to build and complete commercial improvements on the leased land. All required them to maintain the improvements and use them for specified commercial purposes and in accordance with all applicable legal requirements. All conditioned the lessee's or sublessee's right to remove or demolish improvements on the consent of the Secretary of the Interior and the lessors.

Additionally, each lease provided that, at termination, the lessor could require the lessee either to remove the improvements from the leased land or to surrender them to the lessor as the

lessor's property. For example, paragraph 10 of the Pima Grande I lease provided:

> All buildings and improvements, excluding removable personal property and trade fixtures, on the leased property shall at the option of Lessor remain on said property after the termination of this lease and shall thereupon become the property of the Lessor.

Further, the Mervyn's, Target, and Pima Grande II leases each contained provisions to this effect:

> Any improvements of any nature, including, but not limited to, buildings, fixtures, equipment and other materials or items that may be placed upon, installed in or attached to the Leased Premises by Lessee or a sublessee shall, for all purposes, be the property of and assets of lessee or such sublessee, as applicable, and Lessor shall have no right, title or interest therein of any nature during the Term of this Lease.

For tax year 1995, the Maricopa County Assessor assessed the buildings at the Scottsdale Pavilions as class 3P (commercial personal property) on the unsecured personal property roll. The assessor assigned full cash values of $17.4 million to Pima Grande I's improvements, $9.38 million to Pima Grande II's improvements, $3.38 million to Target's improvements, and $2.29 million to Mervyn's improvements. Unsecured personal property taxes were billed to each taxpayer accordingly.

All taxpayers appealed to the State Board of Equalization (Board). For each, the Board reduced the improvements' value to zero. After the Board rendered its decisions and before the delinquency date of January 10, 1996, taxpayers Target and Mervyn's paid the full amounts of their original assessments to the Maricopa County Treasurer. Pima Grande I and II did not. The Maricopa

County Treasurer returned Target and Mervyn's payments to them with a notation of "Resolution Cancelled."

On January 19, 1996, Arizona Department of Revenue (DOR) brought these actions in the tax court to appeal the Board's rulings. In each, the parties filed cross-motions for summary judgment. The tax court jointly considered the motions in the four cases and granted DOR's motions for summary judgment and denied the taxpayers' motions..

In each case, DOR lodged forms of judgment that included interest on the additional assessed taxes from the delinquency date of January 10, 1996. The taxpayers objected. The tax court deleted the interest awards from the judgments in Target's and Mervyn's cases, but not from the judgments against Pima Grande I and II. The court found that Target and Mervyn's had acted like responsible citizens in tendering the amounts of the additional assessments and, as a matter of equity, should not be held responsible for interest from the delinquency date. The court did not find "as much equity" in the objections of Pima Grande I and II, who did not tender payment following the Board's rulings in their favor.

All taxpayers timely appealed. In each case we have appellate jurisdiction under Arizona Revised Statutes Annotated (A.R.S.) section 12-2101(B). We consolidated the four appeals by stipulation of all parties.

DISCUSSION

We agree with the taxpayers that our recent decision in *Cutter Aviation, Inc. v. Arizona Department of Revenue*, 243 Ariz. Adv. Rep. 53 (App. May 22, 1997) (petition for review filed July 8, 1997; now pending) controls these consolidated appeals. That case concerned the tax classification of buildings and other improvements constructed by two long-term lessees of City of Phoenix land. In the case of each taxpayer, if the City were deemed to own the improvements along with the land, the taxpayer's interest in the buildings would constitute a "possessory interest" assessed in class 12 at 1% of full cash value.[1] If the taxpayer was deemed to own the improvements, however, the improvements would be assessed in class 3 at 25% of full cash value. A.R.S. § 42-162(A)(3)(b).

Former A.R.S. section 42-681(3) defined "possessory interest" as:

> [P]ossession of public property pursuant to an agreement with a governmental entity regardless of how the interest is identified in any document by which it is created, *except possession pursuant to and by virtue of* ownership of a freehold interest in the real property or *ownership of the improvements or personal property.*

(Emphasis added.)

In *Cutter Aviation*, we further observed that the result necessarily turned on the meaning of "ownership" as used in A.R.S. section 42-681(3). 243 Ariz. Adv. Rep. at 56. Noting that Title

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[1] A.R.S. sections 42-681 through 42-687, which formerly provided for ad valorem taxation of possessory interests, were repealed by 1995 Ariz. Sess. Laws ch. 241, § 43 and ch. 294, § 8, eff. July 13, 1995, retroactively effective to January 1, 1995.

42 of the Arizona Revised Statutes does not define "ownership," we reviewed Arizona case law and derived the basic rule that "ownership" of an asset does not exist unless the putative owner has the right to control and dispose of the asset. *Id.*; *see also Maricopa County v. Novasic*, 12 Ariz. App. 551, 553, 473 P.2d 476, 478 (1970) (setting forth "general rule that a permanent structure placed upon and attached to the realty by a tenant is real property belonging to the lessor"). Thus, unless a lease contains "clear and express language" that the tenants own improvements, the lessor owns the improvements. *Id.*, 12 Ariz. App. at 554-55, 475 P.2d at 479-80. The legislature's intent in enacting A.R.S. section 42-681(3) was in accord with this principle. *See Cutter Aviation*, 243 Ariz. Adv. Rep. at 58 (legislative intent of taxing previously untaxable property met by limiting "ownership" to fee interests with authority to control and dispose of property).

1. **Pima Grande I Lease**

In its answering brief, DOR conceded that the Pima Grande I lease is essentially the same as the leases at issue in *Cutter Aviation*. Based on DOR's concession, we reverse the judgment against taxpayer Pima Grande I. Moreover, because Pima Grande I could grant to its sublessee no greater interest in the leased premises than it had itself acquired through its lease agreement with the individual Indian allottee-owners, we likewise reverse the judgment against taxpayer Target.

2. Pima Grande II Lease

Unlike the Pima Grande I lease, the Pima Grande II lease expressly provided that the lessee hold title during the term of the lease to any buildings or other improvements it placed on the leased land. The lease further provided:

> Lessor shall have no right, title or interest therein of any nature during the Term of this Lease. Lessee shall be solely entitled to any rights or benefits associated with its ownership of and title to such improvements, including, but not limited to, any depreciation, credits or other tax benefits, and such improvements are not made in lieu of rent.

The sublease between Pima Grande II and Mervyn's contained similar provisions. DOR contends that these passages in the Pima Grande II and Mervyn's leases, make *Cutter Aviation* distinguishable. DOR characterizes the provisions as "clear and unambiguous," and cites the settled proposition that the clear and unambiguous language of a contract must be enforced as written. DOR argues that the provisions make it unnecessary for us to balance the interests of the landlord and tenants to determine ownership, because the taxpayers have "specifically determined ownership in their own leases." DOR further asserts that the long-term nature of the leases is such that it is unlikely the improvements DOR is seeking to tax in this case would still be in existence on the leases' expiration. Therefore, the improvements would never become the landowners' property. DOR's implicit conclusion is that Pima Grande II and Mervyn's effectively own the fee in the leasehold improvements.

We do not agree with DOR's analysis. The provision quoted above may "clearly and unambiguously" state that the taxpayers hold title to the improvements during the terms of their leases. However, the provision, when viewed within the context of the entire lease, does not support the proposition that the lease grants Pima Grande II true "ownership" of the improvements. Numerous provisions of the lease diametrically oppose that proposition. We believe that the "title" provisions were intended to perform a more narrow function, one that is immaterial to the "ownership" question as defined by *Cutter Aviation*.

The passage immediately following the language on which DOR relies provides limitations on lessee's control over the improvements. That provision provides:

> Notwithstanding the foregoing, all buildings and improvements, excluding Removable Personal Property and trade fixtures, on the Leased Premises, shall remain on the Leased Premises after the termination of this Lease and shall thereupon become the property of the Lessor. The Lessor shall have the right to require Lessee to remove any or all of the buildings or improvements on the Leased Premises at the termination of the Lease upon the sole determination of the Lessor that the buildings or improvements or any of them have no commercial value . . . .

As we held in *Cutter Aviation*, a lessee whose lease substantially restricts his right to control and dispose of the leasehold improvements is not considered the owner. 243 Ariz. Adv. Rep. at 56. Under the foregoing language, the right to control and dispose of the improvements belongs to the lessor, not the lessee.

Further, Pima Grande II cannot sublease any part of the improvements without the approval of the lessor and the Salt River

Pima-Maricopa Indian Community. Pima Grande II must also obtain approval to assign or transfer any part of its interest in the lease. Other lease provisions establish virtually conclusively that Pima Grande II's interest in the improvements is that of a lessee only: "For and in consideration of the rents and agreements hereinafter set forth, the Lessor hereby leases to the Lessee, and the Lessee hereby leases from Lessor the Leased Premises." (Emphasis added.) Similarly, the lease also provides: "Lessee agrees to obtain, at its expense, an ALTA extended coverage lessee's policy of title insurance, assuring the conveyance of a valid leasehold interest in the Leased Premises to Lessee, and insuring Lessee's interest in the Leased Premises in a sum deemed necessary by Lessee." (Emphasis added.) The Pima Grande II lease defines "Leased Premises" as:

> Leased Premises or Premises. That certain real property located in Maricopa County, Arizona, and legally described on Exhibit "C" attached hereto, together with a right of ingress and egress thereto and all easements, rights-of-way, privileges, licenses, appurtenances and other rights and benefits belonging to, running with or any way related to such real property and all of the improvements now or hereafter located thereon.

(Boldface emphasis added.) Under these provisions, the lessors leased to Pima Grande II not only the land, but also all current and future improvements that may be placed on it.

Finally, the lease's rental formulae buttresses the view that the lease does not genuinely contemplate an ownership interest in the improvements for Pima Grande II. Pima Grande II's rent encompasses two components. Its Basic Rent is a flat rate per acre that varies from $350 to $11,145 according to the extent of progress

toward issuance of certificates of occupancy and the number of years the lease has been in effect. During the first seven years of the lease, or until completion of all building on the leased land, Pima Grande II's rent is capped at the Basic Rent or 5% of its "Gross Rental Receipts," its total subleasing income, whichever is larger. Thereafter Pima Grande II pays both Basic Rent and "Percentage Rent." Percentage rent is calculated as the difference between a fixed percentage of Gross Rental Receipts and the Basic Rent for the year in question.

These formulae center on the economic productivity of the land and improvements as a whole. The Pima Grande II lease is not a lease of raw land. It is a shopping center lease. The leasehold interest that Pima Grande II received under the lease is in the improvements as well as the land. Pima Grande II is in no sense the "owner" of those improvements.

Thus, the language on which DOR relies, declaring that Pima Grande II holds "title" to and "owns" the buildings and improvements, does not achieve the significance that DOR attaches to it when considered in the context of the entire lease. DOR's interpretation of that language would assign it a function in lone opposition to the rest of the lease. The language may be more sensibly explained in light of its evident objective -- to secure for Pima Grande II the federal income tax benefits ("any depreciation, credits or other tax benefits") that accrue to the "owner" of commercial improvements to real property.

Pima Grande II has no right to control and dispose of the buildings and improvements on which the County imposed ad valorem personal property taxes. It therefore does not "own" them and is not liable for the assessed taxes. *See Cutter Aviation*, 243 Ariz. Adv. Rep. at 57. The presence of an isolated provision through which the parties to the lease jointly declared that the lessee was the "owner" of the buildings and improvements does not change this. Accordingly, neither taxpayer Pima Grande II nor its sublessee, taxpayer Mervyn's, was liable for those taxes. This determination obviates the remaining issues raised on appeal.

The taxpayers request awards of attorneys' fees on appeal under A.R.S. section 12-348(B) and we grant the request. Each appellant may establish the amount of its award by complying with Rule 21(c), Arizona Rules of Civil Appellate Procedure.

CONCLUSION

Based on the foregoing, the judgment is reversed with directions to enter judgment for the taxpayers.

CECIL B. PATTERSON, JR.
Presiding Judge

CONCURRING:

JON W. THOMPSON, Judge

SHELDON H. WEISBERG, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ALLIEDSIGNAL, INC., a corporation, successor in interest to The Garrett Corporation, Plaintiff-Appellant, v. ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona; MARICOPA COUNTY, a political subdivision of the State of Arizona, Defendants-Appellees.	1 CA-TX 96-0018 DEPARTMENT T MEMORANDUM DECISION (Not for Publication, Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Arizona Tax Court

Cause No. TX 95-00024

The Honorable William J. Schafer, III, Judge

AFFIRMED

Donald P. Roelke, Esq.
Attorney for Plaintiff-Appellant — Phoenix

GRANT WOODS, The Attorney General
By: Frank Boucek, III, Assistant Attorney General
Attorneys for Defendant-Appellee
Arizona Department of Revenue — Phoenix

HELM & KYLE, LTD.
By: John D. Helm
and: Roberta S. Livesay
Michelle L. Margolies
Attorneys for Defendant-Appellee
Maricopa County — Tempe

G A R B A R I N O, Judge

Taxpayer AlliedSignal, Inc. (the taxpayer) appeals from summary judgment granted in favor of Maricopa County (the county) and the Arizona Department of Revenue on the taxpayer's claim for

a refund of 1994 ad valorem property taxes. The taxes were assessed against buildings that the taxpayer constructed beginning in the 1950s on land it leased from the City of Phoenix (the city) at Sky Harbor Airport and continued to use through tax year 1994 and thereafter. The taxpayer contends that the county should not have assessed the buildings at the twenty-five percent assessment ratio provided for class three (commercial) property, but rather at the one percent ratio provided for class thirteen (improvements on a possessory interest or right) property. See Ariz. Rev. Stat. Ann. (A.R.S.) § 42-162(A)(3) and (13) (Supp. 1994), amended by A.R.S. § 42-162 (Supp. 1996).[1]

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[1]During the 1994 taxable year, A.R.S. section 42-162(A) provided in pertinent part:

> There are established the following classes of property for taxation:
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> . . . .
>
> 3. Class three, consisting of two subclasses:
>
> (a) Class three (R) consisting of all real property and improvements devoted to any commercial or industrial use other than property included in class one, two, four, six, seven, eight, nine, ten or twelve.
>
> (b) Class three (P) consisting of all personal property devoted to any commercial or industrial use other than property included in class one, two, four, six, seven, eight, nine, ten or twelve.
>
> . . . .
>
> 13. Class thirteen:
>
> (a) Improvements located on public property, as defined in section 42-681, owned by the lessee of such public property provided that the improvements shall become the property of the owner of the public property upon termination of the possessory interest in the public

FACTS AND PROCEEDINGS IN THE TAX COURT

On December 11, 1950, the Garrett Corporation (Garrett), the

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property and that both the improvements and the public property are used primarily for athletic, recreational, entertainment, artistic, cultural or convention activities.

