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April 13, 2009

**VIA HAND DELIVERY**

Kristin K. Mayes, Chairman  
Gary Pierce, Commissioner  
Paul Newman, Commissioner  
Sandra D. Kennedy, Commissioner  
Bob Stump, Commissioner  
ARIZONA CORPORATION COMMISSION  
1200 West Washington  
Phoenix, Arizona 85007

Arizona Corporation Commission  
**DOCKETED**

APR 13 2009

DOCKETED BY 

**Re: *In the Matter of the Application of Johnson Utilities, LLC, for an Extension of its Sewer Certificate of Convenience and Necessity in Pinal County, Arizona (Decision 70849; Docket No. WS-02987A-07-0487)***

Dear Commissioners:

On behalf of Johnson Utilities, LLC ("Johnson Utilities" or the "Company"), I would like to provide additional information regarding a matter that Commissioner Newman raised at the March 3, 2009 Open Meeting and then again at the March 31 and April 1, 2009 Open Meeting. Commissioner Newman asked about litigation and a settlement related to a ranch in Pinal County known as La Osa Ranch. The La Osa Ranch and the adjoining King Ranch (collectively, the "Ranches") were previously owned by entities controlled by George Johnson (the "Johnson Entities"). Since the 1950s, livestock and related agricultural activities have been conducted on the Ranches, and Mr. Johnson has been involved personally in produce, farming and ranching activities his entire life in either Arizona, Mexico or other parts of the United States. Included as Attachment 1 is an article about Mr. Johnson's farming activities from the February 15, 1958 edition of the *Arizona Farmer-Ranchman*.

On December 12, 2003, the Arizona Department of Environmental Quality ("ADEQ") issued a notice of violation to Johnson International, Inc.,<sup>1</sup> alleging that a discharge of pollutants, including sediment, occurred in Los Robles Wash and certain other unspecified ephemeral washes within the Ranches as a result of "clearing, grading and excavation" activities and that

<sup>1</sup> In fact, Johnson International, Inc., was not the record title holder of the land identified in the NOV. The land was owned by other entities controlled by George Johnson.

Letter to Corporation Commissioners

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the alleged discharge occurred without an Arizona Pollution Discharge Elimination System ("AZPDES") permit. The NOV was based upon ADEQ's belief that agricultural activities occurring on the Ranches were instead development activities which required an AZPDES permit and that Los Robles Wash and other ephemeral washes within the Ranches were "navigable waters" within the meaning of the federal Clean Water Act. Mr. Johnson and the Johnson Entities vehemently disagreed, and elected to challenge the NOV.

The NOV led to a lawsuit filed by the State of Arizona against George Johnson and several entities controlled by Mr. Johnson captioned *State of Arizona et al. v. Johnson et al.*, Maricopa County Superior Court, Cause No. CV2005-002692 (the "State Lawsuit"). Mr. Johnson filed counterclaims against ADEQ and the State Attorney General's Office and a separate lawsuit captioned *George H. Johnson, et al. v. Terry Goddard, Attorney General, et al.*, Maricopa County Superior Court, Cause No. CV2006-019807, which was subsequently removed to the United States District Court for the District of Arizona, Case No. CV07-0175-PHX-FJM (the "Section 1983 Lawsuit"). Johnson Utilities was not named in the State Lawsuit and was not a party to the Section 1983 Lawsuit. Johnson Utilities did file a lawsuit against ADEQ in a case captioned *Johnson Utilities v. State of Arizona, et al.*, Maricopa County Superior Court, Cause No. CV2004-022074 (the "Johnson Utilities Lawsuit"), but the Johnson Utilities Lawsuit was unrelated legally to the State Lawsuit or the Section 1983 Lawsuit.

As stated above, Mr. Johnson and the Johnson Entities vehemently disagreed (then and now) with the basis of the December 2003 NOV issued by ADEQ. In a letter dated December 30, 2003, legal counsel for Mr. Johnson and the Johnson Entities addressed many of the defects with the NOV. We believe that the letter provides relevant background regarding Mr. Johnson's dispute with ADEQ regarding the NOV, and a copy has been included with this letter as Attachment 2.

After initial discovery in the State Lawsuit and the Section 1983 Lawsuit, the various parties engaged in settlement discussions which led to a Settlement Agreement and Release (the "Settlement") which resolved the State Lawsuit (including Mr. Johnson's counterclaims), the Section 1983 Lawsuit and the Johnson Utilities Lawsuit. A copy of the Settlement is included with this letter as Attachment 3. The decision to settle the State Lawsuit was a difficult one for Mr. Johnson and the Johnson Entities because they believed strongly that the facts demonstrated that they had not violated any State or federal laws in the conduct of their livestock and agricultural activities on the Ranches. Their willingness to settle ultimately came down to the fact that their insurance carrier encouraged settlement and agreed to fully fund the \$7,000,000 settlement amount. Neither Mr. Johnson nor any of the entities he controls paid any portion of the settlement amount. Moreover, Mr. Johnson and the Johnson Entities expressly disclaimed liability in Section 1.5 of the Settlement, which states as follows:

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Nothing in this Agreement is intended to be, or should be construed as, an admission by any of the Johnson Parties of liability, error, omissions, wrongdoing, misconduct, breach of duty, or violation of law. It is understood that the Johnson Parties expressly deny any such liability, error, omissions, wrongdoing, misconduct, breach of duty, and violation of law.

