



When Recorded Return To:

SNELL & WILMER L.L.P.
1500 UniSource Tower
One South Church Avenue
Tucson, Arizona 85701-1612

DATE/TIME: 01/23/07 1610
FEE: \$71.00
PAGES: 31
FEE NUMBER: 2007-009791

For Recorder's Use

**ROADWAY AND UTILITY CONSTRUCTION, EASEMENT AND MAINTENANCE
AGREEMENT**

This Roadway and Utility Construction, Easement and Maintenance Agreement (this "Agreement") is entered into this 23rd day of JANUARY, 2007, by BRALU, L.L.C., an Arizona limited liability company ("BRALU"), and NEW NGC, INC., a Delaware corporation ("NGC"). NGC and BRALU may collectively be referred to herein as the "Parties".

RECITALS:

A. BRALU is the owner of the real property located in Pinal County, Arizona, which is described on Exhibit "A" attached hereto (the "Benefited Property").

B. NGC is the owner of the real property described on Exhibits "B" and "C" attached hereto (collectively the "NGC Property") through conveyance from BRALU to NGC by Special Warranty Deed. The Parties intend that this Agreement be recorded in the office of the Pinal County Recorder immediately following the recordation of the Special Warranty Deed conveying the NGC Property to NGC.

C. NGC intends to construct a roadway and install certain water and sewer lines to serve the Benefited Property and the NGC Property. The Parties desire to enter into this Agreement to memorialize their respective rights and responsibilities with respect to such construction.

**ARTICLE 1
DEFINITIONS**

"Access Road" shall mean the road and related improvements to be constructed by NGC as described in Article 3.

"City" shall mean the City of Eloy, Arizona.

"Improvements" shall mean the Access Road described in Section 3.2, the retention areas described in Section 3.3, and the Utilities described in Section 4.1.

"NGC" shall mean New NGC, Inc., a Delaware corporation.

"Occupant" shall mean any Person, other than an Owner, occupying any portion of the Benefited Property, or building or structure thereon, as a tenant or otherwise, other than on a merely transient basis.

"Owner" shall mean the owner of legal title to the fee simple interest in any portion of the Benefited Property. The Parties anticipate that there will be multiple Owners from time to time.

"Parcel" shall mean any parcel of real property located within the Benefited Property having a legal description established by an instrument recorded in the Office of the Pinal County Recorder. The term shall not include the Road Parcel or any other parcel of real property within the NGC Property, but shall include the Benefited Property and any portion thereof having a legal description of public record.

"Person" shall mean a natural person, corporation, business trust, estate, trust, partnership, association, limited liability company, limited liability partnership, joint venture, government, governmental subdivision or agency, or other legal or commercial entity.

"Road Parcel" shall mean the portion of the NGC Property described on Exhibit "B" attached hereto.

"Sale Parcel" shall mean the portion of the NGC Property described on Exhibit "C" attached hereto.

"Utilities" shall mean the water and sanitary sewer lines and related equipment to be installed by NGC hereunder.

ARTICLE 2 GENERAL COVENANT

By acceptance of a deed for, or by acquiring any interest in, any of the Benefited Property or the NGC Property, NGC and each Owner and Occupant, for himself, herself or itself, and his, her or its heirs, personal representatives, successors, transferees and assigns, binds himself, herself or itself, and his, her or its heirs, personal representatives, successors, transferees and assigns, to all of the provisions, restrictions, covenants, conditions, rules and regulations imposed by this Agreement. In addition, NGC and each such Owner or Occupant by so doing evidences his, her or its intent that all the restrictions, conditions, covenants, rules and regulations contained in this Agreement shall run with the land and be binding on all subsequent and future NGC, Owners, Occupants, and any grantees, purchasers, assignees, lessees and transferees thereof.

ARTICLE 3 ACCESS ROAD

3.1 Grant of Easements or Dedication. NGC shall use its best commercially reasonable efforts to dedicate the entire Road Parcel to the City for public right-of-way purposes. All Owners shall reasonably cooperate in such efforts. The Owners acknowledge that the dedication may not occur until after NGC completes construction of the Access Road.

3.2 NGC's Construction of the Access Road. NGC shall, subject to the terms hereof, construct and install the Access Road on the Road Parcel. At a minimum, the portion of the Access Road labeled on Exhibit "D" as "Fully Improved" shall contain one traffic lane in each direction, a center turn lane, curb and gutter, and drainage, and shall be constructed with

pavement specified by applicable City standards appropriate for an industrial park. The Access Road shall contain lighting and public signage if and as required by the City, or if included at the discretion of NGC. The portion of the Access Road labeled on Exhibit "D" as "20' Wide Access Road" shall be improved with a twenty (20) foot wide graded and surfaced road bed, but no other improvements shall be required except as required by the City. The Access Road shall be constructed by NGC in accordance with applicable specifications and requirements of the City and all other governmental bodies and legal requirements, including any such requirements with regard to landscaping, sidewalk, drainage, and public signage as are required by City standards. The Access Road shall be constructed in a good and workmanlike, lien free manner.

3.3 Drainage Considerations. The Parties agree and acknowledge that the design of the Access Road will require that (a) each Parcel abutting the Road Parcel retain stormwater falling on the half street abutting the Parcel and (b) the Sale Parcel retain stormwater falling on the half street abutting the Sale Parcel. Each of NGC and the Owners hereby grant for the benefit of each other and the City temporary drainage and retention easements in such locations as such retention areas are shown on the Access Road plans to be prepared and submitted by NGC and approved by the City. Such retention areas and easements shall be for the sole purpose of retaining water falling on the half street abutting the Parcel or Sale Parcel, as applicable, and no Parcel shall be required to accept water from another Parcel or from the Sale Parcel, except as may be inherent in the drainage and conveyance system created by the design of the Access Road, and the drainage and hydrology studies accepted and approved by the City in connection with approval of the Access Road. NGC and the Owners also agree to execute such further documents as are required by the City to grant such easements and upon such grant or dedication to the City of all retention easements required for the Access Road, the foregoing easements granted herein shall automatically terminate. NGC shall install the retention areas on the Parcels and the Sale Parcel which are necessary in connection with construction of the Access Road and which are a part of the approved plans for the Improvements, such installation to be to standards approved by the City, and the responsibility for future maintenance and repair of such retention areas shall rest solely with the Owners with respect to the Parcels, and NGC with respect to the Sale Parcel. As each Parcel adjacent to the Road Parcel is developed, the required retention in connection with the Access Road may be relocated and incorporated into the overall retention system for the Parcel in accordance with plans approved by the City. No consent or acknowledgement by NGC or the other Owners will be required for such relocation and upon such relocation, the easement granted herein shall automatically deemed to be released upon the old location and transferred to the new location approved by the City. Nothing in this Section 3.3 shall create any obligation that NGC construct retentions systems, basins or other structures on any Parcel to accommodate flow from a Parcel in connection with future development or improvement of such Parcel, the obligations of NGC hereunder being limited solely to drainage retention directly related to and caused by drainage from the Access Road.

3.4 Maintenance and Use of Road Parcel. Until such time as the Road Parcel has been dedicated to the City for right-of-way and the City assumes responsibility for maintaining the Access Road, the following conditions shall govern the joint use of the Road Parcel by NGC, the Owners and Occupants:

(a) NGC will maintain the Access Road in good order, condition and repair at its sole cost, except that each Owner and Occupant shall promptly repair any damage to the

Access Road caused by negligent, willful, or wanton conduct of such Owner or Occupant, or reimburse NGC for repairs made by NGC for such damage to the Access Road. In addition, if the construction activities of any Owner, Occupant, or NGC damage the Access Road, such Person shall promptly repair such damage. Maintenance of the Access Road shall include maintaining the surface evenly covered with appropriate material, maintaining any landscaping, and maintaining any signage, lights, and directional signs constructed by NGC. NGC shall not be obligated to maintain improvements constructed by any Owners or Occupants except for improvements constructed by a Construction Agent pursuant to Section 5.8;

(b) During the period of the first eight (8) months following commencement of construction of the Access Road, NGC or the Construction Agent, as defined below, may prohibit use of the Road Parcel in order to protect the work prior to completion, provided, however, that the Parcels lying north of the Road Parcel shall, in case of any emergency during construction activity, be given access to a public street, and shall also be given access if reasonably necessary in the absence of an emergency, provided reasonable advance notice is given to NGC and reasonable precautions, as determined by NGC, are taken to avoid injury or damage to the work relating to the Improvements;