(b) Improvements located on public property, as defined in § 42-681, owned by the lessee of such public property provided:

(i) That the improvements shall become the property of the owner of the public property upon termination of the possessory interest in the public property.

(ii) That both the improvements and the public property are used for or in connection with aviation, including hangars, tie-downs, aircraft maintenance, sales of aviation-related items, charter and rental activities, parking facilities and restaurants, stores and other services located in a terminal.

(iii) That both the improvements and the public property are located on a state, county, city or town airport or a public airport operating pursuant to §§ 2-311, 2-312 and 2-313.

(c) Property that is leased to or acquired by the government and used to perform a government contract and that is defined as "contractor-acquired property" or "government-furnished property" in the federal acquisition regulations (48 Code of Regulations § 45.101, as amended or superseded by federal law or regulation).

(d) Property of a corporation organized by or at the direction of this state or a county, city or town to develop, construct, improve, repair, replace or own any property, improvement, building or other facility to be used for public purposes that the state, county, city or town pledges to lease or lease-purchase with state, county or municipal special or general revenues and not otherwise exempt under § 42-271.

A.R.S. § 42-162(A) (Supp. 1994). During tax year 1994, the assessment percentage for class three property was twenty-five percent, while that for class thirteen property was one percent. A.R.S. § 42-227(A)(3) and (13) (Supp. 1994).

taxpayer's predecessor in interest, entered into a 99-year lease with the city of a 29-acre parcel at Sky Harbor Airport. Garrett was to use the property "principally for any business, industry or operation having to do with aviation or the science of flight, or any allied or related business, industry or operation." However, if conditions changed during the lease rendering the aviation-related use uneconomical or impractical, then the lessee could conduct "any other lawful business or industry" on the land that did not hinder or interfere with the use of Sky Harbor as an airport.

Article V of the lease provided in relevant part:

> Tenant may at any time during the term of this lease, at its sole cost and expense, construct or place upon the demised premises buildings, improvements, fixtures or other similar property, real or personal (collectively referred to hereafter as the "improvements"), of such type and design as Tenant shall select to be used for any purpose authorized by law, provided, however, that nothing in this lease shall be construed as imposing any obligation upon Tenant to do so, except as provided in the second paragraph of this Article V.
>
> Tenant shall commence the construction of such improvements for manufacturing purposes on the demised premises within eight months after the beginning of the term hereof, and shall use reasonable diligence to complete such improvements promptly; and Tenant shall expend not less than Five Hundred Thousand Dollars ($500,000) for such improvements. Tenant shall not be responsible for delays in the commencement or completion of construction which are occasioned by matters or things beyond its control.
>
> . . . .
>
> Tenant may, if it so desires, make any additions to, or alterations of, the improvements, and Tenant may also, if it desires, at any time during the term of this lease, remove the improvements from the demised premises including additions and alterations thereto, it being understood that the improvements shall always remain the

property of Tenant. . . .

. . . .

> Upon termination of this lease for any cause whatsoever, Tenant shall have the right to remove any and all improvements from the demised premises within one hundred and eighty (180) days thereafter. Any improvements not removed within such time shall become the property of the Landlord, and Tenant shall have no further rights thereto.

The taxpayer's improvements on the leased property consisted of twenty-seven buildings, asphalt and concrete access ways, and parking lots. Most of the buildings were constructed in the 1950s. The newest was built in 1980. The improvements have been used to manufacture and test gas turbine aircraft engines and component parts, and to maintain and park aircraft used for flight-testing the engines.

For 1994, the Maricopa County Assessor listed the taxpayer's leasehold interest in the Sky Harbor parcel as class twelve (possessory interest) property, and the taxpayer's improvements as class three (commercial) property. The taxpayer brought this action in January 1995 seeking a reclassification of the improvements to class thirteen (improvements on a possessory interest or right) property for 1994, and a refund of the excess taxes it paid based on the class three assessment for that year.

The taxpayer and the county each filed motions for summary judgment. The tax court denied the taxpayer's motion and granted the county's, reasoning:

> To fall into Class 13, the improvements on the property must become the property of [the] City at the conclusion of the lease. These will not. The lease says "the improvements shall always remain the property of

> Tenant (Allied)." Allied has 180 days to remove the improvements at the end of the lease and "Any improvements not removed within such time shall become the property of the Landlord, and Tenant shall have no further rights thereto."
>
> This seems quite clear; Allied owns the improvements and if it decides at the end of the lease to remove them it may do so; if it does not, they belong to the City. Allied apparently agrees that that is a clear reading of the lease provisions but adds that it has no intention of removing the improvements when the time comes. Therefore, for all intents and purposes, the City will own them when the lease ends. That may well be Allied's intention today; it may not be its intention tomorrow.

From formal judgment in accordance with the tax court's ruling, the taxpayer appeals. We have jurisdiction pursuant to A.R.S. section 12-2101(B) (1994).

ANALYSIS

The issue is whether the tax court correctly sustained the county's decision to classify and assess the improvements as class three (commercial) property. The parties agree that the resolution is dependent upon whether the improvements "become the property of the owner of the public property upon termination of the possessory interest in the public property" as set out in A.R.S. section 42-162(A)(13)(b)(i) (Supp. 1994).

The taxpayer contends that the tax court should have found as fact certain that the taxpayer has no intention of removing its improvements after the lease terminated because of the prohibitive economic impact of removal. The taxpayer argues that because the improvements "shall become the property of the owner . . . upon termination of the possessory interest in the public property" within A.R.S. section 42-162(A)(13)(b)(i), the property should be

assessed as class thirteen property. Should we disagree, the taxpayer argues that there is, at least, a genuine issue of material fact as to the taxpayer's intent.

The taxpayer's analysis is based on interpreting the statute as if the word "will" replaced the word "shall," and the statute stated that "the improvements [will] become the property of the owner . . . upon termination of the possessory interest." The taxpayer argues:

> Removing the improvements would be a financial detriment to appellant. Therefore, appellant should have and does have no intention of removing the improvements upon termination of the lease, whenever it occurs. The improvements will become "the property of the owner of the public property," the City of Phoenix upon termination of the lease.

(Emphasis added.)

We believe the taxpayer misconstrues the word "shall" in A.R.S. section 42-162(A)(13)(b)(i) to mean "will." The word "shall" is defined in pertinent part in BLACK'S LAW DICTIONARY 1375 (6th ed. 1990), as follows:

> As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means "must" and is inconsistent with a concept of discretion. People v. Municipal Court for Los Angeles Judicial Dist., 149 C.A.3d 951, 197 Cal.Rptr. 204, 206.

Similarly, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1310 (Unabr. ed. 1981) defines the declarative use of "shall" as follows:

> 1. (generally used in the first person to denote simple future time) plan to, intend to, or expect to: I shall go

today. 2. (generally used in the second and third persons to denote authority or determination) will have to, is determined to, promises to, or definitely will: You shall do it. He shall do it.

Improvements on a possessory interest or right like the taxpayer's buildings at Sky Harbor meet the requirement of A.R.S. section 42-162(A)(13)(b)(i) only if they unequivocally become the property of the owner of the public property upon termination of the possessory interest in the public property. The likelihood that they "will" is immaterial. The word "will" leaves too much to speculation.

The lease agreement contains the only indication that the taxpayer's improvements might legally pass to the city upon the termination of the lease. The lease agreement also provides that "the improvements shall always remain the property of Tenant," and it conditions their passing to the city on the taxpayer's voluntary choice not to exercise the right to remove them during the six-month period following the agreement's termination. There is no legal obligation on the taxpayer's part, or any legal right on the city's part, that provides definitively that the improvements "shall become the property" of the city upon termination of the lease. The language of the lease relative to the improvements does not meet the requirement of A.R.S. section 42-162(A)(13)(b)(i).

Aside from the question of whether the taxpayer is correct about the language of subsection (b)(i), it is unlikely that our legislature would allow a taxpayer the latitude to alter the present tax classification of property based upon a prediction about what a future owner may choose to do with it upon the

termination of the lease.

When the clear language of the lease is read in the light of the statute, the taxpayer's assertion that a genuine issue of material fact precluded summary judgment becomes irrelevant, and the taxpayer's present intent with respect to the improvements is immaterial.

CONCLUSION

For the foregoing reasons, we affirm the ruling of the tax court.

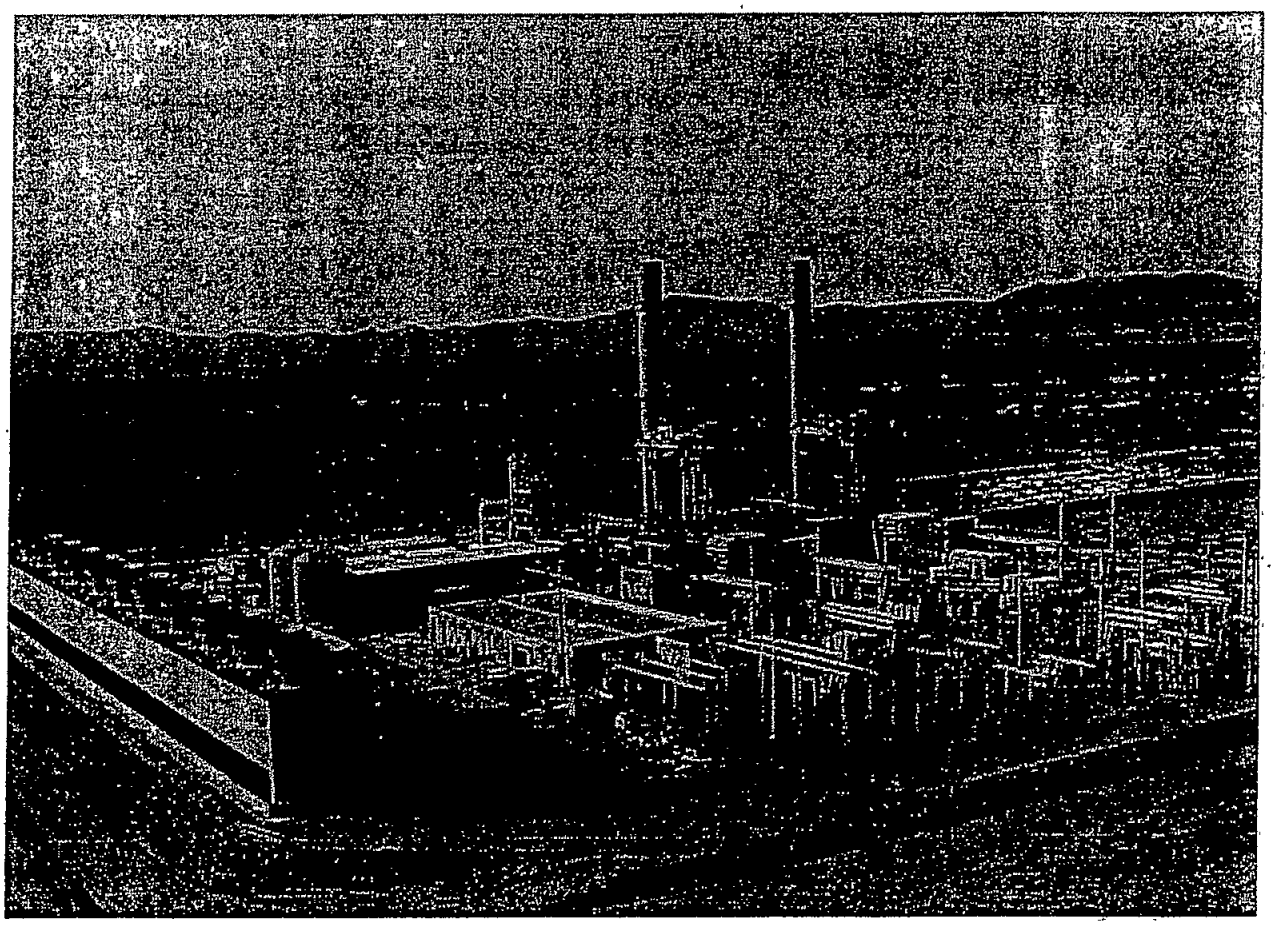
WILLIAM F. GARBARINO, Judge

CONCURRING:

MICHAEL D. RYAN, Presiding Judge

RUTH V. McGREGOR, Judge

South Point Energy Center



Williams DEPO EXH # 16
SANDRA P. WALDO
DATE 6-24-05

AMENDED AND RESTATED GROUND LEASE AGREEMENT

Tom Sansonetti
(307) 778-4200
(wyoming@hollandhart)

between the

Fort Mojave Indian Tribe,
a federally recognized Indian Tribe

"Tribe"

and

Calpine South Point, LLC,
a Delaware limited liability company

"Calpine"

BIA Lease No. B-1778-FM

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FORT MOJAVE INDIAN RESERVATION

BIA Lease No. B-1771 AM

AMENDED AND RESTATED GROUND LEASE AGREEMENT

This Amended and Restated Ground Lease agreement, handsigned and witnessed in quadruplicate, is made and entered into by and between the Fort Mojave Indian Tribe of the Fort Mojave Indian Reservation (the "Tribe"), a Federally recognized Indian Tribe with powers of self-government and CPN South Point, LLC, a limited liability company created under the laws of Delaware, as successors in interest to the original lease signed on October 10, 1994, by Nordic Power of South Point I Limited Partnership, a limited partnership created under the laws of the State of Michigan, ("South Point"), under the provisions of the Act of August 9, 1955 (69 Stat. 539; 25 U.S.C. 415), as amended, and as supplemented by Part 162-Leasing and Permitting-of the Code of Federal Regulations, Title 25, all of which by reference are made a part hereof, and as the signatories of the Amended Ground Lease Agreement, handsigned and witnessed by the same parties on April 29, 1998, which remains in full force and affect until this Amended and Restated Ground Lease Agreement is approved by the Secretary of the Interior. Pursuant to an Assignment and Assumption Agreement, the Lessee's interest in said Amended Ground Lease Agreement was herebefore assigned by Calpine South Point, Inc. to CPN South Point, LLC. CPN South Point, LLC is hereinafter referred to as "Calpine".