This express language disclaiming all liability is very significant. In the end, the decision to settle the litigation related to the Ranches was a business decision by the insurance carrier, Mr. Johnson and the Johnson Entities, made solely on the basis that the insurance carrier agreed to pay in total the settlement amount. The allegations in the December 2003 NOV and the State Lawsuit were never proven and Mr. Johnson and the Johnson Entities denied those allegations from beginning to end. The settlement amount was paid by an insurance company, without any contribution by Mr. Johnson or the Johnson Entities, and ADEQ executed the Settlement with the full knowledge that Mr. Johnson and the Johnson Entities expressly denied any liability, error, omissions, wrongdoing, misconduct, breach of duty or violation of law. Finally, Johnson Utilities was not involved in any way in any of the events surrounding the December 2003 NOV regarding operations at the Ranches.

We hope that this additional information regarding the litigation and subsequent Settlement pertaining to the Ranches is helpful to the Commission.

Very truly yours,

SNELL & WILMER



Jeffrey W. Crockett

JWC:gb

cc (with enclosures): Janice Alward, Chief Counsel, Legal Division  
Yvette B. Kinsey, Administrative Law Judge, Hearing Division  
Ernest Johnson, Director, Utilities Division  
Docket Control (14 copies)

# **ATTACHMENT 1**

February 15, 1958

### Johnson Getting Into Early Cantaloup Game In Two New Districts



**H**ERE'S A YOUNG man just busting out all over with cantaloup ambition and ideas. His name is George Johnson and he lives in Phoenix, but when the Farmer photographer caught up with him he was sizing up an alfalfa field on Les Narramore's farm in Gila Bend Valley.

That's where Johnson is going to raise 60 acres of the 520 acres of cantaloups and honeydews with which he is breaking into the tricky, highly competitive melon game. He has 60 more lined up in that same Gila Bend area, and 480 on the desert four miles south of U. S. 80, southwest of Aztec. His arrangements are made to build a packing house at Sentinel, approximately 30 miles from Narramore's and 21 from the other place.

One of Johnson's ideas is for a revolutionary type of melon planter that he had built to his own specifications. It shapes the bed at the same time it plants, and he believes that it will greatly reduce costs.

Although this is Johnson's first venture into the Arizona produce business, he is by no means an amateur. He got started with his father, the late Harry Johnson, who pioneered winter watermelons on the West Coast of Mexico. Now he believes that the early cantaloup deal is undergoing a revolution and hopes to help shape its course.

# **ATTACHMENT 2**

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A PROFESSIONAL CORPORATION

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December 30, 2003

**BY HAND DELIVERY**

Arizona Department of Environmental Quality  
Mr. Robert Casey, Manager  
Water Quality Enforcement Unit  
1110 W. Washington Street, 5415B-1  
Phoenix, AZ 85007

Re: **Response to Notice of Violation Dated December 12, 2003, Concerning  
the La Osa Ranch Planned Area Development, Pinal County**

Dear Mr. Casey:

We have been retained by Johnson International, Inc., an Arizona corporation (hereinafter, "Johnson International"), in connection with the above-referenced Notice of Violation ("NOV") issued by the Arizona Department of Environmental Quality ("ADEQ"). This NOV was issued by ADEQ on December 12, 2003, and was distributed by ADEQ to the news media on that same day. Johnson International actually received the NOV by certified mail on December 16, 2003. The NOV directs Johnson International to respond to the allegations contained therein within fifteen (15) calendar days of receipt. Johnson International has asked us to respond on its behalf to the NOV. For the reasons set forth below, Johnson International believes that the NOV is groundless and therefore requests that ADEQ immediately withdraw this NOV and cease its attacks on Johnson International and its President, Mr. George Johnson, in the news media.

**A. ADEQ's Misleading Press Release and Statements to the News Media.**

As a preliminary matter, we would like to address a particularly troubling aspect of this matter, which raises serious questions about the agency's ability to perform its duties in a fair and impartial manner. As noted above, the NOV was issued on December 12. That same day, ADEQ contacted various news media about the NOV, and the agency's Director, Stephen A. Owens, made public statements about the NOV, which were highly critical of Mr. Johnson and Johnson International. Stories about the NOV ran in several Arizona newspapers on December

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13, including The Arizona Republic. Subsequently, but still prior to Johnson International's actual receipt of the NOV, ADEQ issued a press release regarding the NOV. The press release referenced "similar violations" by Johnson International in a completely unrelated matter involving a well that was drilled in Apache County, which matter was declared closed by ADEQ in 2002. In the press release, which is available on ADEQ's website, Mr. Owens again personally criticized Johnson International and Mr. Johnson. In fact, this press release states that the NOV was issued to Mr. Johnson when, as you aware, that is not the case.

ADEQ's own NOV states that an NOV is an "informal compliance assurance tool" used to put individuals on notice that ADEQ "believes a violation . . . has occurred." It also states that an NOV is intended to provide the responsible party an opportunity to: "(1) meet with ADEQ and discuss the facts surrounding the [alleged] violation, (2) demonstrate to ADEQ that no violations has occurred, or (3) document that the violation has been corrected." As you are aware, we made numerous attempts to contact ADEQ in order to meet with the agency and explain why the NOV is groundless. Due to the holidays and the unavailability of agency employees, we had a difficult time making telephone contact, and the agency has been unable to meet with Johnson International's representatives to discuss the errors in the NOV.