(c) Except in connection with construction of the Access Road by NGC or by a Construction Agent pursuant to Section 5.8, no Owner or Occupant nor NGC shall park vehicles or trailers on or otherwise obstruct the Road Parcel. The Road Parcel shall not be used for construction staging. During construction by any Person, such Person shall use reasonable efforts to mitigate the negative impact of construction traffic on the Road Parcel and the Access Road improvements;

(d) Each Owner and Occupant shall indemnify, hold harmless, and defend NGC from any and all claims or causes of action associated with such Owner's or Occupant's use of the Road Parcel, including but not limited to claims arising from negligent, willful or wanton acts, except to the extent caused by the negligent or willful or wanton acts of NGC;

(e) Each of the Owners, Occupants, and NGC shall maintain commercial general liability insurance, naming the Owners, Occupants, and NGC as certificate holders and additional insureds, with personal injury and property damage limits of not less than \$2,000,000.00 of coverage, per person, for personal injury, nor less than \$5,000,000.00 coverage in the aggregate, and containing, to the extent reasonably and commercially available, a waiver of the right of subrogation against all certificate holders and additional insureds. Such insurance shall be issued by an insurer authorized to do business in the State of Arizona and rated "A" or better by A.M. Best Co., in Best's Key Guide. Any such insurance coverage maintained pursuant hereto may be a part of the Owner's, Occupant's or NGC's regular, blanket form policies covering its operations or facilities generally, and need not be a separate policy; and

(f) This Section 3.4 shall terminate at such time as the Road Parcel has been dedicated to the City for right-of-way and the City assumes responsibility for maintaining the Access Road.

3.5 Easement Over Road Parcel. Subject to the limitations and provisions of Section 3.4 above, NGC hereby grants to the Owners a nonexclusive easement for vehicular and

pedestrian ingress and egress and for the installation and maintenance of public utilities over, upon, under and across the Road Parcel. The foregoing easement shall be appurtenant to the Benefited Property and shall be for the benefit of all Owners and Occupants of the Benefited Property, their employees, agents, customers, guests, invitees, and emergency service providers. The foregoing easement and this Section 3.5 shall automatically terminate without further acknowledgment upon dedication of the entire Road Parcel to the City for public right-of-way.

3.6 Use During Construction. Each Owner shall indemnify and defend NGC from and against any and all liabilities, claims, demands, injuries, costs and expenses incurred, claimed or asserted as a result of the actions of any Owner or such Owner's guests, invitees, agents, employees, contractors or representatives in the exercise of the easement granted in Section 3.5 above.

ARTICLE 4 UTILITIES

4.1 Installation of the Utilities.

(a) NGC shall install and construct a water delivery system, which shall be a loop system located in part within the Road Parcel and in part within the Benefited Property in locations shown in Exhibit "E" attached hereto. The portion of the water system to be installed on the Benefited Property will be installed in the eastern, southern, and western twenty (20) feet of the Benefited Property as so shown in said Exhibit "E".

(b) NGC shall also construct a sanitary sewer system in the Road Parcel consistent with Exhibit "E" attached hereto. The sewer system shall be installed at a depth to serve both the Benefited Property and the NGC Property.

(c) The Utilities shall be sized and constructed as depicted and shown in Exhibit "E" attached hereto. The Utilities shall serve both the Benefited Property and the NGC Property and shall be 12" lines. The Utilities shall be constructed by NGC in accordance with all applicable specifications and requirements of the City and all other governmental bodies and legal requirements. The Utilities will be constructed in a good and workmanlike, lien free manner.

4.2 Utility Deposits. To the extent that any utility company providing service requires advance deposits for individual service meters to an Owner or Occupant which are paid by NGC, then at NGC's election, either: (i) each Owner shall relinquish to NGC all interest in any refunds or returns of such deposit when service is provided or meters are set; or (ii) NGC shall invoice such Owner for the amount of such deposit and each Owner shall promptly pay such invoice when such Owner obtains a building permit or connects to such utilities.

4.3 Utility Easements and Dedication. NGC shall grant to the City easements within the Road Parcel for the Utilities or shall assure that the right-of-way dedication for the Road Parcel includes the land in which the Utilities thereon are located. The Owners of the Parcels containing the water lines not located within the public right of way of the Access Road shall, promptly upon request by NGC, grant to the City perpetual easements over the eastern, southern, and western twenty (20) feet of the Benefited Property for installation and operation of the water lines and related improvements, and in form necessary for final acceptance by the City, all

consistent with the manner that such water system is depicted and configured in Exhibit "E". NGC, and all Owners to the extent of their interest, shall dedicate the Utilities to the City (and execute such bills of sale or conveyances as are necessary to vest the Utilities in the City), and NGC shall assure that the construction and completion of the Utilities is to the standard necessary for the City to accept dedication. Until such time as the City assumes responsibility for maintaining the Utilities, NGC will maintain the Utilities in good order, condition and repair at its sole cost, except that each Owner and Occupant shall promptly repair any damage to the Utilities caused by negligent, willful, or wanton conduct of such Owner or Occupant, or reimburse NGC for repairs made by NGC for such damage to the Utilities. In order to fulfill its obligation to maintain the Utilities, NGC shall have the right to enter upon such portions of the Benefited Property as are reasonably necessary to maintain the Utilities as approved by the Owner of the applicable portion of the Benefited Property. NGC shall, at its expense, promptly restore any portion of the Benefited Property disturbed by such entry.

4.4 Extinguishment of Water Rights. Each Owner shall extinguish any Grandfathered Groundwater Rights (as defined under Arizona law) appurtenant to each Parcel within the Benefited Property, specifically those Irrigation Grandfathered Rights evidenced by Grandfathered Groundwater Right Certificate No. 58-100896.0015 (Irrigation), or otherwise, issued by the Arizona Department of Water Resources. Each Owner shall further make and file such applications as are needed to convey credits therefrom to the City as and when required by the City as a condition to operation and acceptance of the water system.

4.5 Disclaimer of Additional Utilities Installation. Nothing in this Agreement shall constitute or imply a promise by NGC to install, construct or deliver electrical, natural gas, fiber optic, cable or other utilities on or to the NGC Property or on or to any of the Parcels.

ARTICLE 5 CONSTRUCTION TERMS

5.1 Completion Definition and Deadline. NGC shall commence the Improvements within ten (10) months after the date of recordation of this Agreement. NGC shall complete the Improvements by the first to occur of: (a) the date NGC commences operations in a facility constructed on the Sale Parcel, or (b) the date eighteen (18) months after the date of recording of this Agreement (the "Completion Deadline"). Completion of the Access Road shall mean that the Access Road has passed its final City inspection and all lanes are open to traffic. Completion of the Utilities shall mean the water and sewer systems are charged and functioning, are dedicated to the City, and have been accepted by the City for maintenance. The Completion Deadline shall be extended for any period of time that progress of construction of the Improvements is reasonably delayed due to inclement weather, acts of God, unavailability or shortage of labor or materials, national emergency, fire or other casualty, natural disaster, war, delays or actions of governmental authorities or utilities, acts of omissions of any Owner or Occupant, riots, acts of violence, labor strike, or any other circumstance not reasonably within the control of NGC (any of the foregoing hereinafter referred to as an "Unavoidable Delay"). Financial inability of NGC or NGC's decision to delay development of the Sale Parcel shall not be an Unavoidable Delay.

5.2 Cost of Improvements. The design and construction of the Improvements shall be at NGC's sole cost and expense, except as provided in Section 4.2 relating to utility deposits. NGC shall not impose or seek to impose any impositions or reimbursements from the Benefited Property other than as may be provided in that certain contemporaneously recorded "Use Covenants Running with the Land," executed or to be executed by the parties, and which provides for certain impositions for railroad and related improvements. Nothing herein limits NGC's rights to pursue tax incentive rebates, credits, impact fee offsets or waivers or other such incentives that any governmental agency or authority may offer and which are not direct liabilities of an Owner or lien on the Benefited Property.