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1. Definitions. As used in this Lease, the following terms shall be ascribed the definitions set forth below.

1.1. "Concept Plans" means general development site plans and general design concept drawings generally describing the proposed development of the Leased Land as more particularly described at Section 8.2.2 below.

1.2. "Construction Plans and Specifications" means comprehensive plans and specifications for the development and construction of Improvements on the Leased Land submitted for the appropriate review and approvals.

1.3. "Contingency Deadline" means the date which is sixty (60) days after the Lease Commencement Date.

1.4. "Contingency Inspections" means such inspections and studies of the real property as Calpine deems appropriate, including, without limitation, any geotechnical, geothermal, seismic, environmental, percolation, market analysis, economic analysis and feasibility studies, and other studies and reviews of or relating to the Leased Land.

1.5. "Development Review Fees" means all fees payable to the Tribe, in its capacity as the governmental unit responsible for public welfare and safety, to cover its reasonable costs to administer, review plans and inspect the

development and construction of Improvements on the Leased Land including its actual costs to hire professional consultants relating to such inspections and approvals. Such fees shall be determined by tribal policy and law, but in no event shall such fees be greater than the development review fees charged for similar developments in the Mohave Valley, Arizona area.

1.6. "Financial Closing Date" means the date within the Pre-Operations Period upon which a Mortgage relating to the construction of the Project is recorded in the official records of the Fort Mojave Tribal Clerk and Recorder.

1.7. "Hazardous Materials" means any hazardous or toxic materials, pollutants, contaminants or wastes and any other chemical, material or substance, the handling, storage, release, transportation, or disposal of which is or becomes prohibited, limited or regulated by any federal, state, county, regional or local authority or which, even if not so regulated, is or becomes known to pose a hazard to the health and safety of the occupants of the Leased Land, including, without limitation, (i) asbestos, (ii) petroleum and petroleum by-products, (iii) urea formaldehyde foam insulation, (iv) polychlorinated biphenyls, (v) all substances now or hereafter designated as "hazardous substances," "hazardous materials" or "toxic substances" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq., the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., or the Resource, Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or (vi) all substances now or hereafter designated as "hazardous substances," "hazardous materials" or "toxic substances" under any other federal, state or local laws or in any regulations adopted and publications promulgated pursuant to said laws.

1.8. "Improvements" means all buildings, structures, improvements comprising the electric generation power plant specified in Section 5.1 and other improvements now existing or hereafter constructed on the Leased Land and any and all betterments thereof, including, without limitation, the Infrastructure Improvements.

1.9. "Infrastructure Improvements" means all Improvements relating to the infrastructure for the Leased Land including, without limitation, (i) streets, roads and other access to, from and within the Leased Land as described in Section 8.3.3 below; (ii) water supply and storage facilities as described in Section 8.3.1 below; (iii) telephone and electrical facilities and conduits; (iv) fire, safety and police protection facilities; (v) trash and refuse management and removal facilities; and (vi) all other similar Improvements necessary for the occupancy, use and operation of the Leased Land.

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1.10. "Lease" means this Amended and Restated Ground Lease Agreement entered into by and between the Tribe and Calpine.

1.11. "Lease Commencement Date" means the date on which the Secretary's unconditional written approval of the First Amended Ground Lease Agreement was obtained.

1.12. "Lease Expiration Date" means the date on which this Lease Term shall expire under its terms.

1.13. "Lease Term" means the term of years during which this Lease shall be in full force and effect, including any extensions of the initial fifty (50) year term as provided in Section 4.2 hereof.

1.14. "Lease Year" means a twelve (12) calendar month period, and each successive twelve (12) calendar month period, commencing on the Commercial Operations Date in accordance with the terms and conditions of this Lease.

1.15. "Leased Land" means that certain parcel of undeveloped real property consisting of approximately three hundred twenty (320) acres more or less located within the Fort Mojave Indian Reservation in Mohave County, State of Arizona, more particularly described in Exhibit "A" attached hereto.

1.16. "Mortgage" means any mortgage, deed of trust or other instrument or agreement encumbering all or any part of Calpine's leasehold interest in the Property and/or the Improvements granted with respect to a Qualified Financing.

1.17. "Mortgagee" means the holder of any Mortgage, including, without limitation, any wholly-owned subsidiary of a Mortgagee.

1.18. "Opinion of Counsel" means the opinion of counsel to the Tribe which opinion addresses, among other things, the matters set forth in Exhibit "D" attached hereto and incorporated by reference herein.

1.19. "Person" includes an individual, corporation, partnership, firm or association or other entity wherever the context so requires.

1.20. "Pre-Operations Period" means that period of time beginning on the Lease Commencement Date and ending on the Commercial Operations Date, which period shall not exceed five years.

1.21. "Property" means the Leased Land and any and all Improvements now or hereafter located thereon.

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1.22. "Qualified Financing" means financing for the acquisition, development, construction, improvement, maintenance, repair, reconstruction or refinancing of the Property or Utility and Water Facilities.

1.23. "Rent" for purposes of this Lease shall include base rental payments, and contingent rental payments, as set forth in Section 6 below.

1.24. "Roads" means all streets, roads, highways and other access routes.

1.25. "Secretary" means the Secretary of the Interior of the United States or his authorized representative.

1.26. "Taxes" means all taxes and assessments of whatever type, nature and amount, legally imposed from time to time by governmental entities including the State of Arizona, including, without limitation, gross receipts taxes, real estate taxes, personal property taxes and assessments, possessory interest taxes, transaction privilege taxes, taxes on services and use taxes. Taxes on income are expressly excluded from the definition of "Taxes" herein.

1.27. "Temporary Taking" means a taking pursuant to Section 13.3 below for a duration of not more than forty-five (45) days.

1.28. "Title Company" means Chicago Title Insurance Company or other qualified title insurance company acceptable to Calpine and the Tribe.

1.29. "Title Policy" means a standard ALTA leasehold owner's policy of title insurance.

1.30. "Tribe" means the Fort Mojave Indian Tribe. A certified copy of the Tribal Council Resolution of the Tribe authorizing this Lease transaction, and naming those Tribal officials authorized to execute all lease transaction documents and agreements on behalf of the Tribe is attached hereto as Exhibit "G" and incorporated by reference herein.

1.31. "Utility Facilities" means all utility services, including electrical and telephone service, sewer, water, gas and communications cables, relating to the development, use, occupation and enjoyment of the Leased Land.

1.32. "Water Facilities" means all wells and all water supply reservoirs and other water storage and delivery facilities adequate to meet the commercial and fire protection needs of the Leased Land, including, without limitation, all water lines, pumps, pipes and conduits.

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2. Exhibits A-I to this Lease, having herebefore been approved by the parties, are attached hereto and incorporated herein by reference. Exhibits A-I constitute a part of this Lease and are binding on the parties hereto.

3. Demise of Leased Land.

3.1. Leased Land. The Tribe, for and in consideration of the Rent, covenants and conditions herein contained to be kept, performed and observed by Calpine, does hereby lease and demise to Calpine, and Calpine does hereby rent and accept from the Tribe, the Leased Land. The Leased Land is leased by the Tribe (i) subject to all prior, valid and existing rights-of-way and other matters of record; (ii) subject to a reservation by the Tribe of all mineral rights on, under or within the Leased Land; and (iii) subject to the right of the Tribe to grant rights-of-way and other legal grants over, under and across the Leased Land which do not unreasonably interfere with the use and occupancy of the Leased Land by Calpine.

3.2. The Tribe's Warranty of Title. The Tribe hereby represents and warrants that the Tribe now is, and that the Tribe will be as of the Lease Commencement Date, the beneficial owner of the Leased Land and the possessor of the full and unrestricted right, subject to the approval of the Secretary, prior valid existing rights-of-way and other matters of record, to lease the Leased Land to Calpine. The Tribe hereby warrants that during the term of this Lease, so long as Calpine is not in default under this Lease, Calpine will have the quiet enjoyment and uninterrupted right of use and possession of the Leased Land from the Tribe and any Person claiming by, through or under the Tribe.

3.3. Land Survey; Appraisal. A survey of the Leased Land is attached hereto as Exhibit "B" and incorporated by reference herein. The attached land survey will be prepared and made by a surveyor licensed in the State of Arizona and shall include a plot and a written description, including acreage, of the Leased Land and shall meet the minimum standard detail requirements of ALTA/ACSM for a Class A survey. Also pursuant to the requirement of the Secretary, an appraisal of the value of, and a general description of, the Leased Land, prepared by a qualified appraiser licensed in the State of Arizona, is attached hereto as Exhibit "C" and incorporated by reference herein. By submitting this Lease, the survey and appraisal to the Secretary, the Tribe agrees with and accepts the survey and appraisal. When approved in writing by the Secretary, the description of the Leased Land set forth in the survey shall constitute the "Leased Land" for all purposes under this Lease. Notwithstanding the foregoing, Exhibits "B" and "C" will be attached to this Lease when approved by the parties in accordance with Section 2 hereof.

3.4. Condition of the Premises. Calpine hereby accepts the Leased Land in the condition existing as of the Lease Commencement Date,

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subject to all matters of record and subject to all applicable federal, tribal, county and state laws, ordinances and regulations governing and regulating the use of the Leased Land now or hereafter existing and subject to the right to conduct the Contingency Inspections authorized in Section 4.4.2 below. To the Tribe's actual knowledge, the Leased Land is free of all Hazardous Materials that would prohibit, delay or impede the issuance of any license or permit necessary for the intended use of the Leased Land. Calpine expressly acknowledges that the Tribe has not made, and will not make, any inspection, investigation, and/or review of the Leased Land, and/or of any documents, files, reports or other information relating in any way to the Leased Land, to ascertain if any Hazardous Materials or other substances are located or exist on, under, within, above or near the Leased Land. The Tribe's current land use plan for the Leased Land is consistent with the development of the electric generation power plant to be constructed by Calpine under this Lease and the Tribe will not adopt any zoning or revised land use plan for the Leased Land which would prohibit the development and operation of same unless necessary to protect the health and safety of Fort Mojave Reservation residents as determined by a court of competent jurisdiction.

4. Lease Term.

4.1. Commencement and Expiration Dates. The initial Lease Term shall be for a period of up to five years for financing and construction of the Project which shall commence on the Lease Commencement Date, plus a period of fifty (50) years which shall commence on the Commercial Operations Date and, subject to Section 4.2 below, shall continue in existence until midnight on the Lease Expiration Date, unless this Lease is terminated earlier pursuant to any term or provision of this Lease or is otherwise terminated by operation of law.

4.2. Option to Extend. Calpine shall have the option to extend the term of this Lease for one (1) additional period of fifteen (15) years. At least one (1) year prior to the end of the initial Lease Term, Calpine shall notify the Tribe of Calpine's election to extend the Lease Term and upon delivery of such notice to the Tribe, the Term of this Lease shall be extended for one (1) additional period of fifteen (15) years; provided the parties mutually agree upon terms and conditions.

4.3. Surrender of Premises. Upon the expiration or earlier termination of the Lease Term, Calpine shall leave all Improvements in place on the Leased Land in good repair and in a safe condition; provided, however, that Calpine shall remove equipment, supplies and other personal property, including trade fixtures, which have no economic value to the Tribe from the Leased Land within sixty (60) days after the expiration or termination of the Lease Term upon the written request of the Tribe given any time prior to the expiration or termination of the Lease Term.

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4.3.1. Hazardous Waste Report. Within sixty (60) days before the expiration or earlier termination of this Lease, Calpine shall obtain, at its sole cost and expense, and shall deliver to the Tribe and the Secretary, a hazardous waste report prepared by a Person reasonably acceptable to the Tribe and the Secretary indicating whether such investigation reveals any condition at the Leased Land that would constitute a violation of any applicable environmental protection or hazardous waste disposal laws, regulations or ordinances and representing to the Tribe that such investigation reveals that no Hazardous Materials exist at the Leased Land as a result of Calpine's development and operation thereof. If the hazardous waste report discloses any such violations or Hazardous Materials, Calpine, upon receiving such report, shall immediately commence and thereafter diligently pursue to completion the cure of such violations and shall furnish, at its expense, a later dated hazardous waste report representing to the Tribe and the Secretary that the previous violations of applicable environmental protection or hazardous waste disposal laws, regulations or ordinances have been cured to the standards of the governmental agency having jurisdiction.

4.3.2. Survival of this Section. The provisions of Section 4.3 of this Lease shall survive the expiration or earlier termination of this Lease.

4.4. Conditions Precedent. Each of the respective parties' obligations under this Lease are subject to the complete satisfaction of the following conditions precedent to the extent that such condition precedent is for the benefit of such party. The following conditions precedent may be waived in writing by the party(ies) for whom such condition benefits, except as otherwise provided.

4.4.1. Opinion of Counsel. Within sixty (60) days after the execution of this Lease, the Tribe shall cause to be delivered to Calpine, the Opinion of Counsel, which shall be attached hereto as Exhibit "D." The condition precedent of this Section 4.4.1 is for the benefit of Calpine.

4.4.2. Inspections and Studies. On or before the Contingency Deadline, Calpine shall have conducted and prepared, or caused to have been conducted and prepared, such Contingency Inspections of the Leased Land as Calpine deems appropriate, in its sole and absolute discretion. In the event that Calpine disapproves, in its sole and absolute discretion, of any aspect of the results of such Contingency Inspections, Calpine may terminate this Lease without charge or penalty by delivering written notice of such disapproval to the Tribe on or before the Contingency Deadline. If such written disapproval is not delivered to the Tribe prior to the Contingency Deadline, the conditions of this Section 4.4.2 shall be deemed to have been satisfied in full. After the execution of this Lease by both parties, Calpine, its agents, employees, consultants, contractors and subcontractors, shall have the right, license and authority, and the

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Tribe hereby grants such right, license and authority, to enter upon the Leased Land and to commence the Contingency Inspections. Calpine shall cause such employees, consultants, contractors and subcontractors to comply with the matters set forth in Section 23.

Calpine hereby agrees to indemnify, defend and hold the Tribe harmless from and against any and all losses, costs, liabilities, damages, liens, claims or expenses (including attorneys' fees) asserted against the Tribe by reason of Calpine's entry on the Leased Land or by reason of the conduct of the Contingency Inspections. Calpine shall restore the Leased Land to substantially the condition existing prior to such entry in the event that the transaction contemplated hereunder is not consummated. Calpine's indemnification contained in this section shall survive the expiration or earlier termination of this Lease. Prior to Calpine, or its contractors, consultants or employees, entering upon the Leased Land, Calpine shall (i) provide the Tribe and the Secretary with at least ten (10) days prior written notice so that appropriate nonresponsiblity notices may be posted by Calpine; and (ii) obtain a policy of commercial general liability insurance containing a combined single limit of not less than One Million Dollars ($1,000,000.00) naming the Tribe and the Secretary as additional insureds.