At the same time, however, Mr. Owens has continued to make erroneous, misleading and inflammatory statements to the media and others. Another article on this matter appeared in the December 27, 2003 edition of The Arizona Republic, stating that Mr. Owens "is scoffing at Johnson International's response that the charge is unwarranted and is calling the developer's bluff." It is apparent that ADEQ has prejudged this matter, without waiting for Johnson International's formal response to the NOV and before any meetings between Johnson International's representatives and the agency. In light of the preliminary nature of an NOV, Mr. Owens' grandstanding in the media is improper and raises questions about ADEQ's credibility and its ability to administer the law in a fair and impartial manner.

### **B. The Violations in the NOV are Groundless.**

With respect to the specific allegations in the NOV, Johnson International has the following response to the items identified in the "Documenting Compliance" section of the NOV:

#### **1. Johnson International is *Not* the Responsible Party.**

As discussed above, the NOV was issued to "Johnson International, Inc. as the owner/operator of the La Osa Ranch Planned Area Development." In fact, there is *no* such entity known as the "La Osa Ranch Planned Area Development," and Johnson International is *not* the record title holder of the land identified in the NOV. While the NOV is extremely vague, the

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land that appears to be the subject of the NOV is actually called the King Ranch. The King Ranch is, as its name implies, a working ranch. It is not a "planned area development" or some other type of real estate development, nor is Johnson International responsible for its operations. Accordingly, ADEQ has issued the NOV to the wrong party. Therefore, the NOV should be withdrawn immediately.

### 2. Background on the King Ranch.

The King Ranch was established prior to 1950 and contains approximately 2,076 acres of private land; 12,800 acres of federal leasehold; and 20,480 acres of state leased land. Historically, the ranch was one of southern Arizona's largest working operations. Joe King operated the ranch from 1948 to 1956 after purchasing the ranch from the family-owned King Investment Company. Operations were expanded in the 1960's, and an irrigation system was developed. Crops such as cotton, barley, and hay have been grown on the ranch. Of course, livestock has been the ranch's primary focus, and it historically supported a sizeable herd. The current owner of the King Ranch has continued to raise livestock since purchasing the ranch in June 2003. The King Ranch has continued to issue purchase orders and has receipts for equipment, livestock and feed as part of the operation of the ranch.

Livestock and related agricultural activities on the King Ranch and the adjacent La Osa Ranch are managed by a professional ranch manager who oversees daily operations. At present there are approximately 2,000 head of cattle pastured on both ranches, as well a herd of goats. Very recently, clearing activities were undertaken at the King Ranch to bring historic and new fields into production to grow additional feed for the livestock. The activities that ADEQ evidently observed during its December 5, 2003 inspection were directly related to on-going ranching operations, and had nothing to do with any sort of real estate development, as erroneously alleged in the NOV. This information could have been provided to ADEQ had the agency taken the time to properly investigate this matter, instead of running to the news media with erroneous, misleading and inflammatory comments.

### 3. Agricultural Activities Are Exempt from the AZPDES Program.

In the NOV, ADEQ asserts that a discharge of pollutants, including sediment, occurred in Los Robles Wash and certain other, unspecified ephemeral washes as a result of "clearing, grading and excavation" activities and that the alleged discharge occurred without an Arizona Pollution Discharge Elimination System ("AZPDES") permit. As authority for the alleged violation, ADEQ cited A.R.S. § 49-255(1)(A).

As a preliminary matter, Johnson International – the entity named in the NOV – did not violate A.R.S. §49-255(1)(A) because Johnson International does not own or operate the King

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Ranch. Additionally, the current owner of the ranch was not required to obtain, nor could it have obtained, an AZPDES permit for its agricultural activities. As you know, agricultural activities are expressly exempt from the requirement of securing an AZPDES permit under ADEQ rule A.A.C. 18-9-A902(G)(4). This provision provides that "[a]ny introduction of pollutants from a nonpoint source agricultural or silvicultural activity, including stormwater runoff from an orchard, cultivated crop, pasture, rangeland, and forest land" does *not* require an AZPDES permit. Apparently, ADEQ is now taking the position that removing brush to improve pasture and other ground-disturbing activities associated with farming are subject to AZPDES permitting requirements, notwithstanding this exemption. To our knowledge, ADEQ's position is not supported by any statutory authority and it conflicts with the agency's own rules. Indeed, it would constitute an attempt to dramatically expand ADEQ's jurisdiction in violation of Arizona law.<sup>1</sup> We look forward to discussing the agency's position on its regulation of agricultural activities through AZPDES permits when we meet.

#### 4. The Ranching Activities Did Not Violate A.R.S. § 49-255.01(a).

Putting aside the exemption from the AZPDES Program for agricultural activities, there does not appear to be any legitimate basis for asserting a violation of A.R.S. § 49-255.01(A). This provision provides that a "person shall not *discharge* except under the following conditions: . . ." (emphasis supplied).<sup>2</sup> The term "discharge" is defined in A.R.S. § 49-255(2) as "any addition of any pollutant to *navigable waters* from any *point source*" (emphasis supplied). This definition is repeated in ADEQ's rules. A.A.C. R18-9-A901(a). A "point source" is defined as:

[A]ny discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants may be discharged to navigable waters.

A.R.S. § 49-201(27). There is no discussion in the NOV of the "discernible, confined and discrete conveyance" from which pollutants were purportedly discharged into a navigable water, nor to our knowledge did any discharge from a point source take place. Consequently, the agricultural activities in question are not subject to the prohibition in A.R.S. § 49-255.01(A).