5.3 Temporary Construction Easement. NGC, its agents, employees, contractors and subcontractors, shall have a temporary easement and right to enter and conduct construction activity upon such portions of the Benefited Property wherein the perpetual easements are to be granted to the City for Utilities and Improvements pursuant to Section 4.3 above. NGC shall also have a temporary easement upon, and may during construction activity enter upon, such other nearby or adjacent areas upon each Parcel as are reasonably necessary to install the Improvements and otherwise reasonably prosecute and complete the work, provided that the Owner of each Parcel shall have the right to review and approve the location of such easement and entry areas, which approval shall not unreasonably be withheld, delayed or conditioned. Consent shall be deemed given if no objection is stated within three (3) business days of receipt via facsimile or personal delivery of written request therefor. NGC shall use reasonable efforts to assure that temporary construction activity beyond the limits of the easements for Utilities is limited to the area actually needed for maneuvering of equipment, machinery, personnel and materials. The said temporary construction easement shall terminate upon completion of the Improvements and after such completion NGC shall execute and deliver a release of the foregoing temporary construction easement at the request of any Owner. If not sooner terminated, the foregoing temporary construction easement shall automatically terminate four (4) years from the date of recordation of this Agreement. No easements, rights of entry and/or licenses over any portion of the Benefited Property may be exercised or used in any fashion that would unreasonably interfere with or adversely impact the Benefited Property or an Owner's development of its Parcel. Except as otherwise required by the plans for the Improvements approved by the City, NGC shall, at its expense, promptly restore any portion of the Benefited Property it enters upon as part of its construction of the Improvements to substantially the condition it was in before the construction.

5.4 Indemnity. NGC shall indemnify, defend and hold harmless the Owners and Occupants from and against any and all losses, claims and damages liabilities and expenses which may be claimed or asserted against any Owner or Occupant on account of the acts of NGC causing damage, loss or injury during the period of NGC's use and possession of the easements over the Parcels herein granted in connection with the installation and construction of the Access Road and Utilities or the exercise by NGC of the rights, easements, and obligations herein granted and undertaken in connection therewith, all except to the extent caused by the negligent or willful or wanton acts of any Owner or Occupant seeking indemnity. NGC shall also indemnify, defend and hold harmless the Owners and Occupants from and against any mechanics' or materialmen's liens or claims of lien which may be asserted on account of the performance of the work required for the installation and construction of the Improvements. Should any mechanics' or materialmen's lien or claim of lien be recorded against any Parcel on

account of NGC's installation of the Improvements, the Owner or Occupant of the liened Parcel may cause such lien to be released or satisfied and NGC shall reimburse such Owner or Occupant upon written demand for all costs associated with such release or satisfaction.

5.5 Insurance. NGC shall require the general contractor performing work on the Improvements to maintain, during the period of construction and maintenance of the Access Road and Utilities, commercial general liability insurance, naming NGC and the Owners as certificate holders and additional insureds, with personal injury and property damage limits of not less than \$2,000,000.00 of coverage, per person, for personal injury, nor less than \$5,000,000.00 coverage in the aggregate. NGC shall require the contractor to deliver current certificates evidencing the insurance to all Owners. Such insurance shall be issued by an insurer authorized to do business in the State of Arizona and rated "A" or better by A.M. Best Co., in Best's Key Guide. NGC shall maintain the same insurance coverage, with the same certificates naming additional insureds, as is required of the general contractor, except that insurance coverage maintained by NGC may be secondary, and no insurance required under this Section 5.5 shall apply to NGC while it is maintaining the policy required by Section 3.4(e) above. Any insurance coverage maintained by NGC may be a part of NGC's regular, blanket form policies covering its operations or facilities generally, and need not be a separate policy.

5.6 Security for NGC Performance. In order to secure NGC's obligation to construct the Improvements, simultaneously with execution of this Agreement, NGC shall deposit with Escrow Agent Two Million Five Hundred Thousand Dollars (\$2,500,000.00) in cash (the "Construction Funds").

Not more often than once each calendar month, NGC may deliver to Escrow Agent a disbursement request requesting disbursement to NGC (a "Disbursement Request") in an amount equal to the costs expended to construct the Improvements since any prior Disbursement Request. Each Disbursement Request shall describe the work accomplished and shall be accompanied by invoices from contractors for all of the work, proof of payment by NGC of such invoices, and conditional or final lien waivers for all the work described in the Disbursement Request in the statutorily prescribed form. Any portion of the Construction Funds remaining on deposit with Escrow Agent after NGC has submitted its final Disbursement Request for costs expended to construct the Improvements, and has been paid therefor, shall be disbursed to NGC upon certification by NGC that all work has been completed, such certification being deemed a Disbursement Request solely for such purpose. Escrow Agent shall be entitled to assume that all matters set forth in a Disbursement Request are accurate and complete and shall have no duty to independently verify the truthfulness of the matters set forth in a Disbursement Request. Upon receipt by Escrow Agent of each Disbursement Request, Escrow Agent shall promptly deliver a copy thereof (including any conditional or final lien waivers that accompanied such Disbursement Request) to Bralu. In the event that Bralu reasonably determines that the content of a Disbursement Request does not materially satisfy the requirements of this Agreement, or that any statement made in the Disbursement Request is materially inaccurate, Bralu may reasonably object to such Disbursement Request by delivering a written objection to NGC and Escrow Agent, not later than five (5) days after Bralu receives the Disbursement Request from Escrow Agent. Such objection shall be in writing and shall state in reasonable detail the basis for the objection and the specific item of expense or disbursement with respect to which Bralu is making an objection, provided, however, that no objection may be based on the quality of the

work since quality assurance is a function of the City. Escrow Agent shall disburse Construction Funds in accordance with the Disbursement Request within one (1) business day after the expiration of Bralu's objection period, unless Bralu has made an objection, in which event Escrow Agent shall disburse funds in accordance with the Disbursement Request except for the funds attributable to the objection. In the event that Bralu delivers a timely objection to a Disbursement Request, NGC may amend or supplement the Disbursement Request by delivering a written amendment or supplement to Escrow Agent. Bralu may object to the amended or supplemented Disbursement Request for the reasons, in the manner, and within the period provided above. In the absence of a timely objection, Escrow Agent shall disburse funds in accordance with the foregoing Section. In the event that NGC believes that Bralu's objection is unwarranted, then such matter shall be subjected to arbitration pursuant to Section 5.10 below.

Should Bralu own no part of the Benefited Property at the time a Disbursement Request is made, then the rights of Bralu set forth in this Section 5.6 above, including the right to make objections, may be exercised by an assignee of Bralu, provided that: a) any assignee must be an Owner of not less than 100 acres of the Benefited Property; b) there may at any time be not more than one assignee of such rights; and c) any assignment shall be in writing.

5.7 Escrow Agent; Liability and Obligations.

(a) Fidelity National Title Company, or such other agent as is appointed by NGC and the Owners, shall act as Escrow Agent hereunder. The Parties shall reasonably cooperate to assure that the Escrow Agent deposits all Construction Funds in an interest bearing account, with all interest earned to be added to the Construction Funds.

(b) Escrow Agent shall not be liable for any action taken or omitted by it or by NGC or the Owners, except for its own negligence, bad faith or willful misconduct, nor shall it be liable or responsible for the validity, enforceability or sufficiency of any document furnished to Escrow Agent, nor shall it be responsible for any representations or statements made in any of those documents. Escrow Agent shall be entitled to rely upon advice of counsel concerning legal matters and upon any document or notice delivered to it hereunder which it believes to be genuine or to have been presented by a proper person. A disbursement by Escrow Agent shall not be deemed to be an approval by it of any work performed on the project or any materials furnished with respect thereto or a representation by it that the unused portion of the total cumulative sum is sufficient to pay remaining construction costs.

(c) If conflicting demands are made upon Escrow Agent to any monies at any time held by it hereunder, then Escrow Agent may hold said monies or any documents pertaining thereto until the right of the parties are determined by arbitration as set forth in Section 5.10 below, and Escrow Agent may interplead any and all documents held by it hereunder, pending the outcome of such arbitration, in which event Escrow Agent shall be relieved of any and all liability to the parties hereunder.

(d) NGC shall pay all fees of Escrow Agent.