4.4.3. Title Policy. On or before the Contingency Deadline, Calpine shall have received a commitment from the Title Company to issue the Title Policy as described in Section 19 below. The condition precedent of this Section 4.4.3 is for the benefit of Calpine.

5. Permitted Uses of Leased Land.

5.1. Electric Generation Power Plant. The Leased Land shall be used for the development, construction and operation of an electric generation power plant (which phrase shall include a co-generation power plant) and all other ancillary facilities, including but not limited to pipelines, transmission lines and other structures necessary for the production, transmission and sale of electric power, as well as all streets and roads within the Leased Land necessary for the full development of the Leased Land (the "Project"). The megawatt capacity of the Project shall be as enumerated in Exhibit H.

5.2. No Unlawful Uses. Calpine hereby represents, warrants, covenants and agrees that it will not use or cause to be used any part of the Leased Land for any unlawful conduct or purpose.

6. Rent. As and for rent under this Lease, Calpine shall pay to Tribe the following:

6.1. Rent Prior to Commercial Operations. During the Pre-Operations Period and prior to the Financial Closing Date, there shall be no rent

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paid by Calpine to the Tribe. During the Pre-Operations Period and subsequent to the Financial Closing Date, rent shall be paid by Calpine to the Tribe in the amount of Fifty Thousand Dollars ($50,000) per annum in advance beginning on the Financial Closing Date and continuing on the first day of each year thereafter. Notwithstanding the foregoing, rent shall be paid by Calpine to the Tribe on and subsequent to the Commercial Operations Date in accordance with Sections 6.2 and 6.3 below. Should the Commercial Operations Date occur within a year for which the $50,000 per annum rent has been paid in advance, then the per annum rent paid in advance shall be prorated based on the unexpired portion of the subject year (on a per diem basis based on a 365-day year) and such amount shall be credited against the first rent payment to be made by Calpine to the Tribe under Sections 6.2 and 6.3.

6.2. Base Rental Payments. Commencing on the Commercial Operations Date, as defined in Section 7.2, and continuing on the first day of each successive Lease Year thereafter, Calpine shall pay to the Tribe the Base Rent as set forth in Exhibit H hereof.

6.3. Contingent Rental Payments. In addition to the Base Rent and commencing on January 31 of each year following the Commercial Operations Date, as defined in Section 7.2, Calpine will make contingent rent payments to the Tribe. The Tribe is entitled to receive contingent rent payment equal to the annual amount specified as Contingent Rent in Exhibit H hereof.

6.4. Rental Bond. Within sixty (60) days after the date of approval of this Lease by the Secretary, unless this requirement is waived, Calpine shall post a bond (the "Rental Bond") in a form satisfactory to the Tribe and the Secretary in a penal sum of not less than the rental payment which the Tribe anticipates will be due and payable during the ensuing Lease Year. The Rental Bond shall be deposited with the Secretary and shall remain in full force and effect for the Lease Term. The Rental Bond shall be maintained at all times in an amount not less than the rental payment which Tribe and Calpine anticipate will be due and payable during the ensuing Lease Year. Should a waiver of the Rental Bond be granted, the Secretary may later reinstate the requirements of the Rental Bond and Calpine hereby agrees to comply with said requirement. Calpine may furnish a corporate surety bond, or in lieu thereof, may deposit with the Secretary cash or negotiable United States Treasury Bonds or other negotiable Treasury obligations in the appropriate amount, together with a power of attorney, empowering the Secretary, in the event of Calpine's default in any of the provisions of this Section 6 to pay over such cash, or to dispose of any such bonds and pay over the proceeds derived therefrom to or for the benefit of the Tribe, subject to Calpine's privilege of curing said default as hereinafter provided. Any other type of security which may be offered by Calpine to satisfy the requirements of this Section 6.4 will be considered by the Secretary, but it is understood that acceptance of security in lieu of those described above shall be at

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the sole discretion of the Secretary. It is agreed that the Rental Bond required by this Section 6.4 shall guarantee payment of rent only and that any corporate surety bond shall be in continuous form and may be subject to the provision that the surety may terminate the Rental Bond thirty (30) days subsequent to the then next ensuing anniversary date of this Lease by giving at least forty-five (45) days written notice to the Secretary. If U.S. Treasury Bonds are provided, Calpine agrees to make up any deficiency between the value of the Treasury Bonds and the required Rental Bond. Interest on the Treasury Bonds shall be paid to Calpine.

7. Water.

7.1. Water Usage. Calpine shall have the right to extract from the Leased Land the quantity of water required for the development, construction and operation of the Project, which shall constitute a portion of the Tribe's Colorado River allocation for the Arizona portion of the Fort Mojave Reservation, up to a maximum of four thousand (4000) acre feet per year of consumptive water rights. In the event that Calpine is unable to extract the required quantity and quality of water from the Leased Land, Calpine shall have the right to extract such quantity of water from additional well sites (provided such sites are not encumbered by an existing third party lease) off the Leased Land or from the Colorado River subject to the stated four thousand (4000) acre feet per year maximum. The Tribe shall reasonably cooperate with Calpine to extract such water and to deliver such water to the Project. The costs of drilling and delivery of water from such off-site locations to the Leased Premises shall be borne by Calpine.

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7.2. Demand Fee. Calpine shall pay to the Tribe One Hundred Seventy Five Dollars ($175) per acre foot of water allocated as a demand fee. Calpine shall be required to pay the Tribe a demand fee for the total of four thousand (4000) acre feet of water per year of demand, whether or not Calpine uses such water. The first payment shall be made in advance on the date on which the plant begins to produce electric power for sale to third parties (the "Commercial Operations Date"), and each payment thereafter shall be made annually on each successive anniversary date following the first payment.

7.3. Water Use Charge. Calpine shall pay to the Tribe One Hundred Seventy-Five Dollars ($175) per acre foot of water used as a water use charge. For permitted water usage, the Tribe shall invoice Calpine for such water usage on a monthly basis, based on actual metered usage, and Calpine shall pay such invoices within thirty (30) days after receipt of each invoice.

7.4. Authorization to Lease. The Tribe hereby warrants that it is authorized to lease the 320 acres of land together with appurtenant water rights of four thousand (4000) acre feet of water to Calpine pursuant to 25 U.S.C. § 415 as

said rights were adjudicated in the U.S. Supreme Court case of Arizona v. California. 363 U.S. 546 (1963) and the supplemental decree 439 U.S. 419 (1979).

7.5. Adjustment to Water Use Charge. The per acre foot demand fee and the per acre foot water use charge specified in Sections 7.2 and 7.3 shall be adjusted annually.

During Lease Years one through seven the per acre foot demand fee and the per acre foot water use charge specified in Sections 7.2 and 7.3 shall be increased annually by the amount of three percent per annum. During Lease Years eight through twelve the per acre foot demand fee and the per acre foot water use charge specified in Sections 7.2 and 7.3 shall be increased annually by the average percentage increase in the Consumers Price Index of the first seven years, except that the annual adjustments shall not be less than three percent per annum. During Lease Years thirteen through seventeen the per acre foot demand fee and the per acre foot water use charge specified in Sections 7.2 and 7.3 shall be increased annually by the average percentage increase in the Consumers Price Index of the previous five years, except that the annual adjustments shall not be less than three percent per annum.

For each successive Lease Year thereafter, the per acre foot demand fee and the per acre foot water use charge shall be increased (but not decreased) by an amount equal to the change from the beginning of the preceding year in the charge for water of the Los Angeles Metropolitan Water District as published or announced by the City of Los Angeles, California, ("MWD Index"). In the event that the MWD Index is no longer published or announced, the Tribe, the Secretary and Calpine shall mutually agree upon a reasonably similar substitute index.

7.6. One Time Tribal Water Payment. Calpine shall make a one-time tribal water payment totaling Two Million Dollars ($2,000,000) as follows: Upon the signing of the First Amended Lease Agreement, April 29, 1998, Calpine made a payment of Three Hundred Thousand Dollars ($300,000) to the Tribe. In addition, Calpine shall make a Fifty Thousand Dollar ($50,000) payment each year on the anniversary date of the signing of the First Amended Ground Lease Agreement until the Financial Closing Date occurs. In addition, on the Financial Closing Date, Calpine shall pay the balance of the Two Million Dollars to the Tribe. This one-time payment shall be in consideration of the Tribe's inability to use the four thousand (4000) acre feet of water referred to in Section 7.1 during the construction period of the Project.

7.7. No Sale of Water or Water Rights. Any water or water rights which Calpine obtains under this Lease shall be used exclusively for the development, construction and operation of the Project upon the Leased Land and

shall not be sold, subleased, conveyed, alienated, assigned or otherwise transferred in any manner whatsoever.

8. Construction Rights, Responsibilities, Covenants and Obligations.

8.1. Calpine's Right and Obligation to Build in General. Subject to all of the terms and conditions contained in Section 9, Calpine shall have the right and obligation to erect, maintain, alter, remodel, demolish, reconstruct, rebuild, replace and renew all Improvements on the Leased Land. Calpine shall pay the Development Fees for all necessary permits, plan check and review, on-site inspections and similar matters as more particularly described below.

8.1.1. Development Review Fees. The Tribe may charge Calpine Development Review Fees in connection with the review, approval and inspections of the development of and construction on the Leased Land.

8.2. Plans; Construction of Improvements.

8.2.1. Planned Area Development Plan. Calpine shall submit to the Tribe for review and approval a Planned Area Development Plan as prescribed in the Fort Mojave Planned Area Development and Subdivision Ordinance. The Tribe shall act on such plan within the time limit set forth in Section 8.2.4. No construction may begin on the Leased Land until the Tribe approves the Planned Area Development Plan in writing.

8.2.2. Concept Plans. Within sixty (60) days after submission of this Lease to the Secretary for approval, Calpine and the Tribe shall submit to the Secretary, for review and approval, three (3) sets of Concept Plans for the development of the Leased Land. The Concept Plans shall include a general development site plan, general design concept drawings and a description of the proposed ingress to and egress from the Leased Land. The Secretary's approval of this Lease shall also be deemed his approval of the Concept Plans.

8.2.3. Construction Plans and Specifications. Within one hundred twenty (120) days after the Financial Closing Date, Calpine shall submit to the Tribe for review and approval as to compliance with the Concept Plans, the Planned Area Development Plan, and building, health and safety codes established by the Tribe, two (2) sets of construction Plans and Specifications for the construction of all Improvements then proposed, which Construction Plans and Specifications may be submitted in phases, as appropriate. The Construction Plans and Specifications shall be comprehensive and shall include a site plan, grading plans and detailed drawings. The Construction Plans and Specifications shall be approved if they comply with the Concept Plans, the Planned Area Development Plan, and the Tribe's building codes then existing (or if not then adopted, the then current uniform building code). In the event that the Tribe disapproves of the Construction Plans and Specifications in any respect, such

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disapproval shall specify the changes necessary to bring such Construction Plans and Specifications into conformance with the Concept Plans and/or the Tribe's building and other codes then in effect. Once the Construction Plans and Specifications have been approved by the Tribe, no substantial change, or change which would have a material adverse affect on the Tribe's potential income under this Lease will be made to the Construction Plans and Specifications without the approval of the Tribe. Calpine shall be responsible for obtaining all of the necessary building permits and approvals in order to construct the Utility and Water Facilities and for payment of the Development Review Fees pursuant to Section 8.1.1 above.

8.2.4. Time for Approvals, Extension of Time. Once submitted, the Plans and Specifications shall be returned within thirty (30) days, either approved or with comprehensive and complete written comments, objections or corrections noted thereon. The Tribe shall retain sufficient staff and engage all appropriate consultants necessary to process all Plans and Specifications within the thirty (30) day time period. An extension of time for the submission of any plans which may be needed by Calpine shall be given reasonable consideration, providing Calpine submits to the Tribe, not less than ten (10) days before such plans are due to be submitted, a letter of request for such extension stating the reason the time limit cannot be met and the additional period Calpine considers necessary. In the event that any Plans and Specifications are not approved by the Tribe, Calpine shall make the necessary corrections or revisions and resubmit those plans and Specifications to the Tribe within a reasonable period of time.

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8.2.5. Construction of Improvements. Calpine shall construct all Improvements on the Leased Land in accordance with the approved Plans and Specifications as provided above, subject to the provisions of Section 9 below. All Improvements shall be constructed free of any mechanic's or materialmen's liens, in strict accordance with the approved Plans and Specifications, in a good and workmanlike manner and in compliance with all applicable laws and codes. Calpine shall have the right, at any time during the term of this Lease, to make normal and ordinary alterations, additions, repairs and improvements (subject only to the issuance of appropriate permits) to any of the Improvements without the prior written approval of the Tribe or the Secretary. Other than as authorized under Section 4.3, the removal or demolition of any of the Improvements shall not be made without the prior written approval of the Tribe and the Secretary, which approvals shall not unreasonably be withheld.

8.3. Construction of Infrastructure Improvements. Upon obtaining all of the necessary approvals and permits in accordance with the requirements for detailed Plans and Specifications and the approval process therefor described above in this Section 8, Calpine shall commence the

preparation, construction and establishment of the Infrastructure Improvements pursuant to all of the terms and conditions set forth below in this Section 8.3. The Tribe hereby agrees to cooperate with Calpine with respect to the planning, development, approval and construction of the Infrastructure Improvements, including, without limitation, cooperating with Calpine with respect to easements, dedications and other instruments in recordable form that may be required by (i) public utilities companies for the purpose of supplying utilities to the Property or (ii) any governmental or regulatory authority thereof in connection with this Lease or the construction of the Infrastructure Improvements on the Fort Mojave Indian Reservation, at no cost or expense to the Tribe except its typical costs of plan check, approval, inspection and similar items with respect to which the Tribe shall receive Development Fees. Calpine shall construct, contract with and otherwise provide for Infrastructure Improvements with respect to the Leased Land as follows:

8.3.1. Water Facilities. Calpine shall construct and install Water Facilities on the Leased Land in accordance with the approved Concept Plans and approved Plans and Specifications. Calpine shall obtain all easements and rights-of-way necessary to construct and maintain all Water Facilities as set forth in the Plans and Specifications therefor. Calpine shall install and develop water supply systems in such a manner so as to avoid any contamination of available ground water resources. Such Water Facilities, which may include but are not limited to, evaporation ponds for water disposal purposes, shall be in full compliance with all appropriate health and safety codes of the Tribe and the provisions of federal and Arizona law which would be applicable if such Water Facilities were constructed outside the borders of the Tribe's trust lands.