<sup>1</sup> A.R.S. § 49-255.01(B) prohibits the Director from adopting any requirement that is more stringent than or in conflict with the federal Clean Water Act. The Clean Water Act and its implementing regulations expressly exclude agricultural stormwater discharges and the discharge of pollutants from any nonpoint source agricultural activities. See 33 U.S.C. § 1362(14) and 40 C.F.R. § 123.3(e).

<sup>2</sup> The conditions are (1) in conformance with an AZPDES permit, or (2) pursuant to an EPA permit until an AZPDES permit is issued or authorized. A.R.S. § 49-255.01(A)(1) and (2).

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In addition, it is uncertain whether Los Robles Wash and the other unidentified washes actually constitute "navigable waters." The term "navigable waters" is defined as "the waters of the United States as defined by § 507(7) of the Clean Water Act (33 United States Code § 1362(7))." A.R.S. § 49-201(21). In this case, the washes identified in the NOV are not "navigable" nor, to our knowledge, is the lower Santa Cruz River, which is an isolated, ephemeral water that terminates somewhere in central Pinal County. Moreover, the reach of the Santa Cruz River in the vicinity of the King Ranch is dominated by wastewater effluent, discharged by Pima County's sewage treatment plant near Roger Road, in northwest Tucson. We would like to immediately obtain all data in the agency's possession indicating that the lower Santa Cruz River at or below its confluence with Los Robles Wash is a navigable water, particularly in light of the United States Supreme Court's holding in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), that isolated, intrastate waters do not constitute water of the United States (i.e., navigable waters) under the Clean Water Act ("CWA").

Assuming for the sake of argument that the activities in question caused a discharge from a point source, that the lower Santa Cruz River is a navigable water, and that Los Robles wash and other unnamed washes that were alleged to have been polluted by agricultural activities are subject to ADEQ's jurisdiction under the AZPDES program, it nevertheless does not appear that a AZPDES permit was required. Under the CWA and its implementing regulations, the discharge of dredged or fill material into waters of the United States is regulated under Section 404 of the CWA by the United States Army Corps of Engineers ("Corps"). See 33 U.S.C. §1344. For this reason, ADEQ's rules specifically provide an exemption for the "[d]ischarge of dredged or fill material into a navigable water that is regulated under Section 404 of the Clean Water Act."<sup>3</sup>

In short, there is not any legitimate basis for ADEQ's asserted violation of A.R.S. § 49-255.01(A) in the NOV. Agricultural activities are exempt under ADEQ rules. Moreover, the activities do not satisfy the definitions established by the Legislature in A.R.S. §§ 49-201 and 49-255.

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<sup>3</sup> It should be emphasized that, in the context of Section 404 of the CWA, normal farming and ranching activities are also exempt from the requirement to obtain a permit for the discharge of dredged or fill material. This exemption includes plowing, cultivating, minor drainage, constructing and maintaining farm roads, and constructing and maintaining stock ponds and irrigation ditches. 33 U.S.C. § 1344(f)(1)(A), (C) and (E).

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5. Alleged Violation of Narrative Water Quality Standard (A.A.C. R18-11-108(A)(1)).

In addition to claiming that an AZPDES permit is needed to conduct agricultural activities on the King Ranch, despite the agency's own exemption for such activities, ADEQ asserts that Johnson International violated the narrative water quality standard requiring "surface water to be free from pollutants in amounts that settle to form bottom deposits that inhibit or prohibit the habitation, growth, or propagation of aquatic life or that impair recreational uses." A.A.C. R18-11-108. This allegation is also groundless. Again, Johnson International is not the owner or operator of the King Ranch. Putting that error aside, for a violation of A.A.C. R18-11-108 to have occurred, the following are necessarily presupposed: (a) Los Robles Wash and the other unnamed washes contain surface water; (b) these dry, ephemeral desert washes are capable of supporting "aquatic life" (e.g., fish) or are used for recreational purposes (e.g., fishing); and (c) the addition of a pollutant "inhibits" or "prohibits" the existence of aquatic life or recreational use.

In this instance, there is insufficient information in the NOV to allow a reasoned response to the alleged violation. Given that the washes are normally dry, there does not appear any basis for ADEQ's assertion that the washes contain, or are capable of containing, aquatic life. There is no indication in the NOV of the particular type(s) of aquatic life that inhabit the washes, or how these species have been affected. Nor does there appear to be any basis for the assertion that the washes are used for recreational purposes that are associated with aquatic life.<sup>4</sup> Further, no information was provided regarding the allegation that the alleged "pollution" will inhibit the growth of such aquatic life or interfere with recreational uses. Moreover, these recreational uses would necessarily involve trespassing on the King Ranch.

ADEQ must have some rational basis for alleging a violation of a narrative water quality standard. Unless ADEQ provides a reasonably detailed information package to substantiate the allegation (e.g., water quality samples, the nature and extent of aquatic flora and fauna inhabiting the washes, the type of recreational use anticipated), it is impossible to respond in detail about this allegation.

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<sup>4</sup> It is possible that the washes could be used for other types of recreational purposes, such as driving motorcycles and similar off-road vehicles in them. This sort of recreational use, however, would not be the type of activity that is protected by the agency's narrative water quality standards.

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## C. Order to Cease Farming and Ranching Activities Prior to SWPPP Approval.