5.8 Default of NGC. In the event that NGC is in material default of its obligations to commence or construct the Access Road or Utilities as required hereunder, then any Owner may

deliver a written notice of default hereunder to NGC, with copies thereof to all other Owners, which notice shall specify in detail the items or matters which NGC has failed to timely complete or otherwise not completed, or the obligations it has otherwise not complied with hereunder (the "Default Notice"). If NGC does not cure its default within thirty (30) days after receipt of the Default Notice, then, in addition to all other rights and remedies of the Owners, any Owner may elect to assume responsibility for design and construction of any portion of the Improvements. An Owner assuming responsibility for construction of a portion of the Improvements shall have the rights and responsibilities of NGC under Sections 5.3 and 5.4 herein and shall be referred to herein as a "Construction Agent". The Construction Agent shall have the right to enter upon the NGC Property in order to construct the Improvements, and the Construction Agent shall have the right to enforce the obligations of NGC hereunder with respect to maintenance and dedication of the Improvements. The Construction Agent may notify all contractors employed by NGC that it has assumed responsibility for the completion of construction of the applicable portion of the Improvements. Upon presentation of invoices and lien waivers, the Construction Agent shall have the right to request and receive disbursement of the Construction Funds in monthly disbursements equal to the sums spent by the Construction Agent to design and construct the Improvements, to enforce this Agreement against NGC, and to cure any defaults of NGC, including all extra costs caused by the delay or default of NGC. If the Construction Funds are insufficient to pay for the Improvements and costs of enforcement, NGC will, within five (5) days after written demand, pay to the Construction Agent the deficit. The Construction Agent shall have a lien on the NGC Property to secure all sums owing by NGC hereunder. The said lien may be foreclosed in the same manner as a mortgage, which lien shall be subordinate only to the lien of taxes, assessments, and to the lien of one first mortgage given in good faith for value. The assumption of responsibilities by a Construction Agent shall not relieve NGC of any of its obligations hereunder.

5.9 Assignment of Contracts. In the event the responsibility for completion of the any portion of the Improvements is transferred in accordance with Section 5.8 above, NGC hereby assigns all of its rights to the following items to Construction Agent to allow the Construction Agent to complete the Improvements:

- (a) All plans and specifications for the Improvements;
- (b) All assignable rights under any construction management agreement and NGC's contract with the project engineers;
- (c) All of NGC's rights under construction contracts for all or any portion of the Improvements.

NGC agrees that in the event control of the construction of the Improvements is transferred to a Construction Agent, NGC shall cooperate with the Owners and Construction Agent in order to carry out the intent of this Section 5.9 and Section 5.8 above, including executing and delivering such specific transfer and other documents as may be reasonably requested by Escrow Agent and/or the Owners. NGC agrees that, if control of the construction of the Improvements is shifted to the Construction Agent, NGC will remain liable under any of the construction contracts assigned to the Construction Agent for any contractor's claims.

5.10 Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. If the Improvements have not been timely commenced or completed or it appears that they will not be timely commenced or completed, the arbitrator shall have the authority to appoint a Construction Agent. Notwithstanding the foregoing, however, the parties shall not be precluded from pursuing temporary injunctive relief in a court of law to preserve the status quo or to enforce performance or rights or duties hereunder.

ARTICLE 6 REMEDIES AND SELF HELP

6.1 Remedies. In addition to any other amounts an Owner or NGC may be required to pay, expend or reimburse pursuant to this Agreement, NGC and any Owner shall be entitled to recover from a Person defaulting under this Agreement (the "Defaulting Party"): (a) all costs and expenses incurred in successfully enforcing this Agreement, including but not limited to, reasonable attorneys' fees and expenses; and (b) interest at a rate equal to twelve percent (12%) per annum on all amounts as may be owed by the Defaulting Party, from the dates such amounts were expended or incurred by the Person successfully enforcing (or otherwise became owed by the Defaulting Party), until fully paid. All such costs, expenses, interest and other amounts shall be paid by the Defaulting Party whether or not a lawsuit or other legal action is filed or commenced, but if a lawsuit or other legal action is brought, the successful Person shall have the right to have all such costs, expenses, interest and other amounts included in any judgment. In appropriate circumstances, NGC or an Owner shall also be entitled to seek and obtain equitable relief against the Defaulting Party, including, but not limited to, declaratory relief, injunctive relief and orders of specific performance.

6.2 Self Help and Lien for NGC Default. In addition to the above, if NGC fails to perform its obligations under this Agreement, any Owner, in addition to all other remedies it may have hereunder or at law or in equity, shall have the right to perform such obligation on behalf of NGC, provided that the Owner has first given NGC twenty (20) days prior written notice (or in the event of an emergency after such notice as is practical under the circumstances) and NGC has not cured the default within such time period. In the event an Owner cures a default of NGC, NGC shall reimburse such Owner the reasonable and necessary cost thereof, together with interest thereon at a rate of twelve percent (12%) per annum accruing from the date the reimbursable costs were incurred, within five (5) days after receipt of an invoice. Any sums due from NGC under this Agreement shall be secured by a lien on the NGC Property, which lien shall be subordinate only to the lien of taxes, assessments, and to the lien of one first mortgage given in good faith and for value. Such lien may be enforced and foreclosed in the same manner as a mortgage. Any right to cure, or to pursue "self-help" pursuant to the provisions hereof, or to pursue any alleged lien right, shall cease and terminate immediately upon completion of the Improvements, acceptance of same by the City, including for maintenance, and after payment has been made in full for all the Improvements with no lien asserted.

ARTICLE 7 MISCELLANEOUS PROVISIONS

7.1 Plat Cooperation. If a lot split or plat is required in connection with the NGC Property and the Benefited Property, NGC and the Owners shall cooperate with each other to meet all such requirements.

7.2 Running of Benefits and Burdens. All provisions of this Agreement, including the benefits and burdens, shall run with the land and are binding upon and shall inure to the benefit of the successors and assigns of the Parties. Notwithstanding the foregoing, no transfer by NGC of all or any portion of the NGC Property will relieve NGC of its obligations hereunder, and NGC and any transferee of the NGC Property will remain jointly and severally liable for the obligations of NGC hereunder. Upon the transfer by any Owner of its Parcel, that Owner shall be released from the obligations of this Agreement other than payment of any amounts which are due and owing under this Agreement prior to such transfer, and other than liabilities and obligations which have been incurred or which have accrued prior to such transfer.

7.3 Attorneys' Fees. In the event of any action to enforce the provisions of this Agreement, the substantially prevailing Person shall be entitled to receive its reasonable costs and attorneys' fees.

7.4 Amendments and Termination. This Agreement may be amended or terminated by recording, in the office of the Recorder of Pinal County, Arizona, an instrument in writing signed by NGC and Owners who in the aggregate own at least fifty-one percent (51%) of the land area, in square footage, of the Benefited Property. Notwithstanding the foregoing, no termination or amendment of Section 3.5 (other than automatic termination as specifically provided in said Section 3.5) shall be effective unless it is approved in writing by all Owners. Upon satisfaction or release of any obligation or term of this Agreement, the Owners or NGC, as applicable, will upon request acknowledge such satisfaction or release in a recordable document. Upon the satisfaction or release of all obligations under this Agreement and termination of all easements granted herein, NGC and the Owners shall acknowledge termination of this Agreement. No joinder of any Occupant shall be required to satisfy, release, amend, or terminate this Agreement.

7.5 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.

[Signatures on Following Page]

EXECUTED as of the day and year first above written.

NGC:

NEW NGC, INC., a Delaware corporation

By: _____
Name: _____
Its: _____

BRALU:

BRALU, L.L.C., an Arizona limited liability company

By: William S. Lund
Name: William Lund
Its: Manager

STATE OF _____)
)ss
County of _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 200____, by _____, the _____ of NEW NGC, INC., a Delaware corporation, on behalf of the corporation.

Notary Public

My commission expires:

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this 18 day of January, 2007, by William Lund, the xxxxxxxxxxxxxxxxxxxxxxxx of xxxxxxxxx manager of BRALU, L.L.C., an Arizona limited liability company.

Catherine S Corley
Notary Public

My commission expires:

6/12/2008

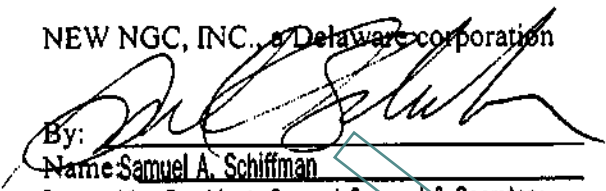


CATHERINE S. CORLEY
Notary Public - Arizona
Maricopa County
Expires 06/12/08

EXECUTED as of the day and year first above written.