8.3.2. Utility Facilities. Calpine shall enter into agreements with the Tribe or Tribal utility companies to provide all Utility Facilities for the Leased Land in accordance with the approved Concept Plans and approved Plans and Specifications, including without limitation, an agreement with Aha Macav Power Services regarding its delivery of construction power to the Project and other matters relating thereto and excluding sewage and communication lines for system control and data acquisition. Tribal utility service shall be provided at competitive rates relative to utility service providers serving off-reservation customers. Calpine shall deliver to the Tribe and the Secretary a plat or diagram showing the locations of all sewage and communication lines to be constructed or installed on the Leased Land. All agreements entered into under this Section 8.3.2 shall not extend beyond the term of the Lease without the prior written approval of the Tribe and the Secretary. Calpine shall obtain all easements and rights-of-way necessary for the construction and maintenance of all Utility Facilities. The Tribe shall not unreasonably withhold its approval of a request by Calpine for a necessary right-of-way. Any costs associated with extending any utility facilities to the Leased Land and/or within the Leased Land shall be the responsibility of Calpine.

8.3.3. Street and Road Access. Calpine shall use existing roads within the Leased Land to the extent they are available and adequate. Calpine shall construct and maintain all additional roads within the Leased Land, and provide for ingress to and egress from the Leased Land, all in accordance with the approved Concept Plans and approved Plans and Specifications as more specifically set forth in 8.4.

8.3.4. Fire and Public Safety. To the extent that Calpine deems it necessary or desirable to supplement the services provided by the Tribe, Calpine may contract with and/or hire private companies to provide fire prevention, inspection and safety services and all public safety and security services which Calpine deems necessary for the safe use, occupation and operation of the Leased Land. Calpine may hire private security personnel and shall have responsibility to insure public safety and security within the Property. Upon entering into any such contracts or agreements, Calpine shall furnish executed copies of the same to the Tribe and the Secretary. All contracts and agreements entered into pursuant to this Section 8.3.4 shall not extend beyond the terms of the Lease without the prior written approval of the Tribe and the Secretary. The parties shall work together and from time to time to evaluate the quality, extent and nature of the fire and security services necessary to service the Property.

8.4. Easements and Rights-of-Way; Use Permit. The Tribe agrees to cooperate with Calpine with respect to Calpine's obtaining any easements for utilities, roads, streets and such other ingress and egress rights to and from other properties owned or controlled by the Tribe as are reasonably necessary to Calpine's full enjoyment and development of the Leased Land. Any such easements and rights-of-way shall be obtained by Calpine pursuant to 25 U.S.C. §§ 323-328 and 25 C.F.R. Part 169.

8.5. Notices of Nonresponsibility. At least ten (10) days prior to the commencement of any construction, alteration or repair of any Improvements, Calpine shall give written notice to the Tribe and to the Secretary of its intent to commence such construction, alteration or repair. Calpine shall post and record the appropriate notices of nonresponsibility as provided under applicable laws. Nothing contained herein shall in any manner be construed as a waiver of the immunity of trust property from mechanic's or materialmen's liens nor obligate the Tribe to post notices of nonresponsibility while the Leased Land is in a trust status.

8.6. Calpine's Ownership of Improvements and Fixtures. Throughout this Lease Term, all buildings, improvements, fixtures, machinery and equipment of whatever nature at any time constructed, placed or maintained on any part of the Leased Land shall be the property of Calpine. Upon the expiration or earlier termination of the Lease, Calpine may remove any inventory

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and personal property then located at the Improvements or Leased Land, [subject to the provisions of Section 4.3.]

8.7. Failure to Timely Complete Construction. Notwithstanding anything to the contrary herein, the Commercial Operations Date shall be not later than five (5) years from the Lease Commencement Date or the Tribe shall have the right to terminate this Lease upon written notice to Calpine; provided, however, that this five (5) year time period shall be extended by the amount of time reasonably required for Calpine to contend with any extraordinary circumstances beyond Calpine's control which creates a construction delay.

9. Guaranty of Completion. Prior to commencing construction of the Improvements, Calpine hereby agrees to provide security to guaranty (i) the completion of all such Improvements then contemplated, and (ii) payment in full of all claims of all persons or entities for work performed on or material furnished for the construction thereof. The foregoing security may be provided in any one or combination of the following ways:

9.1. Bond. Calpine may obtain and post a completion and performance bond in an amount equal to the cost of the Improvements then contemplated to be constructed. Such bond shall be deposited with the Secretary and shall remain in effect until the Improvements for which the bond has been posted shall have been completed and the persons or entities rendering services to, or furnishing materials for, the construction of such Improvements shall have been paid in full and/or shall have delivered to Calpine appropriate waivers and releases. The Tribe shall be named an additional obligee on all such bonds.

9.2. Cash and/or Treasury Bonds. Calpine may deposit, in an escrow maintained at a financial institution reasonably acceptable to the Secretary, negotiable United States Treasury Bonds or cash or maintain a valid line of credit, in an amount equal to the cost of construction of the Improvements then contemplated to be constructed. The instructions for such escrow shall provide for disbursement of the funds on deposit in installments upon the receipt of appropriate certification of Calpine's architect, engineer or contractor at scheduled intervals of the construction of the Improvements. The Tribe and the Secretary shall have access to all information relative to the disbursement of funds through the escrow. All escrow instructions prepared pursuant to this Section 9.2 shall require a ten percent (10%) retention until the lien free completion of all work with respect to which the escrow has been established. Calpine shall assume all risks associated with the fluctuation in the value of U.S. Treasury Bonds.

9.3. Bonding Companies. All completion, performance and rental bonds caused to be issued by Calpine in accordance with the terms of this Lease shall be furnished by companies holding certificates of authority from the

Secretary of the Treasury as acceptable sureties of federal bonds. Calpine shall bear the cost of providing all such bonds.

9.4. Project Lender Requirements. Calpine may obtain Qualified Financing from a project lender (the "Project Lender"). Loan documents of the Project Lender shall contain requirements to guarantee completion of the Project and such requirements shall be deemed to satisfy the requirements of this Section 9. In addition, the Parties may explore the possibility of obtaining industrial revenue bonds for the construction of the transmission line on Tribal property and the water supply pipeline system, if such funding is a positive to the overall financing of the project.

10. Force Majeure. In the event of unavoidable delays, including, without limitation, acts of God, strikes, lockouts, other labor problems, wars, governmental, judicial or other similar actions or administrative proceedings, public unrest, unavailability of materials or labor, and other events not within the exclusive control of Calpine, it is agreed that Calpine shall be granted a reasonable extension of time within which to perform its obligations under this Lease. Calpine's obligations and the terms of this Lease Agreement shall be suspended so long as Calpine is rendered unable to carry out said obligations by reasons of Force Majeure, provided that Calpine shall use reasonable diligence to remove the Force Majeure condition as quickly as possible, and provided further that Calpine shall not be required to settle labor difficulties contrary to the mutual interests of the Parties under this Lease Agreement.

11. Taxes - Payment by Calpine.

11.1. Payment of Taxes by Calpine. Calpine shall comply with all duly enacted tax ordinances of the Tribe; provided, however, that the Tribe agrees that any tribal taxes levied against Calpine, the Project, the Improvements, the Leased Land or any activities or operations of Calpine authorized under the Lease or incidental thereto will not exceed the lowest rate of tax levied upon similar premises, activities, uses, operations and leaseholds within the unincorporated areas of Mohave County, Arizona, Clark County, Nevada or San Bernardino County, California. In the event that tribal taxes, when added to applicable state and local taxes, would exceed the above-referenced tax limitation, the excess tribal taxes shall be abated by the Tribe, and to the extent not abated by the Tribe, in addition to any other legal recourse it may have, Calpine may deduct such excess tax from any Rent due the Tribe under the Lease.

Notwithstanding the provisions of the immediately preceding paragraph, Calpine will make a payment of $2.5 million to the Tribe in lieu of all Tribal sales and use taxes which would be due to the Tribe by Calpine, either directly or indirectly through its vendors and contractors, during the construction phase of the Project. One half of said in lieu payment (i.e., $1.25 million) is due and shall

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be paid to the Tribe on the Financial Closing Date, and the second half (i.e., $1.25 million) is due and shall be paid to the Tribe on or before the first anniversary of the Financial Closing Date. Subsequent to completion of the construction phase of the Project, Tribal sales and use taxes shall be due and payable by Calpine in accordance with the Fort Mojave Tribe Tax Ordinance subject to the provisions of the first paragraph of this Section 11.1, except that no sales or use taxes will be levied on replacement equipment used for the generation or transmission of power.

Notwithstanding the provisions of the first paragraph of this Section 11.1, Tribal leasehold taxes (Fort Mojave Indian Tribe Tax Ordinance Chapter 202) paid by Calpine to the Tribe will be $2.0 million annually for the first twenty (20) years of the Lease. Payment of said annual $2.0 million leasehold taxes shall be made by Calpine at the times and in the manner provided in the Fort Mojave Indian Tribe Tax Ordinance. Thereafter, Tribal leasehold taxes paid by Calpine to the Tribe will not be capped and will be assessed by the Tribe and payable by Calpine in accordance with the leasehold tax provisions in effect in the Fort Mojave Indian Tribe Tax Ordinance at that time.

Notwithstanding the provisions of the first paragraph of this Section 11.1, Tribal personal property taxes (Fort Mojave Indian Tribe Tax Ordinance Chapter 209) of any kind paid by Calpine to the Tribe will be capped at no more than $25,000 per year for the first twenty years of the lease term; capped at $27,500 for years 21 though 40; and capped at $30,250 for years 41 through 50 of the lease term.

11.2. No Tribal Income Taxes. Nothing contained herein shall authorize the Tribe to levy, assess or collect any tribal income tax, or similar tax or assessment upon Calpine, the Project or the activities or operations conducted by Calpine under this Lease, and the Tribe expressly agrees that it will not levy, assess or collect any such tribal tax from Calpine during the Lease Term. In the event the Tribe seeks to impose a tax prohibited under this Section 11.2, in addition to any other legal recourse it may have, Calpine may deduct the amount of such tax from any Rent due the Tribe under this Lease.

11.3. State or Local Taxation Not Approved. Nothing in this Lease shall be deemed to constitute acquiescence in, or approval of, any authority of Arizona or other local government to impose taxes on activities on reservation or trust lands.

11.4. Time of Payment. Subject to Calpine's right to pay Taxes in installments and to contest Taxes, as provided below, all payments to be made by Calpine pursuant to this Section 11 shall be made before any fine, penalty, interest or cost may be added thereto for nonpayment. If by any law any Tax is payable or may, at the option of the taxpayer, be paid in installments, Calpine

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may pay the Tax, together with any accrued interest on the unpaid balance of the Tax, in installments as they become due.

11.5. Contesting Taxes. Calpine shall have the right to contest the amount or validity of any Tax by appropriate legal proceedings, but this right shall not be deemed or construed in any way as relieving or modifying or extending Calpine's covenants to pay any such imposition at the time and in the manner provided in Section 11; provided, however, Calpine may, in lieu of paying any contested Tax, obtain a bond in a form and amount reasonably acceptable to the Tribe pending resolution of such contest.

12. Insurance to be Maintained by Calpine.

12.1. Insurance. During the term of this Lease, Calpine shall at all applicable times provide, maintain and keep in force the following policies of insurance:

12.1.1. Insurance against loss or damage to the Improvements on the Leased Land by fire and any of the risks covered by insurance of the type now known as "special risk" or "special peril" coverage casualty insurance, in an amount not less than the full replacement cost of the Improvements (exclusive of the cost of excavations, foundations and footings).

12.1.2. Commercial general liability insurance on an "occurrence basis" against claims for bodily injury, death or property damage occurring on or about the Property. Such insurance shall afford minimum protection of not less than Five Million Dollars ($5,000,000.00) combined single limit coverage and shall reflect the Tribe and the Secretary as additional insureds. Such insurance shall afford coverage even in the event that the injury or damage is as a result of the Tribe's intentional misconduct or negligence and shall contain a contractual liability endorsement covering Calpine's indemnification obligations under this Lease. The minimum liability insurance coverage requirements shall be reviewed and agreed to between the parties at each five (5) year interval during the term of this Lease, but shall in no event be greater than the industry standard for similar facilities.

12.1.3. Worker's compensation insurance during all phases of construction and operation of the Utility and Water Facilities.

12.2. Waiver of Subrogation. All policies of casualty insurance provided hereunder shall contain a clause whereby the insurer waives its rights of subrogation against the Tribe and the Secretary. Calpine hereby waives any claims against the Tribe and the Secretary to the extent such claims are covered or would be covered by the casualty insurance actually maintained or required to be maintained under this Lease.

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12.3. Certificates of Insurers. Calpine shall deliver to the Tribe and to the Secretary certificates of insurance evidencing the existence of all insurance which is required to be maintained by Calpine. Delivery shall be made (i) promptly after the Lease Commencement Date, and (ii) within ten (10) days prior to the expiration of any insurance. Any insurance required hereunder may be provided under blanket policies so long as the insurer issues a certificate to the Tribe and the Secretary expressly segregating a portion of the available insurance with respect to the coverage required hereunder. All insurance required hereunder shall contain a provision providing the Tribe and the Secretary with no less than thirty (30) days written notice of cancellation or non-renewal. All insurance policies obtained by Calpine pursuant to the terms of Section 13 shall be furnished and maintained by insurers rated A - Class XI or better in the current edition of Best's Insurance Guide and which hold certificates of authority from the Secretary of the Treasury as acceptable sureties of federal bonds. Calpine hereby agrees to notify the Tribe and the Secretary of any occurrence which might require the filing of a claim under any such policy of insurance.