The NOV expressly orders Johnson International to “immediately” cease all “clearing, grading, excavating, and stockpiling activities, and only resume such activities subsequent to the department’s approval of the SWPPP.” A stormwater pollution prevention plan or SWPPP is required in connection with certain industrial activities that discharge stormwater, but not agricultural activities. This unilateral injunction is neither lawful nor practicable. It must be emphasized, again, that Johnson International does not own and operate the King Ranch. Additionally, it is unreasonable to expect any working ranch to indefinitely cease these sorts of activities (which are at best vaguely described) over more than 30,000 acres of land.<sup>5</sup> Further, ADEQ’s order to cease all “clearing, grading, excavating, and stockpiling activities, and only resume such activities subsequent to the department’s approval of the SWPPP” prevents the lawful use of private property without compensation or due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

We also wish to note a public statement made by Mr. Owens that similarly suggests that ADEQ is acting in an unlawful manner. Specifically, Mr. Owens is quoted in the December 27, 2003 edition of *The Arizona Republic* as follows:

“They’re going to have to put something in writing, that’s in an enforceable document, that this is a working ranch, and if they ever don’t use it as a working ranch, there will be ramifications.”

This threat, if carried out by the agency, would constitute an unlawful taking of private property by effectively freezing the property’s use. We are not aware of any law that would allow Mr. Owens to dictate land uses in this manner. Further, Mr. Owens apparently does not understand that there is a substantial amount of land throughout Arizona, including Maricopa, Pinal and Pima Counties, that has historically been farmed or ranched, and continues to be farmed or ranched, even though it is currently owned by a home builder or developer that ultimately intends to convert the property to a new use. Because of the amount of time needed to obtain zoning and other land use approvals, agricultural land often continues to be used for agricultural purposes during the entitlement process. The fact that agricultural land may be converted to some type of commercial or industrial use in the future does not allow ADEQ to ignore the existing agricultural use, nor is the agency authorized to dictate land uses through the AZPDES Program or under any other provision in Title 49.

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<sup>5</sup> For example, what is meant by the term “stockpile” in this context? Does it include the storage of feed, supplies and materials needed for on-going agricultural activities? The fact that ADEQ would unilaterally issue such an order certainly suggests that its goal is to harass Johnson International, as opposed to administering the AZPDES program in a fair and equitable manner.

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Despite the lack of a legitimate basis for the NOV and Mr. Owens' media grandstanding, the King Ranch is willing to work with ADEQ in a constructive manner. However, the King Ranch is not willing to cease lawful activities associated with operating the ranch, which have occurred for over 50 years.

### **D. Request for Immediate Production of Documents.**

As you are aware, the Arizona Administrative Procedure Act contains several provisions designed to protect the rights of the regulated community. Under A.R.S. § 41-1009, ADEQ is required to provide identification and notice of certain rights before an inspection, an inspection report following the inspection, and regular updates on actions that will be taken after the inspection has not been provided. To date, no inspection report has been provided. Moreover, we understand that ADEQ did not contact the ranch manager (or any other person) about an inspection, either before or after the inspection occurred. We have also been advised that subsequent inspections of the King Ranch have been conducted by ADEQ employees, again without notice. This conduct violates A.R.S. §§ 41-1001.01(A)(4) and 41-1009. We request that you provide us a copy of the completed agency inspection form relating to the inspection conducted on December 5, 2003 and all subsequent inspections of the King Ranch by any ADEQ employees as soon as possible.

In addition, we request the name of the person or entity who made the complaint to ADEQ on December 1, 2003 that triggered the December 5, 2003 inspection, as well as the names of any other person or entities who have made complaints relating in any way to this matter, pursuant to A.R.S. § 41-1010. We also request copies of all complaint receipt forms relating to this matter.

### **E. Notice of Intent to File Claim under A.R.S. § 41-1092.12.**

For the reasons set forth above, Johnson International believes that the issuance of the NOV, as well Mr. Owens' repeated and erroneous statements to the news media regarding this matter and Johnson International generally, are arbitrary, capricious and not in accordance with law. Accordingly, Johnson International hereby gives written notice of its intention to seek appropriate relief pursuant to A.R.S. § 41-1092.12, or as may otherwise be available under Arizona law, *unless* the NOV is formally withdrawn on or before January 9, 2003. Such notice is not intended to constitute a waiver or relinquishment of any other right or remedy that may be available to Johnson International (or to Mr. Johnson personally) arising out of related to the agency's entry upon and inspection of the King Ranch; the NOV or any allegation contained therein; or any public statements made by Mr. Owens or ADEQ relating to this matter or about Johnson International or Mr. Johnson.

# FENNEMORE CRAIG

BY HAND DELIVERY

Arizona Department of Environmental Quality

December 30, 2003

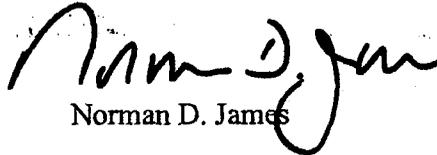
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Finally, we would like to express our disappointment that ADEQ staff was unavailable to meet in advance of the written response deadline to discuss the allegations in the NOV. The response process necessarily involves a dialogue and information exchange between the agency and the regulated party. It is particularly important in this case, given the agency's apparent lack of knowledge about the King Ranch and its mistaken belief that real estate development is occurring. To the extent the agency knew its key staff members would be unavailable to discuss the matters as a result of the holiday schedule, issuance of the NOV should have been postponed or additional time should have been provided for the response. Nevertheless, we remain willing to meet with ADEQ to further discuss the alleged violations and reserves the right to provide additional written response upon the receipt of additional documentation from ADEQ relative to this matter.