NGC:

NEW NGC, INC., a Delaware corporation

By: 

Name: Samuel A. Schiffman

Its: Vice President, General Counsel & Secretary

BRALU:

BRALU, L.L.C., an Arizona limited liability company

By: _____

Name: _____

Its: _____

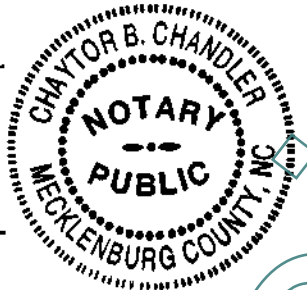
STATE OF North Carolina)
)ss
County of Mecklenburg)

The foregoing instrument was acknowledged before me this 19 day of January,
2007, by Samuel A. Schiffman, the Vice President, General Counsel & Secretary of NEW NGC, INC., a
Delaware corporation, on behalf of the corporation.

Thayer B. Chandler
Notary Public

My commission expires:

10/25/09



STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of _____,
200__, by _____, the _____ of _____,
manager of BRALU, L.L.C., an Arizona limited liability company.

Notary Public

My commission expires:

LIST OF EXHIBITS

Exhibit A – Legal Description of Benefited Property

Exhibit B – Legal Description of Road Parcel

Exhibit C – Legal Description of Sale Parcel

Exhibit D – Depiction of Road Parcel

Exhibit E – Depiction of Utilities

Unofficial

Exhibit "A"

[Legal Description of the Benefited Property Attached]

Unofficial

**Legal Description
Remainder Parcels
Sunshine Boulevard & I-10**

Job No. 06-031

Revised: January 17, 2007
August 10, 2006
August 9, 2006
July 26, 2006
July 5, 2006

Remainder Parcel 1:

A portion of Section 8 and the Northeast Quarter of Section 17, Township 8 South, Range 8 East, of the Gila and Salt River Meridian, Pinal County, Arizona, being more particularly described as follows:

COMMENCING at a $\frac{3}{4}$ " pipe at the southeast corner of said Section 8, from which a $\frac{3}{4}$ " pipe at the south quarter corner of said Section 8 bears N89°46'45"W (an assumed bearing) at a distance of 2636.32 feet; thence S00°24'55"E, along the east line of the Northeast Quarter of Section 17, for a distance of 80.00 feet to the POINT OF BEGINNING;

Thence continuing S00°24'55"E, along said east line, for a distance of 1,180.19 feet to a point on the northeasterly line of the Interstate 10 right of way; thence N74°33'00"W, along said northeasterly line, for a distance of 2183.69 feet (2184.64 feet record) to a point on a non tangent curve, concave to the northeast, the center of which bears N15°26'50"E at a distance of 17,038.73 feet; thence northwesterly, along said northeasterly line and the arc of said curve, through a central angle of 06°52'22" for a distance of 2043.84 feet; thence N15°30'00"W (N16°18'47"W record), not tangent to said curve, along said northeasterly line, for a distance of 68.57 feet (69.56 feet record); thence N76°16'11"W, along said northeasterly line, for a distance of 162.81 feet; thence N64°07'58"W, along said northeasterly line, for a distance of 175.17 feet to the beginning of a curve, concave to the northeast, the center of which bears N25°52'01"E at a distance of 1177.86 feet; thence northwesterly, along said northeasterly line and the arc of said curve, through a central angle of 26°45'05" for a distance of 549.94 feet to a point of tangency; thence N37°22'54"W, along said northeasterly line, for a distance of 440.46 feet; thence N18°56'27"W, along said northeasterly line, for a distance of 230.92 feet; thence N89°30'00"E, leaving said northeasterly line of the Interstate 10 right of way, for a distance of 753.11 feet; thence N00°30'00"W, along a line parallel with the west line of the Southwest Quarter of said Section 8, for a distance of 1045.21 feet; thence S89°30'00"W for a distance of 858.11 feet to a point on the east line of the west 50.00 feet of the Southwest Quarter of said Section 8; Thence N00°30'00"W, along said east line, for a distance of 514.51 feet to a point on the east-west midsection line of said Section 8; thence N00°29'38"W, along the east line of the west 50.00 feet of the Northwest Quarter of said Section 8, for a distance of 96.11 feet; thence N89°46'44"E for a distance of 350.00 feet; thence N88°05'27"E for a distance of 246.49 feet to the beginning of a curve, concave to the south, the center of which bears S05°46'24"W at a distance of 1,160.00 feet; thence easterly, along the arc of said curve, through a central angle of 30°33'03" for a distance of 618.52 feet to a point of tangency; thence S53°40'34"E for a distance of 2,739.64 feet to a point on a non-tangent curve, concave to the southwest, the center of which bears S36°19'26"W at a distance of 25.00 feet; thence southeasterly, along the arc of said curve, through a central angle of 51°45'12" for a distance of 22.58 feet to the beginning of a reverse curve, concave

to the northeast, the center of which bears N88°04'38"E at a distance of 80.00 feet; thence southeasterly along the arc of said curve, through a central angle of 103°30'24" for a distance of 144.52 feet to the beginning of a reverse curve, concave to the south, the center of which bears S15°25'46"E at a distance of 25.00 feet; thence easterly along the arc of said curve, through a central angle of 51°45'12" for a distance of 22.58 feet to a point of tangency; thence S53°40'34"E for a distance of 1,210.52 feet to the beginning of a curve, concave to the north, the center of which bears N36°19'26"E at a distance of 840.00 feet; thence easterly, along the arc of said curve, through a central angle of 36°06'12" for a distance of 529.30 feet to a point of tangency on the south line of the north 80.00 feet of the Northeast Quarter of said Section 17; thence S89°46'45"E, along said south line, for a distance of 270.29 feet to the POINT OF BEGINNING.

Remainder Parcel 2:

A portion of the North Half of Section 8, Township 8 South, Range 8 East, of the Gila and Salt River Meridian, Pinal County, Arizona, being more particularly described as follows:

COMMENCING at a 3/4" pipe at the southeast corner of said Section 8, from which a 3/4" pipe at the south quarter corner of said Section 8 bears N89°46'45"W (an assumed bearing) at a distance of 2636.32 feet; thence N00°13'36"W, along the east line of the Southeast Quarter of said Section 8, for a distance of 1301.21 feet to a point on the southerly line of the Union Pacific Railroad right of way; thence N53°40'34"W, along said southerly line, for a distance of 2900.00 feet; thence S36°19'26"W, leaving said southerly line, for a distance of 150.00 feet to the POINT OF BEGINNING;

Thence continuing S36°19'26"W for a distance of 1,200.00 feet; thence N53°40'34"W for a distance of 1,107.19 feet to the beginning of a curve, concave to the south, the center of which bears S36°19'26"W at a distance of 1,240.00 feet; thence westerly, along the arc of said curve, through a central angle of 34°24'53" for a distance of 744.81 feet to a point of tangency; thence S88°05'27"W for a distance of 170.70 feet; thence S89°46'44"W for a distance of 33.00 feet to a point on the east line of the west 367.00 feet of the Northwest Quarter of said Section 8; thence N00°29'38"W for a distance of 1,915.16 feet to a point on a line parallel with and 150 feet southwest of the southwesterly line of the Union Pacific Railroad right of way; thence S53°40'34"E, along said southwesterly line, for a distance of 3,123.05 feet to the POINT OF BEGINNING.

The above described parcels contain an area of 12,069,875 square feet or 277.0862 acres, more or less.

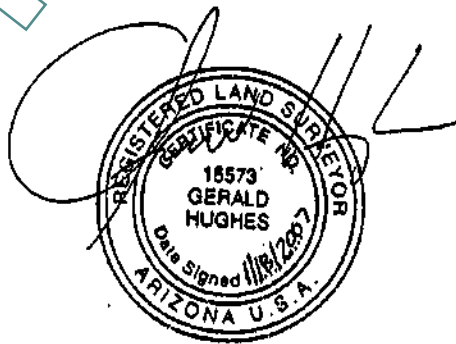


Exhibit "B"

[Legal Description of the Road Parcel Attached]

Unofficial



**Legal Description
Access Road
Sunshine Boulevard & I-10**

Job No. 06-031

Revised: January 16, 2007
August 9, 2006
July 26, 2006
June 28, 2006

A portion of Section 8 and the Northeast Quarter of Section 17, Township 8 South, Range 8 East, of the Gila and Salt River Meridian, Pinal County, Arizona, being more particularly described as follows:

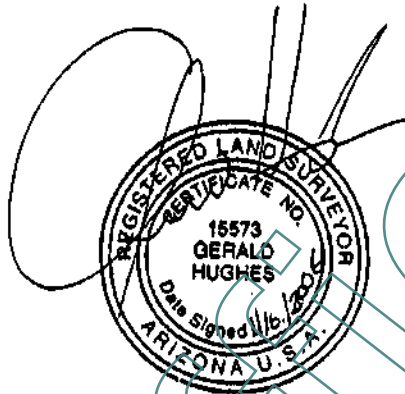
BEGINNING at a $\frac{3}{4}$ " pipe at the southeast corner of said Section 8, from which a $\frac{3}{4}$ " pipe at the south quarter corner of said Section 8 bears N89°46'45"W (an assumed bearing) at a distance of 2636.32 feet; thence S00°24'55"E, along the east line of the Northeast Quarter of Section 17, for a distance of 80.00 feet; thence N89°46'45"W for a distance of 270.29 feet to the beginning of a curve, concave to the north, the center of which bears N00°13'15"E at a distance of 840.00 feet; thence westerly, along the arc of said curve, through a central angle of 36°06'12" for a distance of 529.30 feet to a point of tangency; thence N53°40'34"W for a distance of 1,210.52 feet to the beginning of a curve, concave to the south, the center of which bears S36°19'26"W at a distance of 25.00 feet; thence westerly, along the arc of said curve, through a central angle of 51°45'12" for a distance of 22.58 feet; to the beginning of a reverse curve, concave to the northeast, the center of which bears N15°25'46"W at a distance of 80.00 feet; thence northwesterly along the arc of said curve, through a central angle of 103°30'24" for a distance of 144.52 feet to the beginning of a reverse curve, concave to the west, the center of which bears S88°04'38"W at a distance of 25.00 feet; thence northwesterly, along the arc of said curve, through a central angle of 51°45'12" for a distance of 22.58 feet to a point of tangency; thence N53°40'34"W for a distance of 2739.64 feet to the beginning of a curve, concave to the south, the center of which bears S36°19'26"W at a distance of 1160.00 feet; thence westerly, along the arc of said curve, through a central angle of 30°33'03" for a distance of 618.52 feet; thence S88°05'27"W, not tangent to said curve, for a distance of 246.49 feet; thence S89°46'44"W for a distance of 350.00 feet to a point on the east line of the west 50 feet of the Northwest Quarter of Section 8; thence N00°29'38"W, along said east line, for a distance of 100.00 feet; thence N89°46'44"E, leaving said east line, for a distance of 350.00 feet; thence S88°05'27"E for a distance of 170.70 feet to the beginning of a curve, concave to the southwest, the center of which bears S01°54'33"W at a distance of 1240.00 feet; thence easterly, along the arc of said curve, through a central angle of 34°24'53" for a distance of 744.81 feet to a point of tangency; thence S53°40'34"E for a distance of 2741.16 feet to the beginning of a curve, concave to the north, the center of which bears N36°19'26"E at a distance of 25.00 feet; thence easterly, along the arc of said curve, through a central angle of 51°45'12" for a distance of 22.58 feet to the beginning of a reverse curve, concave to the southwest, the center of which bears S15°25'46"E at a distance of 80.00 feet; thence southeasterly, along the arc of said curve, through a central angle of 103°30'24" for a distance of 144.52 feet to the beginning of a reverse curve, concave to the northeast, the center of which bears N88°04'38"E at a distance of 25.00 feet; thence southeasterly along the arc of said curve, through a central angle of 51°45'12" for a distance of 22.58 feet to a point of tangency; thence S53°40'34"E for a distance of 1,210.52 feet to the

EPS Group, Inc. • 2150-I S. Country Club Dr., Suite 22 • Mesa, AZ 85210
Tel (480) 503-2250 • Fax (480) 503-2258

S:\Projects\2006\06-031\Legal Survey\Legal\06031LD Rev Access Road.doc

beginning of a curve, concave to the north, the center of which bears N36°19'26"E at a distance of 760.00 feet; thence easterly, along the arc of said curve, through a central angle of 36°06'12" for a distance of 478.89 feet to a point of tangency on the south line of the Southeast Quarter of said Section 8; thence S89°46'45"E, along said south line, for a distance of 269.41 feet to the POINT OF BEGINNING;

An area containing 11.67 acres, more or less.



EPS Group, Inc. • 2150-I S. Country Club Dr., Suite 22 • Mesa, AZ 85210
Tel (480) 503-2250 • Fax (480) 503-2258

S:\Projects\2006\06-031\Legal Survey\Legals\06031LD Rev Access Road.doc

Exhibit "C"

[Legal Description of the Sale Parcel Attached]

Unofficial



**Legal Description
National Gypsum
Sunshine Boulevard & I-10**

Job No. 06-031

Revised: August 9, 2006
July 26, 2006
June 28, 2006

A portion of Section 8, Township 8 South, Range 8 East, of the Gila and Salt River Meridian, Pinal County, Arizona, being more particularly described as follows:

BEGINNING at a $\frac{1}{4}$ " pipe at the southeast corner of said Section 8, from which a $\frac{1}{4}$ " pipe at the south quarter corner of said Section 8 bears N89°46'45"W (an assumed bearing) at a distance of 2636.32 feet; thence N89°46'45"W, along the south line of the Southeast Quarter of said Section 8, for a distance of 269.41 feet to the beginning of a curve, concave to the north, the center of which bears N00°13'15"E at a distance of 760.00 feet; thence westerly, along the arc of said curve, through a central angle of 36°06'12" for a distance of 478.89 feet to a point of tangency; thence N53°40'34"W for a distance of 1,210.52 feet to the beginning of a curve, concave to the northeast, the center of which bears N36°19'26"E at a distance of 25.00 feet; thence northwesterly, along the arc of said curve, through a central angle of 51°45'12" for a distance of 22.58 feet; to the beginning of a reverse curve, concave to the southwest, the center of which bears S88°04'38"W at a distance of 80.00 feet; thence northwesterly along the arc of said curve, through a central angle of 103°30'24" for a distance of 144.52 feet to the beginning of a reverse curve, concave to the north, the center of which bears N15°25'46"W at a distance of 25.00 feet; thence westerly, along the arc of said curve, through a central angle of 51°45'12" for a distance of 22.58 feet to a point of tangency; thence N53°40'34"W for a distance of 1633.98 feet; thence N36°19'26"E for a distance of 1350.00 feet to a point on the southerly line of the Union Pacific Railroad right of way; thence S53°40'34"E, along said southerly line for a distance of 2900.00 feet to a point on the east line of the Southeast Quarter of said Section 8; thence S00°13'36"E, along said east line, for a distance of 1301.21 feet to the POINT OF BEGINNING;

An area containing 102.90 acres, more or less.

EPS Group, Inc. • 2150-1 S. Country Club Dr., Suite 22 • Mesa, AZ 85210

Tel (480) 503-2250 • Fax (480) 503-2258

C:\Documents and Settings\jldham\Local Settings\Temporary Internet Files\OLKE\06031\LD National Gypsum.doc