13. Condemnation of the Property.

13.1. Termination and Proceeds. If, at any time during the term of this Lease, title to the whole or substantially all of the Property shall be taken in condemnation proceedings, by any right of eminent domain, or by any other similar right or authority, all Rent and additional payments, if any, hereunder shall be apportioned and paid to the date of taking. For purposes of this Section 13, "substantially all of the Property" shall be deemed to have been taken if the remaining portion is not capable of producing a fair return to Calpine and the Tribe as compared to the return generated by the operation of the Property prior to such taking. In the event of any such taking, notwithstanding that this Lease shall terminate by operation of law or otherwise upon the date of such taking, any award(s) by the condemning authority shall be distributed to Calpine, including, without limitation, any portion of the award representing the value of the Leased Land without Improvements.

13.2. Partial Taking. In the event of any such taking of less than the whole or substantially all of the Property, the term of this Lease shall not be reduced or affected in any way, and any award(s) by the condemning authority shall be distributed to Calpine, including, without limitation, any portion of the award representing the value of the Leased Land without Improvements. Calpine shall repair, alter and restore the remaining part of the Property to the extent reasonably possible, economically feasible and there are available proceeds from condemnation awards, with such repair, alteration or restoration to be done in conformity with the provisions of Sections 8 and 14 hereof. The Rent, excluding earned interests, for the balance of this Lease shall be reduced, effective as of the date of such partial taking, on a pro rata basis.

13.3. Temporary Taking. If the whole or any part of the Property or of Calpine's interest in this Lease shall be taken in condemnation proceedings, by any right of eminent domain, or by any other similar right or authority for a temporary use of occupancy, the term of this Lease shall not be reduced or affected in any way and Calpine shall continue to pay in full the Rent and other charges herein reserved or provided for without reduction or abatement in the manner and at the times herein specified (except only to the extent that Calpine is prevented from so doing pursuant to the terms of the order of the condemning authority) and Calpine shall continue to perform and observe all of the other covenants, agreements, terms and provisions of this Lease as though such taking had not occurred. In the event of any such taking referred to in this Section 13.3, Calpine shall be entitled to receive the entire amount of any award made for such taking whether such award is paid by way of damages, rent or otherwise, unless such period of temporary use or occupancy shall extend beyond the Lease Expiration Date of this Lease in which case such award shall be apportioned to the Tribe and Calpine as of such Lease Expiration Date in the same ratio that the part of the entire period for which such compensation is made falling before this Lease Expiration Date and that part of such period falling after such Lease Expiration Date bears to the entire period.

13.4. Notice of Proceeding. In the event the Tribe or Calpine shall receive notice of any proposed or pending condemnation or similar proceeding affecting this Lease or the Property, the party receiving such notice shall promptly notify the other party.

13.5. Limitation on Takings; Award. Notwithstanding anything contained in this Lease or under federal, state or Tribal law to the contrary, the Tribe hereby represents, warrants, covenants and agrees that it shall not effect, and shall not cause to be effected, any taking of this Lease, the Property or the Utility or Water Facilities, or any portion hereof or thereof, whether by right of condemnation, eminent domain or otherwise, except for matters of extreme public safety which are not adequately being addressed by Calpine after appropriate notice and failure by Calpine to appropriately respond in a reasonably timely manner. In the event of any unlawful taking of this Lease by the Tribe, Calpine may pursue any and all remedies afforded by the Indian Civil Rights Act, 25 U.S.C. §§ 1301 et seq.

13.6. Alternate Allocation of Award. The Tribe and Calpine hereby acknowledge and agree that the condemnation/taking award allocations provided at Sections 13.1, 13.2, and 13.3 above were expressly negotiated items between the Tribe and Calpine considering that the Tribe, as lessor, would also be the condemning authority. Accordingly, the parties have agreed that Calpine shall be fully compensated for the value of the loss as described above in the event of a taking by the Tribe. Notwithstanding anything contained in Section 13 of this Lease to the contrary, if the United States, State of Arizona or any agency

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or political subdivision thereof, is the condemning authority, except if the United States, State of Arizona, or any agency or political subdivision thereof, condemns or otherwise effects a taking of any of the Leased Land and/or any Improvements thereon at the request, application or upon the initiation of the Tribe, in the event of the taking of any, all or a substantial portion of the Leased Land or the Improvements at any time during the Lease Term, the rights of Calpine and the Tribe to share in the net proceeds of any award for the taking of the Leased Land and Improvements and the damages upon any such taking shall be as follows and in the following order of priority:

13.6.1. To the Tribe, that portion of the award that shall represent compensation for the value of the Leased Land considered as vacant and unimproved land, without deduction for the value of Calpine's leasehold, if any;

13.6.2. To Calpine (to the extent available after the payment in 13.6.1 above), such portion of the award that shall represent compensation for the value of the Improvements;

13.6.3. To the Tribe (to the extent available after the payments in 13.6.1 and 13.6.2 above), the value of the Tribe's reversionary interest in the Improvements or the part thereof so taken;

13.6.4. To Calpine (to the extent available after the payments in 13.6.1, 13.6.2 and 13.6.3 above), the value of the leasehold and the Improvements;

13.6.5. If the court in any condemnation proceeding allocates the condemnation award between the Tribe and Calpine according to the provisions of subparagraphs 13.6.1, 13.6.2, 13.6.3 and 13.6.4 above, the value so determined shall be conclusive upon the Tribe and Calpine.

14. Maintenance and Repair of Improvements.

14.1. Calpine's Duty to Maintain. Throughout the term of this Lease, Calpine shall, at Calpine's sole cost and expense, maintain the Property and all Improvements thereon in proper working condition and repair (including landscaping and parking), making all necessary substitutions and replacements.

14.2. Calpine's Duty to Repair. If any Improvements on the Leased Land shall be damaged or destroyed by any cause whatsoever during the term of this Lease, Calpine shall, subject to Section 8 hereof, with reasonable promptness rebuild, repair or restore the same, to at least substantially the condition existing immediately prior to such damage or destruction. Such reconstruction shall commence within one hundred twenty (120) days after the damage occurs or the full insurance proceeds are received, whichever is later, and

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thereafter shall be pursued diligently to completion. Insurance proceeds shall be deposited with an institution or escrow holder reasonably acceptable to the Tribe and the Secretary. Calpine shall also deposit with such institution or escrow holder any funds in addition to insurance proceeds required to reconstruct the damaged Improvements. The "escrow instructions" shall include provisions that all funds shall be used to reconstruct the damaged Improvements, and funds shall be disbursed during the reconstruction process in accordance with generally accepted construction lending practices, including, without limitation, a ten percent (10%) retainage until the lien free completion of the Improvements. If Calpine is not then in default under the terms of this Lease, after reconstruction of the Improvements is completed, the balance of any funds remaining in the escrow account shall be immediately released to Calpine. If Calpine is then in default of the terms of this Lease, any balance in the escrow account shall remain in such account as security for the full performance by Calpine under the terms hereof, after which such funds shall be released to Calpine. Notwithstanding anything contained in this Lease or any Mortgage instrument to the contrary, any Mortgagee may be named as a beneficiary of insurance proceeds; however, all insurance proceeds paid under any policy of insurance shall be subject to the obligation to repair and reconstruct. Calpine's obligation to restore damaged or destroyed Improvements shall not be subject to or limited by the availability of insurance proceeds.

15. Mortgaging.

15.1. Mortgage Financing. Calpine shall have the right to Mortgage its leasehold interest in the Property, convey it by deed of trust (or other form of mortgage), or create any other encumbrance on all or any part of Calpine's leasehold interest in the Property and Improvements so long as such Mortgage is approved by the Secretary and the Tribe in writing. No purported Mortgage encumbrance on the Property shall be valid without such approval. The Secretary and the Tribe shall approve such Mortgage so long as it is made pursuant to a Qualified Financing, conforms to the standards established by the Secretary, and the proceeds of the Qualified Financing are used exclusively for the development and/or operation of the Property or other authorized purposes. Any such Mortgage may convey a lien on Calpine's leasehold estate in the Property, but no Mortgage shall, or shall purport to, encumber the Tribe's interest in the Property. The Tribe hereby agrees to cooperate with any prospective Qualified Financing Mortgagees and execute and deliver all documents and agreements reasonably requested by any such Qualified Financing Mortgagee to facilitate a Qualified Financing.

15.2. Rights of a Mortgagee. If, from time to time, Calpine encumbers its leasehold estate in the Property with a Mortgage approved by the Secretary and the Tribe or the Mortgagee delivers a copy of such approved Mortgage and the Mortgagee's name and address to the Tribe and Secretary, then

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the Tribe agrees that the Mortgagee shall, for so long as the Mortgage shall remain unsatisfied and of record, have the rights provided for in Sections 15.3, 15.4 and 15.5 of this Lease.

15.3. Notice to Mortgagees. Each Mortgagee shall be entitled to a contemporaneous written notice from the Secretary and the Tribe of any default by Calpine. The notice to each Mortgagee required hereunder shall be delivered personally or sent by certified or registered mail through the United States mail service (with postage prepaid). Either method of service shall be to the address provided to the Tribe by each Mortgagee in the notice given by such Mortgagee to the Tribe and the Secretary under Section 15.2 of this Lease, and that address may be changed from time to time by written notice to the Tribe and the Secretary.

15.4. Mortgagee's Right to Cure. Each Mortgagee shall have the right to cure any default by Calpine either on its own account or for the account of Calpine. Each Mortgagee will have 45 days for a monetary default and 90 days for a non-monetary default, plus an extension of this deadline if a cure for a non-monetary default is diligently being pursued, in addition to the time to cure such default that is afforded to Calpine under Section 17.1 of this Lease in order to cure any default by Calpine. Additionally, the Mortgagee will have additional time to cure defaults if bankruptcy is declared voluntarily or involuntarily by Calpine. The Mortgagee will not be required to have possession of the property in order to cure non-monetary defaults.

15.5. Mortgagee's Right to Limitations on Termination of Lease. If Calpine is in default under any of the provisions of Section 6 and so long as all defaults in the payment of Rent are cured by Mortgagee within forty-five (45) days of the Secretary's declaration of default, the Secretary will take no action to effect a termination of the Term of this Lease without first giving to each Mortgagee reasonable time, not to exceed ninety (90) days from the time such Mortgagee received notice from the Secretary within which to either (i) obtain possession of the Property (including possession by receiver) and cure such default in the case of a default which is susceptible of being cured when the Mortgagee, or its designee, has obtained possession, or (ii) institute foreclosure proceedings and, after commencement of such foreclosure within such ninety (90) day period, thereafter to complete such foreclosure or otherwise acquire Calpine's interest under this Lease with diligence and continuity.

If any Mortgagee complies with the immediately preceding paragraph of this Section 15.5 and pays all monetary obligations of Calpine under this Lease, and cures all nonmonetary defaults of Calpine under this Lease reasonably curable by the Mortgagee, it shall, when it, or its designee, obtains possession of the Property, immediately give the Tribe and the Secretary written notice of such event, at which time, at the option of the Mortgagee, or its

designee, the Tribe shall terminate this Lease with Calpine and enter into a new lease with such Mortgagee. The new lease shall be in exactly the same form, terms and provisions as this Lease except that the new lease: (i) shall be effective as of the termination of this Lease and shall have a term equal to the then remaining Lease Term; (ii) the Mortgagee, or its designee, shall be named as Lessee thereunder; and (iii) the then current beneficial owner of the Leased Land shall be the Tribe.

15.6. Limitations on Mortgagee Liability. A Mortgagee shall not be liable in any manner for any of the obligations or covenants of Calpine under this Lease unless and until such Mortgagee becomes the owner of Calpine's leasehold estate. A Mortgagee shall have personal or corporate liability with respect to defaults which occurred while it was the lessee under this Lease. In that event, the Mortgagee shall be, and remain, liable for all obligations and covenants of Calpine for so long as it remains the owner of the leasehold estate. The Mortgagee shall never be liable for any defaults arising either before it became the lessee or after the time that it ceases to be the lessee under this Lease; provided, however, that these limitations upon the Mortgagee's personal or corporate liability for such defaults shall not affect the Tribe's right to terminate this Lease should the Mortgagee fail to cure any such defaults (regardless of when such defaults occurred) within the time afforded to the Mortgagee under this Lease. The Tribe may exercise all rights and remedies available to it in the event of a non-monetary default by a Mortgagee who has become the lessee under this Lease. The Tribe shall not terminate this Lease so long as the Mortgagee pays all monetary and performs all non-monetary obligations within the cure periods outlined in paragraph 15.4 of Calpine hereunder and the Tribe agrees to accept such payment as performance by Calpine.

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15.7. Assignment in Connection with Foreclosure. The Tribe covenants and agrees that in the event of any foreclosure under any Mortgage either by judicial proceedings, under power of sale contained therein, or transfer in lieu of foreclosure, all right, title and interest of Calpine under this Lease may be assigned to and vested in the purchaser/transferee at such foreclosure, subject and subordinate, however, to the rights and title of the Tribe hereunder and conditioned upon the assumption in writing by such purchaser/transferee of all obligations of Calpine under this Lease and continued performance of the Lease provisions hereunder. Upon such written assumption, such purchaser shall be vested with all right, title and interest of Calpine under this Lease.

15.8. Estoppel Certificates. The Tribe and Calpine will execute, acknowledge and deliver to the other promptly upon request, a certificate certifying (i) that this Lease is unmodified and in full force and effect (or, if there have been modifications, that this Lease is in full force and effect, as modified, and stating the modifications), (ii) the dates, if any, to which Rent has been paid, and (iii) that no notice has been given to Calpine of any default which has not

been cured and to the best of its knowledge and belief no default exists (or, if there has been notice or such default exists, describing the same). Certificates from the Tribe and Calpine pertaining to the same matters may be relied upon by any prospective Mortgagee or by any prospective transferee of any interest under this Lease.

16. Dispute Resolution.

16.1. Meet and Confer. Whenever during the term of this Agreement, any disagreement or dispute arises between the parties as to the interpretation of this Lease Agreement or any rights or obligations arising thereunder, such matters shall be resolved whenever possible by meeting and conferring. Either party may request such a meeting by giving notice to the other, in which case such other party shall make itself available within seven (7) days thereafter.