Thank you, and we look forward to working with you to resolve this matter, hopefully without further media involvement.

Sincerely,

FENNEMORE CRAIG



Norman D. James

cc: Mr. Stephen A. Owens, Director, ADEQ  
Ms. Karen Smith, Director, Water Quality Division, ADEQ  
Ms. Suzanne Straussner, Director Pinal County Department of Public Health  
Ms. Michele Robertson, Manager, WPS, ADEQ  
Mr. George Johnson  
Mr. Brian Tompsett – Johnson International, Inc.

# **ATTACHMENT 3**

### SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is entered into as of November 20, 2007 by and between the State of Arizona, the Arizona Department of Environmental Quality, the Arizona State Land Department, the Arizona Game and Fish Commission, the Arizona Department of Agriculture, and the Arizona Board of Regents on behalf of the Arizona State Museum (collectively, the "STATE"); and George H. Johnson and Jana S. Johnson, husband and wife; The George H. Johnson Revocable Trust, and George H. Johnson and Jana S. Johnson, co-trustees; Johnson International, Inc.; The Ranch at South Fork, LLC; General Hunt Properties, Inc.; and Atlas Southwest, Inc., (collectively, the "Johnson Defendants"), and Johnson Utilities, LLC, on the other hand. The Johnson Defendants and Johnson Utilities LLC are collectively referred to here as the "Johnson Parties." The STATE and the Johnson Parties are collectively referred to here as the "Parties."

**WHEREAS**, STATE filed a lawsuit against the Johnson Defendants and others styled *State of Arizona et al. v. Johnson et al.*, Maricopa County Superior Court, Cause No. CV2005-002692 (the "underlying action") on February 14, 2005 (the "Lawsuit") alleging, *inter alia*, that the Johnson Defendants had caused damage to protected native plants, pygmy owl habitat, archeological sites and protected waterways.

**WHEREAS**, some of the Johnson Defendants filed counterclaims in the Lawsuit against the Arizona Department of Environmental Quality, Stephen Owens and Karen Owens, the Office of the Attorney General, and Terry Goddard and Monica Goddard (the "Counterclaims").

**WHEREAS**, in 2004, Johnson Utilities filed a lawsuit against the State of Arizona, the Arizona Department of Environmental Quality, and Stephen Owens styled *Johnson Utilities v. State of Arizona, et al.*, Maricopa County Superior Court, Cause No. CV2004-022074 (the "Johnson Utilities Suit").

**WHEREAS**, some of the Johnson Parties subsequently filed a lawsuit against Terry Goddard and others styled *George H. Johnson, et al. v. Terry Goddard, Attorney General, et al.*, Maricopa County Superior Court, Cause No. CV2006-019807, which was subsequently removed to the United States District Court for the District of Arizona, Case No. CV07-0175-PHX-FJM (the "Section 1983 Action").

**WHEREAS**, the Parties have now reached an agreement for the settlement and dismissal with prejudice of the Lawsuit against the Johnson Defendants, the dismissal with prejudice of the counterclaims in the Lawsuit, the dismissal with prejudice of the Johnson Utilities Suit, and the dismissal with prejudice of the Section 1983 Action, all as described below to resolve any and all claims that have been brought or could have been brought in the Lawsuit against the Johnson Defendants; to resolve all claims that have been brought or could have been brought by any of the Johnson Parties in the Counterclaims, the Johnson Utilities Suit, and the Section 1983 Action.

**NOW, THEREFORE**, in consideration of the promises and covenants contained herein, it is mutually agreed as follows:

**1. SETTLEMENT AND RELEASE**

**1.1** For and in consideration of, and effective upon the receipt of, payment in the amount of Seven Million Dollars (\$7,000,000) to STATE, the adequacy of which is hereby acknowledged, STATE, for and on behalf of itself and its, departments, agencies, boards, commissions, employees, attorneys, and agents, **RELEASES, ACQUITS, AND FOREVER DISCHARGES** the Johnson Parties, Karl Andrew Woehlecke and Lisa Woehlecke, husband and wife, Jack McCall, and their spouses, agents, officers, and employees, from any and all claims, actions, causes of action, demands, suits, debts, sums, rights, damages, awards, penalties, costs, attorneys fees, losses, expenses and liabilities whatsoever, whether known or unknown, accrued

or unaccrued, which it may now have, has had, or which may hereafter accrue, individually, collectively or otherwise that were brought or sought in the Lawsuit or could have been brought or sought in the Lawsuit. It is expressly agreed and understood that this release does not extend to any claims that do not arise out of, or relate to, the subject matter of the Lawsuit. It is also expressly agreed and understood that this release does not extend to 3-F Contracting, Inc., or Bill Preston Well Drilling dba Preston Well Drilling.