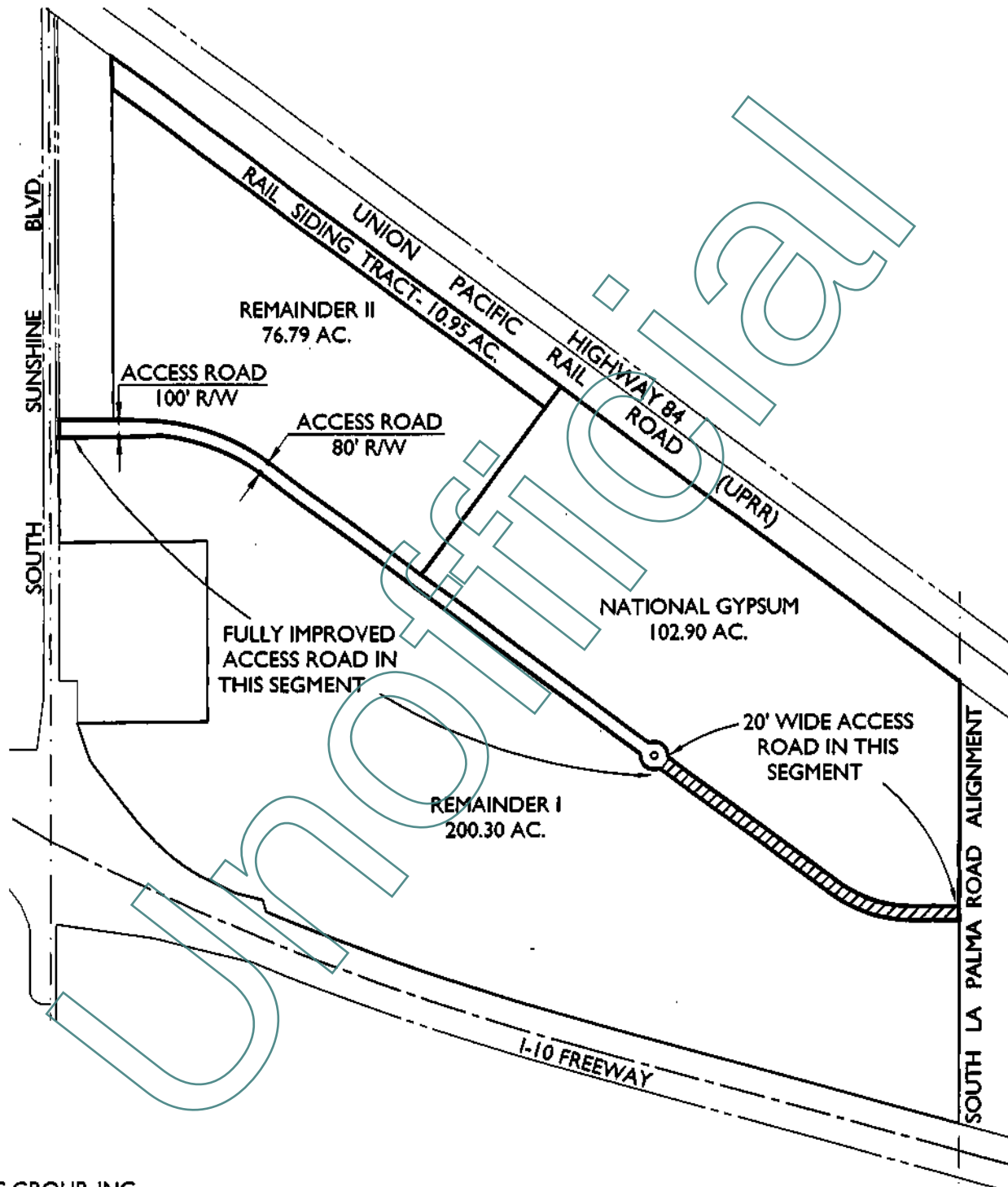
Exhibit "D"

[Depiction of the Road Parcel Attached]

Unofficial

**ROAD EXHIBIT
FOR
NATIONAL GYPSUM COMPANY**

A portion of Section 8 & Section 17, T. 8 S., R. 8
E., of the Gila and Salt River Meridian, Pinal County,
Arizona



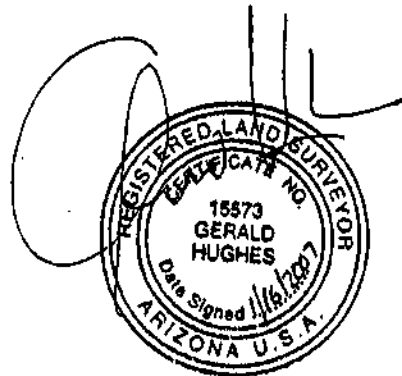
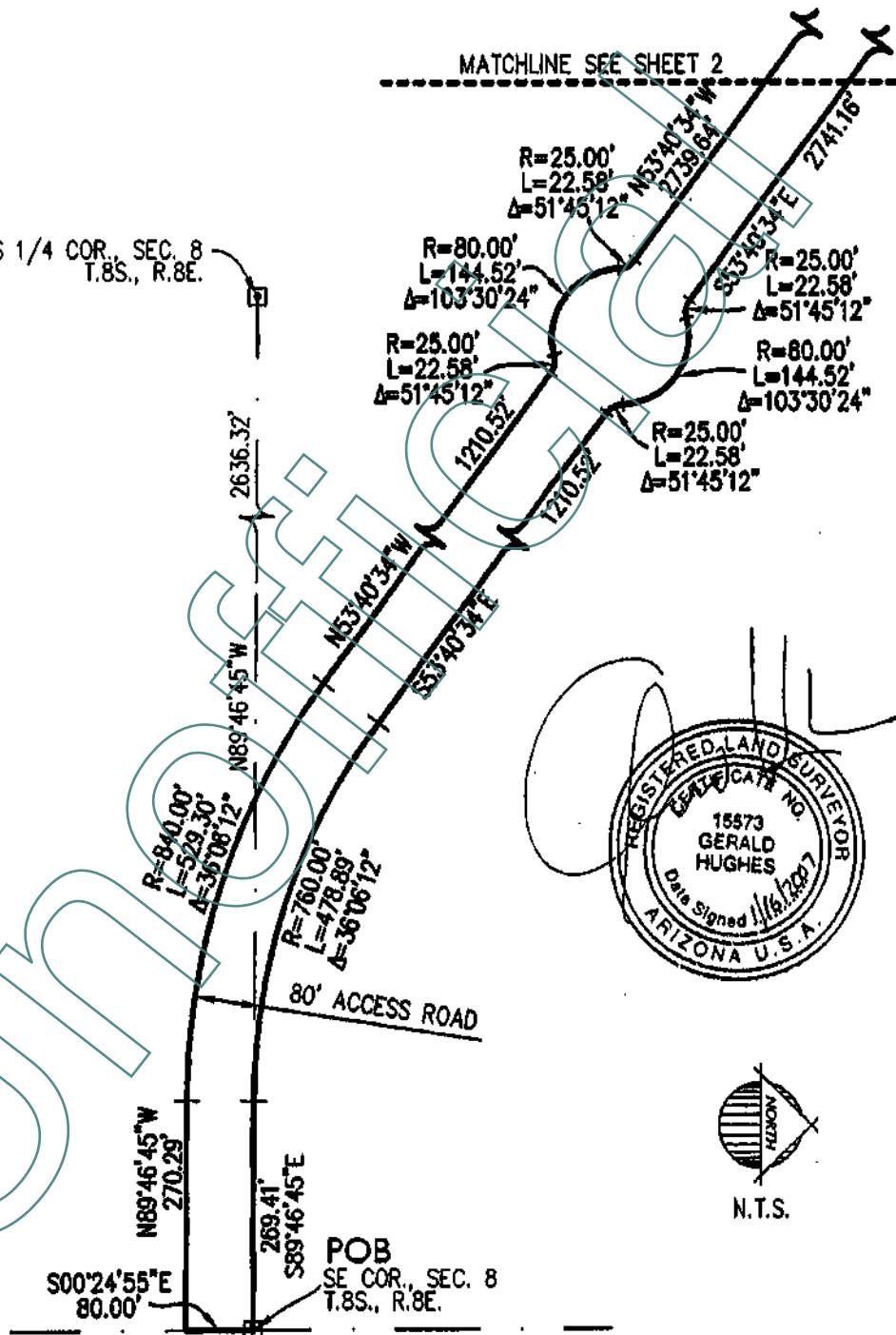
EPS GROUP, INC.
2150-1 S. COUNTRY CLUB DR., STE. 22
MESA, AZ 85210
TEL. (480)-503-2250
FAX (480)-503-2258