16.2. Arbitration. If such matters cannot be so resolved within ten (10) days, and do not involve any claim of breach or termination of this Lease Agreement either party may seek a resolution by arbitration in accordance with the procedures set forth herein, and the Tribe expressly grants a limited waiver of tribal sovereign immunity as and to the extent provided within Section 16.3. herein in connection with any such request for arbitration. Such disputes shall be adjudicated exclusively by binding arbitration conducted by the American Arbitration Association (the "AAA") in accordance with the Commercial Arbitration Rules of the AAA then in effect. The arbitration shall take place in Maricopa County, Arizona, or such other place as the parties may agree. In such an arbitration proceeding each party shall appoint an arbitrator within ten (10) days of the commencement of the arbitration and the two arbitrators shall mutually appoint a third arbitrator within ten (10) days of their appointment. If either party fails or refuses to appoint an arbitrator, the arbitrator appointed by the other party shall be the sole arbitrator. If the two arbitrators are unable to agree on the appointment of a third arbitrator within ten (10) days, the third arbitrator will be appointed by the AAA. Any hearing shall be conducted within fifteen (15) days after the panel is appointed, and the decision of a majority of the members of the arbitration panel shall be final, binding and unappealable. The costs of the arbitration shall be borne equally by the parties, unless the arbitration panel rules otherwise.

16.2.1. Limitation on Scope of Decision. In rendering its decision and award, if any, the arbitration panel shall not alter or otherwise modify the provisions of this Lease Agreement.

16.2.2. Judicial Enforcement of Arbitration Award. Either party may, subject to the provisions of 25 C.F.R. part 162, seek judicial enforcement of an arbitration decision. Any effort to seek judicial enforcement

in a court of competent jurisdiction of an arbitration decision against the Tribe shall be done in accordance with the provisions of Section 16.3.

16.3. Limited Waiver of Sovereign Immunity.

16.3.1. Scope of Waiver. By this Lease Agreement, the Tribe does not waive, limit or modify its sovereign immunity from unconsented suit except as set forth below.

16.3.2. Procedural Requirements. The Tribe does grant a limited waiver of its sovereign immunity as to any claim if, and only if, each and every one of the following four conditions is met:

(1) The claim is made by Calpine or its approved assignee or approved mortgagee, and not by any other person, corporation, partnership, or entity whatsoever;

(2) The claim alleges a breach by the Tribe of one or more of the specific obligations or duties expressly assumed by it under the terms of this Lease Agreement or an approved mortgage;

(3) The claim seeks either:

(a) some specific action, or discontinuance of some action, by the Tribe, to bring the Tribe into full compliance with the duties and obligations expressly assumed by the Tribe in this Lease Agreement; or

(b) money damages, provided that money damages may be sought or awarded against the Tribe in arbitration and/or judicial action only from monies paid to the Tribe by Calpine under this Lease; and, provided further that no Fort Mojave Tribal trust resources or other assets of the Tribe shall be subject to attachment, execution or other similar process. Notwithstanding the foregoing terms of this subsection (3)(b), the limitation that money damages may be sought or awarded against the Tribe in arbitration and/or judicial action only from monies paid to the Tribe by Calpine under this Lease shall not apply so long as Calpine is not in a fully matured default under the terms of this Lease and should it be finally determined that the Tribe has violated Calpine's right to extract up to a maximum of four thousand (4000) acre feet per year of consumptive water rights in accordance with Section 7.1 of this Lease; or

(c) to foreclose on the collateral secured under an approved mortgage.

(4) The claim is made in writing to the Tribe and the Tribe shall have thirty (30) days to act on such claim before judicial proceedings may be instituted.

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16.3.3. Time Period. With respect to any claim authorized herein, judicial proceedings shall be instituted within twelve (12) months after the claim accrues or shall be forever barred. The waiver granted herein shall commence on the effective date of this Lease Agreement and shall continue for twelve (12) months following expiration, termination, or cancellation of this Lease Agreement, except that the waiver shall remain effective for any proceedings then pending, and all appeals therefrom.

16.3.4. Service of Process. In any such suit, service on the Tribe shall be effective if made by certified mail, return receipt requested, to the Chairperson of the Tribal Council at the address set forth in Section 26.18.2, or as thereafter amended.

16.3.5. Consent to Jurisdiction. Under this limited waiver of sovereign immunity, the Tribe agrees to submit disputes arising under this Agreement to arbitration under Section 16.2 and to judicial enforcement of arbitration decisions under Section 16.2.2, and to judicial proceedings under Section 16.3, to submit to the jurisdiction of such tribunals, and to give full legal effect to such decisions.

16.3.6. No Exhaustion of Tribal Court Remedies. The parties hereby agree that under the limited waiver of tribal sovereign immunity provided for herein, the assumption of jurisdiction by any arbitration panel or court of competent jurisdiction shall not be delayed or curtailed by any doctrine requiring exhaustion of tribal court remedies, and the Tribe expressly waives any rights under such doctrine, as the parties have expressly agreed that either arbitration or a court having competent jurisdiction is appropriate under this Lease Agreement.

17. Default and Remedies.

17.1. Lessee's Default. An event of default shall be deemed to have occurred upon the occurrence of any of the following:

17.1.1. Failure to Pay Rent. The failure by Calpine to pay any Rent, or any other sum payable by Calpine to the Tribe, which failure is not fully cured within thirty (30) days after receipt by Calpine of written notice from the Tribe and/or Secretary setting forth such failure;

17.1.2. Other Breach. If Calpine fails to materially perform or materially comply with any other material covenant, term or condition of this Lease, and such failure is not fully cured within thirty (30) days after receipt by Calpine of written notice from the Tribe and/or the Secretary setting forth such failure; provided, however, that with respect to any such failure which is curable, but is of such a nature that it cannot, with due diligence, reasonably be cured within such thirty (30) day period, an event of default shall not be deemed to

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exist if Calpine promptly commences to cure such failure within such thirty (30) day period and thereafter pursues such cure to completion with due diligence;

17.1.3. Insolvency or Bankruptcy. Any action taken or suffered by Calpine as a debtor under any voluntary or involuntary insolvency or bankruptcy act or reorganization, moratorium or similar law affecting debtors' and creditors' rights generally.

17.2. Remedies. If there exists an event pursuant to Section 17.1 above, then, after the appropriate notice and cure periods set forth in Section 17.1, the Tribe may submit this Lease to the Secretary for termination and, subject to the rights of any approved Mortgagees and the limitations of federal law, the Tribe and/or the Secretary shall have any or all of the following rights and remedies as well as rights and remedies under applicable law.

17.2.1. Declare this Lease to be terminated and re-enter the Leased Land or any part thereof, pursuant to an order of a federal court having jurisdiction and/or a duly constituted board of arbitration issued pursuant to proceedings for unlawful detainer prescribed under federal law, and if federal law does not establish a procedure for such proceedings, then as provided under Arizona procedural law, and expel or remove Calpine and all parties occupying the same or any of them, and retake possession of the Leased Land without prejudice to any remedies that the Tribe and/or the Secretary might otherwise have by reason of such event of default; provided, however, that neither the Tribe or the Secretary shall have the right to terminate the right of possession of any sublessee so long as (i) such sublessee has been approved by the Tribe pursuant to Section 26.4 below; (ii) such sublessee is not in default under its sublease agreement with Calpine; and (iii) such sublessee attorns to the Tribe or, at the Tribe's and/or Secretary's option, agrees to enter into a new lease for the balance of the term of such sublessee's sublease upon the same terms and provisions as contained in such sublease.

17.2.2. Re-enter the Leased Land, pursuant to an order of a federal court having jurisdiction and/or a duly constituted board of arbitration issued pursuant to proceedings for unlawful detainer prescribed under federal law, and if federal law does not prescribe a procedure for such proceedings, then as provided under Arizona procedural law, and at the Tribe's and/or Secretary's option, without declaring this Lease to be terminated, re-let the Leased Land or any part thereof for the account of Calpine, on such terms and conditions and at such rent as the Tribe and/or Secretary may then reasonably deem appropriate, collecting such rent and applying it to the amount due from Calpine hereunder, to the expenses of reletting and to any other damages or expenses sustained by the Tribe and/or Secretary, recovering from Calpine the difference between the proceeds of such reletting and the amount of the Rent reserved to be paid by Calpine hereunder, such sum Calpine shall pay upon demand.

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17.2.3. Recover from Calpine the amount, at the time of such termination, equal to the excess, if any, of the amount of Base Rent, Contingent Rent, and other items of Rent reserved herein for the balance of the Lease Term over the then reasonable rental value of the Leased Land for the same period. The Tribe and/or the Secretary will not, by any re-entry or other act, be deemed to have terminated this Lease, or the liability of Calpine for the Rent reserved hereunder or any installment thereof then due or thereafter accruing or, for damages, unless the Tribe and the Secretary notify Calpine in writing that the Tribe and the Secretary have so elected to terminate this Lease.

17.2.4. Collect by suit or otherwise, all monies as they become due hereunder, or enforce, by suit or otherwise, Calpine's compliance with all terms of this Lease through the date of termination of this Lease.

17.2.5. Limited Recourse. The obligations of Calpine under this Lease shall be without recourse to any of the officers, directors, shareholders, employees, agents, partners or affiliates of Calpine. The Tribe's recourse under and in connection with this Lease shall be expressly limited to the assets of Calpine, specifically including the Project and any and all assets and rights directly associated with the Project. Notwithstanding anything herein to the contrary, in the event Calpine (or any successor or assign thereof) shall at any time own one or more power generation facilities in addition to the Project (together with any and all assets and rights directly associated therewith, the "Additional Projects"), then the obligations of Calpine (or such successor or assign) under this Lease shall be without recourse to the Additional Projects.

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17.3. Cumulative Remedies. Calpine, the Tribe and the Secretary acknowledge that either party to this Lease may restrain any breach or threatened breach of any covenant, agreement term, provision or condition of this Lease by the other party. The mention of any particular remedy shall not preclude a party from any other remedy available either at law or in equity. Any right or remedy of a party specified in this Lease, and any other right or remedy that Calpine, the Tribe and/or Secretary may have at law, in equity or otherwise upon breach of any covenant, agreement, term, provision or condition in this Lease, shall be distinct, separate and cumulative rights or remedies, and no one of them, whether exercised by such party or not, shall be deemed to be in exclusion of any other.

17.4. The Tribe's Default. The Tribe shall not be considered to be in default under this Lease, unless (i) the Tribe has been given notice specifying the default and (ii) the Tribe has failed to cure the default within thirty (30) days; provided, however, that in the event of a default not reasonably curable within such thirty (30) day period, the Tribe shall not be deemed in default if the Tribe commences such cure within such thirty (30) day period and thereafter diligently prosecutes such cure to completion. Upon an uncured default by the Tribe,

Calpine may terminate this Lease and/or pursue any other remedy permitted by applicable law to the extent expressly provided within Section 16.3 of this Lease.

17.5. Right to Terminate Prior to Closing. At any time prior to the Financial Closing Date (as defined in Section 1.6 above) Calpine may terminate the Lease by giving the Tribe thirty (30) days written notice. In the event that Calpine terminates the Lease under Section 17.5, Calpine shall reimburse the Tribe for all costs and expenses incurred by the Tribe in fulfilling its obligations under this Lease and previously approved by Calpine.

18. The Tribe's General Protective Provisions.

18.1. The Tribe's Right of Entry and Inspection. Calpine shall permit the Tribe, the Secretary, or the Tribe's or the Secretary's agents, representatives or employees to enter upon the Leased Land at reasonable times for the purposes of inspecting, posting notices of non-responsibility or similar notices, and determining whether agreements in this Lease are being complied with.

18.2. The Tribe's Right to Cure Default. In the event Calpine shall fail to pay and discharge or cause to be paid and discharged, when due and payable, any Tax, assessment, or other charge upon or in connection with the Leased Land, or any lien or claim for labor or material employed or used in, or any claim for damage arising out of, the construction, repair, restoration, replacement, maintenance and use of the Leased Land and the improvements thereon, or any judgment on any contested lien or claim thereof, or any insurance premium or expense in connection with the Leased Land and improvements thereon, or any claim, charge or demand which Calpine has agreed to pay or caused to be paid under the covenants and conditions of this Lease, and if Calpine, after thirty (30) days written notice from the Tribe so to do (or such lesser amount of time as necessary in the event action must be taken or payment made to preserve the Tribe's or Calpine's rights or avoid penalties), shall fail to pay and discharge the same, the Tribe and/or Secretary may, at its/his option, pay any such Tax, assessment, insurance expense, lien, claim, charge, or demand or settle or discharge any action therefor, or judgment thereon, and all costs, expenses and other sums incurred or paid by the Tribe in connection with any of the foregoing with interest at the maximum rate permitted under applicable law, shall be paid by Calpine to the Tribe as additional Rent upon demand and any default in such payment shall constitute a breach by Calpine of the covenants and conditions of this Lease. Notwithstanding anything in this Section 18.2 to the contrary, Calpine may, at its sole option, in lieu of paying any contested Tax, assessment, lien or similar charge upon the Leased Land, obtain a bond in a form and amount reasonably acceptable to the Tribe and/or Secretary, until such Tax dispute is resolved according to the provisions of this Lease.

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19. Title Insurance. Calpine's duties and obligations under this Lease and the commencement of this Lease Term shall be subject to the condition that the Title Company shall have, on or before the Contingency Deadline, issued or committed to issue a Title Policy in such amount as Calpine may require insuring Calpine's interest in the leasehold estate, subject only to title exceptions reasonably acceptable to Calpine. The cost of such Title Policy shall be paid by Calpine.

20. Indemnification. Calpine hereby agrees to pay, defend, indemnify and hold the Tribe and the United States, and their respective tribal members, officers, agents and employees, harmless from and against any and all claims, demand, damages liabilities, losses and costs (including attorneys' fees and costs) in any way arising from, relating to or in connection with (i) the use, occupancy, development, management or operation of the Property or the facilities located thereon; or (ii) a breach of this Lease by Calpine. Notwithstanding anything contained in this Lease to the contrary, the foregoing indemnification is not applicable, and shall have no force or effect with respect to any such claim, demand, damage, liability, loss or cost arising from, relating to or in connection with the intentional misconduct or negligence of the Tribe or any of its members or agents (whether or not then in the employ of Calpine) or of any of the agents or employees of the United States.

21. Cost of Operations. All cost of production and generation of power on and off the Leased Land shall be borne by Calpine.

22. Employment Preferences.

22.1. Generally. Calpine agrees to comply with the provisions of the Fort Mojave Indian Tribe's Tribal Employment Rights Ordinance ("TERO").