1.2 For and in consideration of the agreements and releases described herein, and effective when the release described in paragraph 1.1 becomes effective, the Johnson Parties RELEASE, ACQUIT, AND FOREVER DISCHARGE the STATE, its departments, agencies, boards, commissions, Office of the Attorney General, Terry Goddard and Monica Goddard, husband and wife, Stephen Owens and Karen Owens, husband and wife, Karen Smith, Patrick Cunningham, Linda Taunt, Robert Casey, Peter Jagow, and Mark Winkleman and their respective spouses, and all other STATE officers, agents and employees from any and all claims, actions, causes of action, demands, suits, debts, sums, rights, damages, awards, penalties, costs, attorneys fees, losses, expenses, and liabilities whatsoever, whether known or unknown, accrued or unaccrued, which they may now have, have had, or which may hereafter accrue, individually, collectively or otherwise, that were brought or sought, or could have been brought or sought, in the Counterclaims, the Johnson Utilities Suit, and/or the Section 1983 Action. It is expressly agreed and understood that this release does not extend to any claims that do not arise out of, or relate to, the subject matter of the Counterclaims, the Johnson Utilities Suit, or the Section 1983 Action.

1.3 The Parties expressly assume the risk that there are or may be additional facts, rights, evidence, claims, injuries and/or damages within the scope of the release which they do

not know or suspect exist, whether through lack of knowledge, oversight, error, negligence or otherwise, and which, if presently known, materially could affect their decision to enter into this Settlement Agreement and Release.

1.4 The Parties hereby warrant that there are no other persons or entities from whom releases should be obtained for any of the rights, claims, liens, demands and/or causes of action that they are releasing herein.

1.5 Nothing in this Agreement is intended to be, or should be construed as, an admission by any of the Johnson Parties of liability, error, omissions, wrongdoing, misconduct, breach of duty, or violation of law. It is understood that the Johnson Parties expressly deny any such liability, error, omissions, wrongdoing, misconduct, breach of duty, and violation of law.

1.6 The \$7 million settlement payment referred to in paragraph 1.1 shall be made no later than January 4, 2008.

1.7 A portion of the settlement funds referred to in paragraph 1.1 shall be allocated to ADEQ in satisfaction of, among other things, its claim for recovery of its litigation costs pursuant to A.R.S. § 49-262. A portion of the settlement funds referred to in paragraph 1.1 shall be allocated to the Arizona State Land Department pursuant to A.R.S. §§ 37-521 and 37-525. A portion of the settlement funds referred to in paragraph 1.1 shall be allocated to the Arizona Game and Fish Commission pursuant to A.R.S. §§ 17-261 and 35-142(A)(6). A portion of the funds referred to in paragraph 1.1 shall be allocated to the Arizona Department of Agriculture pursuant to A.R.S. § 3-913(C). \$150,000 of the settlement funds referred to in paragraph 1.1 shall be donated to the Arizona State Acquisition and Preservation Fund pursuant to A.R.S. § 41-866.

**2. CONSTRUCTION**

**2.1** It is the intent of the Parties hereto that no part of this Agreement be construed for or against any of the Parties and that any statute or rule of construction that ambiguities are to be resolved against the drafting party(s) shall not be employed in the interpretation of this Agreement.

**2.2** This Agreement constitutes a single integrated written contract expressing the entire agreement and understanding between the Parties hereto and supersedes any prior understandings and agreements among the Parties with respect to this matter. There are no representations, agreements, arrangements or understandings between the parties, oral or written, pertaining to the settlement which are not fully expressed herein. Any statements, promises or inducements, whether made by any Party or any agents of any Party with respect to this settlement which are not contained in this Agreement shall not be valid or binding.

**3. REPRESENTATIONS AND WARRANTIES**

**3.1 Capacity to Execute Agreement:** Each Party hereby represents and warrants, by and through its authorized representative, undersigned, that it has the legal capacity and sole right and authority to enter into this Agreement and receive the settlement amount specified above; that no other person or entity has or has had any interest in the claims, rights, causes of action, and/or demands released herein; and that it has not sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims, rights, causes of actions, and/or demands referred to and/or released herein. Each Party understands and agrees that this Settlement Agreement and Release shall be binding upon itself and its past, present, and future predecessors, successors, subsidiaries and affiliated companies, representatives, agents, attorneys, and/or assignees.

**3.2 Entire Agreement:** Except as expressly stated in this Agreement, each Party hereby represents and warrants, by and through its authorized representative, undersigned, that it has not relied upon any statement or representation made by any other Party, or any officer, agent, employee, representative or attorney acting on their behalf, in executing this Agreement, or in making the settlement herein provided; and that this Agreement supersedes and replaces all prior and contemporary oral and written agreements, the Rule 80(d) Agreement entered into as of November 20, 2007, and all negotiations and discussions regarding the settlement of any matter mentioned in the Agreement.

**3.3 Comprehension of Agreement:** Each Party hereby represents and warrants, by and through its authorized representative, undersigned, that it has read this Agreement and is fully aware of and understands its contents and legal effect; that it has consulted with legal counsel of its own choosing in connection with this Agreement; and that it freely and voluntarily enters into and accepts the terms and conditions of this Agreement.

**3.4 Binding Effect:** This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their assignees, predecessors, successors, heirs, executors, supervisors, administrators, officers, directors, employees, servants, privies, attorneys and agents.

**3.5 Enforceability:** If any provision of this Agreement is found to be unenforceable, the remaining provisions hereof shall, nevertheless, be carried into effect.

**3.6 Governing Law:** This Agreement has been negotiated and executed in the State of Arizona, and shall be construed and enforced in accordance with the laws of the State of Arizona.