JOB NO. 06-031.1
DATE NOVEMBER 1, 2006
REVISED JANUARY 18, 2007



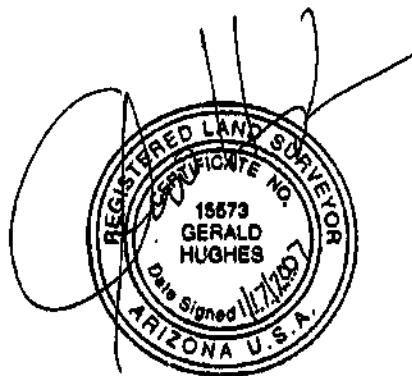
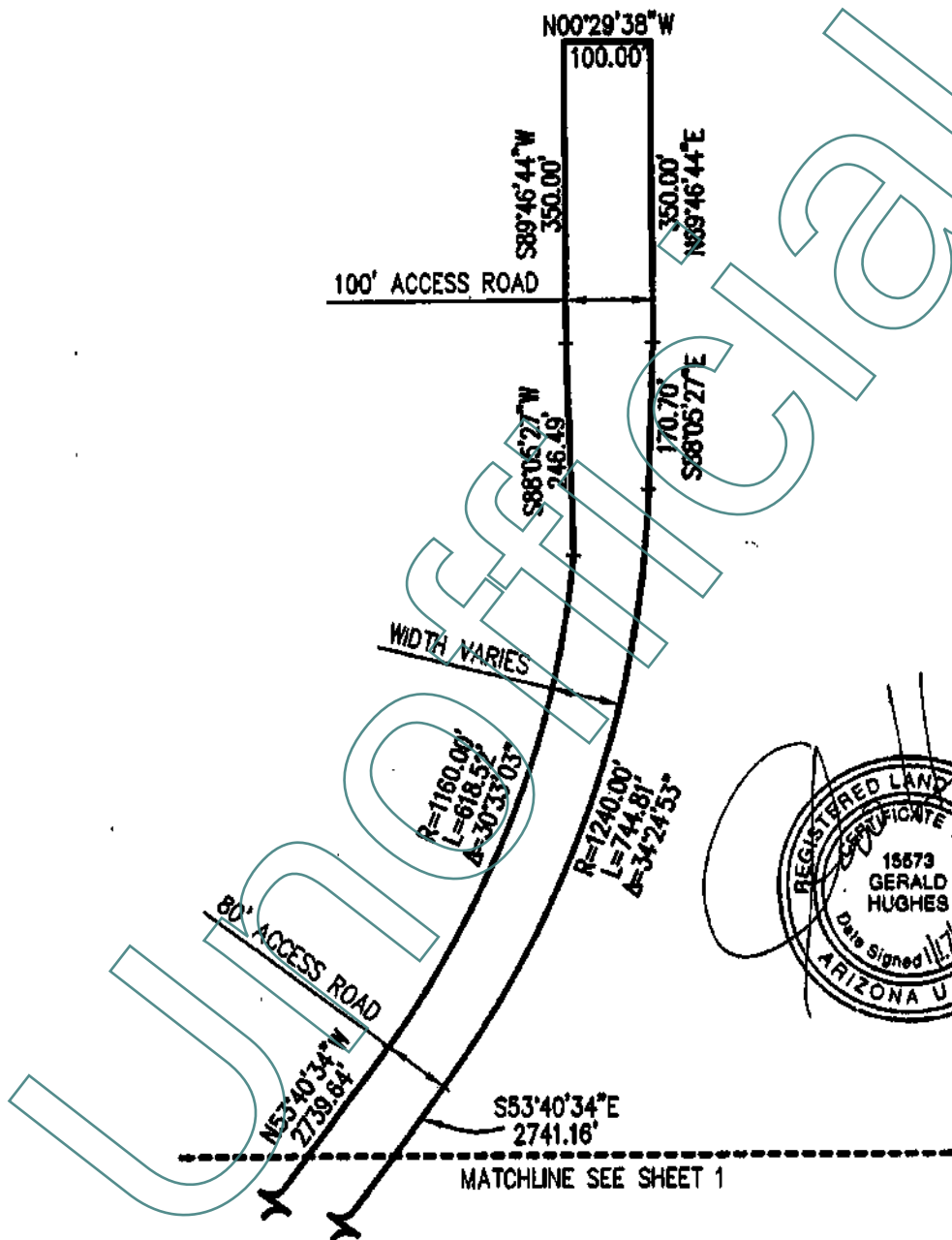
S 1/4 COR., SEC. 8
T.8S., R.8E.

MATCHLINE SEE SHEET 2



SHEET 1 OF 2

06-031	Project: Access Road Sunshine Boulevard & I-10 Eliz. Arizona Exhibit	Geps group, Inc. Engineers, Planners & Surveyors 3150-1 S. Country Club Dr., Ste. 11, Mesa, Arizona 85210 Phone (480) 892-2710 Fax (480) 343-2110
--------	--	--



SHEET 2 OF 2

06-031	Project:	Access Road Sunshine Boulevard & I-10 Eliz. Arizona	 Eps group, Inc. Engineers, Planners & Surveyors 2150-1 S. Country Club Dr., Ste. 21, Mesa, Arizona 85210 Phone (480) 505-7510 Fax (480) 505-7550
	Exhibit		

Exhibit "E"

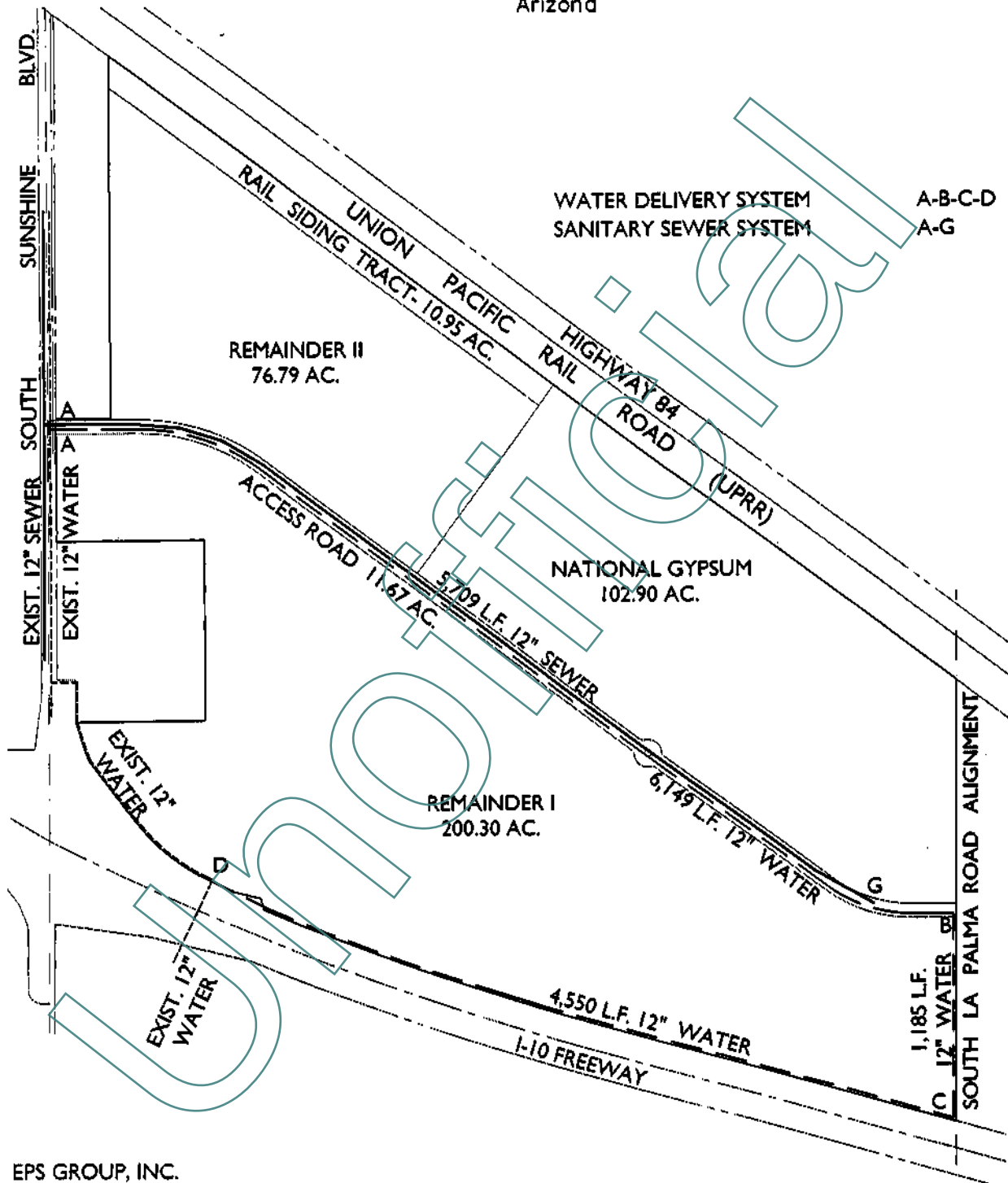
[Depiction of the Utilities Attached]

Simonm\TUX\434481 10

Unofficial

WATER AND SEWER EXHIBIT
FOR
NATIONAL GYPSUM COMPANY

A portion of Section 8 & Section 17, T. 8 S., R. 8
E., of the Gila and Salt River Meridian, Pinal County,
Arizona



EPS GROUP, INC.
2150-I S. COUNTRY CLUB DR., STE. 22
MESA, AZ 85210
TEL. (480)-503-2250
FAX (480)-503-2258

JOB NO. 06-031.1
DATE OCTOBER 4, 2006
REVISED JANUARY 18, 2007