22.2. Compliance Agreement. In fulfillment of the obligations set forth in Section 22.1, Calpine and the Tribe shall negotiate a Compliance Agreement under the TERO, a copy of which Agreement will be attached hereto as Exhibit "E." Notwithstanding the eventual terms of the Compliance Agreement, Calpine and the Tribe agree that the provisions of Chapter III, Section 11. ("Compliance Fees") of the TERO shall be completely satisfied by payment by Calpine to the Tribe of the following monies: One Hundred Thousand Dollars ($100,000.00) on the Financial Closing Date, One Hundred Thousand Dollars ($100,000.00) on the first anniversary of that date, and Fifty Thousand Dollars ($50,000) on the second anniversary of that date.

23. Laws and Regulations. Subject to Section 11 of this Lease, Calpine shall comply with and conduct all of its operations hereunder in accordance with the applicable federal and tribal laws, regulations, ordinances, rules and orders.

24. Exclusivity. During the Term of this Lease, the Tribe agrees to deal exclusively with Calpine with respect to power plant development on the Fort Mojave Indian Reservation, except for renewable resource generation.

25. Development Assistance. The Tribe shall provide assistance to Calpine in obtaining the Secretary's approval of this Lease, in obtaining any necessary permits or approvals for the Project, and in performing other reasonable acts required for the development, construction and operation of the Project, including any required environmental analysis under NEPA. The Tribe shall be reimbursed for its actual costs incurred in providing such development assistance, which costs shall be subject to prior approval by Calpine. The Tribe shall invoice Calpine quarterly for such approved development assistance costs.

26. General Provisions.

26.1. Utilities. Calpine shall pay for all utilities and services furnished to or used with respect to the Property and the Facilities as more particularly described in Section 8.3.2 above.

26.2. Waiver of Breach. No failure by either the Tribe or Calpine to insist upon the strict performance by the other of any covenant, agreement, term or condition of this Lease or to exercise any right to remedy consequent upon a breach thereof, shall constitute a waiver of any such breach or of such covenant, agreement, term or condition. No waiver of any breach shall affect or alter this Lease, but each and every covenant, condition, agreement, and term of this Lease shall continue in full force and effect with respect to any other then existing or subsequent breach.

26.3. Computation of Time. The time in which any act provided by this Lease is to be done is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday or legal holiday under the laws of the United States or State of Arizona, and then it is also excluded.

26.4. Subleasing; Assignment/Successors in Interest. Calpine shall not sublease any right to or interest in the Lease and any part of the Improvements on the Leased Land, without the prior written consent of the Tribe, which consent shall not unreasonably be withheld. The criteria which shall be considered upon a requested sublease shall include the net worth, credit standing, experience and number of comparable projects in operation of the proposed sublessee. No such purported sublease shall be valid or binding without such consent, and then only upon the condition that the sublessee has agreed in writing that in the event of a conflict of any provisions of this Lease and of the sublease, the provisions of this Lease shall govern. The term of any sublease shall not exceed the term of this Lease. No sublessee shall release Calpine from any obligation under this Lease. Any purported sublease made, except as set forth above, shall be deemed a breach of this Lease and shall be null and void.

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Calpine shall not assign or transfer all or any part of Calpine's interest in this Lease without the prior written consent of the Tribe, which consent shall not unreasonably be withheld; provided, however, that Calpine may assign and transfer its interest in this Lease to a wholly-owned subsidiary of Calpine's parent, Calpine Corporation, a Delaware corporation, without obtaining the consent of the Tribe. The criteria which shall be considered upon a requested assignment or transfer shall include the net worth, credit standing, experience and number of comparable projects in operation of the proposed assignee or transfer. Upon a permitted assignment hereunder, Calpine shall be released from any and all obligations under this Lease with respect to the interest assigned. Each and all of the terms, covenants, conditions and restrictions set forth in this Lease shall inure to the benefit of and be binding upon the approved assigns and successors-in-interest of Calpine, and their respective approved Mortgagees, assigns, transferees, subtenants, licensees and other successors-in-interest. Any purported, assignments or transfer made, except as set forth above, shall be deemed a breach of this Lease and shall be null and void.

26.5. Conflict of Interest. The Tribe hereby declares that it has not made any payments, and Calpine hereby declares that it has not made any payments, nor shall they make any payments, respectively, to any elected member of the Fort Mojave Tribal Council for the purpose of obtaining or maintaining this Lease or any other privilege on behalf of Calpine or other parties in interest. The parties hereto represent and warrant on their own behalf that no party in interest is an elected member of the Fort Mojave Tribal Council nor considered a relative in the immediate household of an elected member of the Fort Mojave Tribal Council. Calpine hereby agrees that no elected member of the Fort Mojave Tribal Council may be an employee of Calpine. No member of, or delegate to, Congress shall be admitted to any share or part of this Lease or to any benefit that may arise herefrom; provided, however, that this provision shall not be construed to extend to this Lease if assigned to a company or corporation for its general benefit.

26.6. Environmental Protection Requirements. It is agreed that it shall be the responsibility of Calpine to satisfy all appropriate environmental protection standards as stated in the National Environmental Policy Act of 1969 or as otherwise provided under any other applicable environmental laws. It is further agreed that Calpine will furnish the Secretary with a copy of all environmental assessments, environmental impact statements or reports, or negative declarations, and any rulings on such documents.

26.7. Archaeological, Cultural and Historical Resources Protection. Calpine agrees that whenever in the course of construction of the Improvements on the Leased Land, Calpine has appropriate evidence of the existence of subsurface archaeological, cultural or historic resources, the construction of Improvements at such site shall be halted and the area involved

shall be re-evaluated by qualified archaeologists acceptable to the Secretary to prevent the inadvertent destruction of such nonrenewable resources. Calpine shall comply with the recommendations for mitigation of damages made by the archaeologists. The cost of any required archaeological re-evaluation and mitigation shall be borne by Calpine. Any archaeological, cultural or historic artifacts which may be salvaged from the site shall be delivered for appropriate disposition to the Tribe. Any delay caused by the provisions of this Section 26.7 extends the time for Calpine's performance under this Lease for a like duration as the delay.

26.8. Termination of Federal Trust. Nothing contained in this Lease shall operate to delay or prevent termination of the Federal Trust responsibilities with respect to the Leased Land during the term of this Lease; provided, however, that in the event of any such termination, all of the terms and conditions of this Lease and of all the documents, instruments and agreements executed in connection herewith shall remain in full force and effect and shall not be abrogated in any manner whatsoever. The Tribe and Calpine shall be notified of any such change in the status of the Leased Land. Notwithstanding anything contained in this Lease to the contrary, while the Leased Land is in trust or restricted status, all of Calpine's obligations under this Lease, and the obligations of its sureties, if any, are to the United States as well as to the Tribe.

26.9. Expenses. Except as otherwise specifically provided herein, each party hereto shall bear its own costs and expenses incurred or to be incurred in connection with the negotiation and approval of this Lease or amendments thereto.

26.10. Entire Agreement. This Lease, the Exhibits attached hereto and all documents, instruments and agreements executed in connection herewith or referred to herein set forth the entire understanding and agreement of the Tribe and Calpine with respect to the Property; all courses of dealing, usage of trade and all prior or contemporaneous negotiations, representations, warranties, promises, understandings, covenants and agreements, whether oral or written, are superseded by and merged into this Lease.

26.11. Partial Invalidity. If any term, covenant, condition or provision of this Lease is held by a court of competent jurisdiction to be invalid, void, or unenforceable, then the remainder of the provisions of this Lease shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

26.12. Relationship of Parties. Nothing contained in this Lease shall be deemed or construed by the parties or by any third person or court to create the relationship of principal and agent between the Tribe and Calpine, other than the relationship of lessor and lessee.

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26.13. Interpretation and Definition. As the terms and conditions of this Lease have been fully negotiated by and between the parties, the language in all parts of this Lease shall in all cases be simply construed according to its fair meaning and not strictly for or against the Tribe or Calpine.

26.14. Number and Gender. In this Lease the neuter gender includes the feminine and masculine, and the singular number includes plural, as appropriate.

26.15. Captions. The captions and headings of the sections and paragraphs of this Lease are for convenience of reference only, and the words contained therein shall in no way be held to explain, modify, amplify, or aid in the interpretation, construction or meaning of the provisions of this Lease.

26.16. Attorneys' Fees. In the event the Tribe, the Secretary or Calpine shall bring any action or proceeding against the other(s) for damages for an alleged breach of any provision of this Lease, whether to recover rents, to enforce, protect, to establish any right or remedy of any party, or to interpret this Lease, the prevailing party shall be entitled to recover, as a part of such action or proceeding, its attorneys' fees and court costs.

26.17. Modification. This Lease is not subject to modification, supplement or amendment except by a writing signed by the parties hereto and approved by the Secretary.

26.18. Delivery of Rent and Notices.

26.18.1. Method and Time. All notices, demands, or requests from one party to another shall be made in writing and may be personally delivered, or sent by mail, certified or registered, postage prepaid, or by commercial overnight delivery service, to the addresses stated in this section, and shall be deemed to have been given (i) at the time of personal delivery or (ii) forty-eight (48) hours after deposit in the U.S. Mail. Rejection, or refusal to accept, or inability to deliver because of change in address of which no notice was given as provided herein, shall be deemed to be receipt of the notice sent.

26.18.2. Notice to the Tribe. All notices, demands or requests from Calpine to the Tribe shall be given to the Tribe and the Secretary as follows:

Fort Mojave Indian Tribe
500 Merriman Road
Needles, California 92363
Attn: Tribal Chairperson

and: United States Department of the Interior

Bureau of Indian Affairs, Colorado River Agency
Route 1, Box 9C
Parker, Arizona 85344
Attn: Agency Superintendent

and

Fredericks, Pelcyger & Hester, LLC
Attorneys at Law
1075 S. Boulder Road, Suite 305
Louisville, CO 80027
Attn: Thomas W. Fredericks, Esq.

26.18.3. Notice to Calpine. All notices, demands or requests from the Tribe or the Secretary to Calpine shall be given to Calpine as follows:

Calpine South Point, LLC
50 West San Fernando St.
San Jose, California 95113
Attn: General Counsel

26.18.4. Change of Address and/or Payee. Each party shall have the right, from time to time, to designate a different address by notice given in conformity with this section. The Tribe and the Secretary shall have the right, from time to time, to designate a different payee and/or a different place of payment of Rent and other sums payable by Calpine to the Tribe by notice given in conformity with this section.

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26.19. Recording and Execution. Upon receipt of the Secretary's approval of this Lease, the parties shall join in the execution of a memorandum or "short form" of this Lease in the form of Exhibit "F" which will be attached hereto and incorporated by reference herein, and record the same in all appropriate places. Calpine shall bear all costs and charges of or imposed in connection with such recording.

26.20. Time is of the Essence. Time is of the essence with respect to each and every term, condition and provision of this Lease.

27. Conditional Approval. Calpine shall use its good faith efforts to apply for and obtain a conditional approval of this Lease from the Secretary pending the completion of the environmental process. The Tribe shall reasonably cooperate with Calpine with respect to obtaining said conditional approval.

28. Late Payment by Calpine. In the event that Calpine should fail to pay any Rent or other amount owing when due under the terms of this Lease, interest shall accrue on the outstanding amounts at the prime rate, as published in

The Wall Street Journal, from time to time, plus 2% from the date when due until the date when paid.

29. Governing Law; Judicial Forum. The terms of this Lease, and the rights and obligation of the Tribe and Calpine hereunder, shall be governed and construed in accordance with Fort Mojave Tribal law and, to the extent not inconsistent therewith, the laws of the State of Arizona. Subject to the Tribe's limited waiver of sovereign immunity within Section 16.3 of this Lease, an action to enforce the terms of this Lease may be brought in an action in the U.S. District Court for Arizona, if the same shall have jurisdiction, and then, but only if said U.S. District Court finds or the parties agree that said U.S. District Court is without jurisdiction, in an Arizona State Court, if the same shall have jurisdiction, and then, but only if said Arizona State Court finds or the parties agree that said Arizona State Court is without jurisdiction, in the Fort Mojave Tribal Court.

IN WITNESS WHEREOF, the Tribe and Calpine have executed this Lease on the _____ day of _____, 1999 at the Fort Mojave Indian Reservation, Mohave County, Arizona.

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The "Tribe"

FORT MOJAVE INDIAN TRIBE, a
Federally recognized Indian Tribe

By: _____
Chairperson

"Calpine"

CPN SOUTH POINT, LLC,
a Delaware limited liability company

By: _____
John P. Rocchio
Vice President

604-050-99

THE FOREGOING LEASE AND
ALL OF ITS TERMS AND CONDITIONS
ARE APPROVED AS OF THIS ____
DAY OF _____, 1999.

SECRETARY OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

By: _____
Authorized Representative

RECEIVED
1999 JU 25 PM 3:35
LAND TITLE & RECORDS
BUR OF INDIAN AFFRS
ALBUQUERQUE NEX

STATE OF ARIZONA)
) ss.
COUNTY OF MOHAVE)

On this 4th day of AUGUST, 1999, before me, the undersigned Notary Public, personally appeared NORA HELTON personally known to me to be the person(s) whose name(s) is/are subscribed to within Instrument and acknowledged to me that he/she/they executed the same in

APPROVAL

The foregoing lease and all of its terms and conditions are approved as of this 19th day of August, 1999.

Allen J. Anspach, Superintendent
Pursuant to that authority delegated to the Assistant Secretary-Indian Affairs by 209 DM 8, Redelegated to Phoenix Area Director by Sec. Order Nos. 3150 and 3177, Amendment No. 4, 10 BIAM 13, and Nos. 9307; 9317; 9409; 9602; and 9702 dated January 31, 1999.

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his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

OFFICIAL SEAL
GARY L. GOFORTH
Notary Public - State of Arizona
MOHAVE COUNTY
My Comm. Expires Oct. 14, 2002

NOTARY PUBLIC

My Commission Expires:

10/14/02

STATE OF ARIZONA)
) ss.
COUNTY OF MOHAVE)

On this 4th day of AUGUST, 1999, before me, the undersigned Notary Public, personally appeared John P. Rocchio personally known to me to be the person(s) whose name(s) is/are subscribed to within Instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

604-050-99

WITNESS ~~my hand~~ and official seal.

OFFICIAL SEAL
GARY L. GOFORTH
Notary Public - State of Arizona
MOHAVE COUNTY
My Comm. Expires Oct. 14, 2002

NOTARY PUBLIC

My Commission Expires:

10/14/02

RECEIVED
1999 AUG 25 PM 3:35
LAND TITLES & RECORDS
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE NEX

CHEYENNE:0078815.15