**3.7 Execution:** This Agreement may be executed in counterparts and the executed signature pages may be exchanged by facsimile or electronically. Each counterpart shall be deemed an original and all taken together shall constitute one and the same instrument. If executed in counterparts, the counterpart signature pages may all be attached to one document, which shall constitute the original signed document.

**3.8 Duty of Cooperation:** Each Party agrees to cooperate fully and to execute and/or authorize its counsel to execute all such further documents as shall be necessary or helpful to carry out the provisions of this Agreement, including Stipulations for Dismissal, with prejudice, of the claims released herein and to take all additional actions which may be necessary or appropriate to give full force and effect to the terms and intent of this Settlement Agreement and Release.

**IN WITNESS THEREOF,** each of the undersigned has executed this Agreement as of the date set forth above.

STATE OF ARIZONA

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA DEPARTMENT OF  
ENVIRONMENTAL QUALITY

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA STATE LAND DEPARTMENT

By: \_\_\_\_\_

Its: \_\_\_\_\_

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**IN WITNESS THEREOF,** each of the undersigned has executed this Agreement as of the date set forth above.

STATE OF ARIZONA

By: [Signature]

Its: Arizona Attorney General's Office

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA STATE LAND DEPARTMENT

By: \_\_\_\_\_

Its: \_\_\_\_\_

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IN WITNESS THEREOF, each of the undersigned has executed this Agreement as of the date set forth above.

STATE OF ARIZONA

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

By: *[Signature]*

Its: Director

ARIZONA STATE LAND DEPARTMENT

By: \_\_\_\_\_

Its: \_\_\_\_\_

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IN WITNESS THEREOF, each of the undersigned has executed this Agreement as of the date set forth above.

STATE OF ARIZONA

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA STATE LAND DEPARTMENT

By: [Handwritten Signature]

Its: Land Commissioner

ARIZONA GAME AND FISH COMMISSION

By: Dean S. Shoupe

Its: Director and Secretary To Commission

ARIZONA DEPARTMENT OF AGRICULTURE

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA BOARD OF REGENTS

By: \_\_\_\_\_

Its: \_\_\_\_\_

By: \_\_\_\_\_

GEORGE H. JOHNSON

By: \_\_\_\_\_

JANA S. JOHNSON

THE GEORGE H. JOHNSON REVOCABLE TRUST

By: \_\_\_\_\_

Its: \_\_\_\_\_

THE GEORGE H. JOHNSON REVOCABLE TRUST - CO-TRUSTEES

By: \_\_\_\_\_

GEORGE H. JOHNSON

By: \_\_\_\_\_

JANA S. JOHNSON

JOHNSON INTERNATIONAL, INC.

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA GAME AND FISH COMMISSION

By \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA DEPARTMENT OF AGRICULTURE

By: Donald Butler

Its: Director

ARIZONA BOARD OF REGENTS

By: \_\_\_\_\_

Its: \_\_\_\_\_

By: \_\_\_\_\_  
GEORGE H. JOHNSON

By: \_\_\_\_\_  
JANA S. JOHNSON

THE GEORGE H. JOHNSON REVOCABLE TRUST

By: \_\_\_\_\_

Its: \_\_\_\_\_

THE GEORGE H. JOHNSON REVOCABLE TRUST - CO-TRUSTEES

By: \_\_\_\_\_  
GEORGE H. JOHNSON

By: \_\_\_\_\_  
JANA S. JOHNSON

JOHNSON INTERNATIONAL, INC.

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA GAME AND FISH COMMISSION

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA DEPARTMENT OF AGRICULTURE

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA BOARD OF REGENTS

By: X Jessie P. Johnson

Its: Vice President for Research + Graduate Studies

By: \_\_\_\_\_

GEORGE H. JOHNSON

By: \_\_\_\_\_

JANA S. JOHNSON

THE GEORGE H. JOHNSON REVOCABLE TRUST

By: \_\_\_\_\_

Its: \_\_\_\_\_

THE GEORGE H. JOHNSON REVOCABLE TRUST - CO-TRUSTEES

By: \_\_\_\_\_

GEORGE H. JOHNSON

By: \_\_\_\_\_

JANA S. JOHNSON

JOHNSON INTERNATIONAL, INC.

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA GAME AND FISH COMMISSION

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA DEPARTMENT OF AGRICULTURE

By: \_\_\_\_\_

Its: \_\_\_\_\_

ARIZONA BOARD OF REGENTS

By: \_\_\_\_\_

Its: \_\_\_\_\_

By: \_\_\_\_\_

GEORGE H. JOHNSON

By: \_\_\_\_\_

JANA S. JOHNSON

THE GEORGE H. JOHNSON REVOCABLE TRUST

By: \_\_\_\_\_

Its: TRUSTEE

THE GEORGE H. JOHNSON REVOCABLE TRUST - CO-TRUSTEES

By: \_\_\_\_\_

GEORGE H. JOHNSON

By: \_\_\_\_\_

JANA S. JOHNSON

JOHNSON INTERNATIONAL, INC.

By: \_\_\_\_\_

Its: PRESIDENT

THE RANCH AT SOUTH FORK, LLC

By: \_\_\_\_\_

Its: \_\_\_\_\_

GENERAL HUNT PROPERTIES, INC.

By: \_\_\_\_\_

Its: \_\_\_\_\_

ATLAS SOUTHWEST, INC.

By: \_\_\_\_\_

Its: \_\_\_\_\_

JOHNSON UTILITIES, LLC

By: \_\_\_\_\_

Its: \_\_\_\_\_