

Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, AZ 85009-6399

Intergovernmental Agreement
for
Recreational Use at the Spook Hill Flood Retarding Structure
between
The Flood Control District of Maricopa County
and
The City of Mesa

IGA FCD 2016A010

Agenda Item _____

This Intergovernmental Agreement, IGA FCD 2016A010 (this “AGREEMENT”) is entered into between the Flood Control District of Maricopa County, a political subdivision of the State of Arizona, acting by and through the Board of Directors (the “DISTRICT”) and the City of Mesa, Arizona, a municipal corporation (the “CITY”). The DISTRICT and the CITY are collectively referred to as “PARTIES” or individually as a “PARTY”.

This Agreement shall become effective, when fully executed by the DISTRICT and the CITY.

STATUTORY AUTHORIZATION

1. The DISTRICT is empowered by Arizona Revised Statutes § 48-3603 and 11-952 to enter into this Agreement, and has authorized the undersigned to execute this Agreement on behalf of the DISTRICT.
2. The CITY is empowered by Arizona Revised Statutes § 11-951 *et seq.*, and Section 101 of the Mesa City Charter, to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the CITY.

BACKGROUND

3. The Spook Hill Flood Retarding Structure (FRS) (hereinafter PROJECT) is a structural plan element of the Watershed Work Plan, prepared by the Natural Resources Conservation Service (NRCS: formerly Soil Conservation Service) for the Buckhorn-Mesa Watershed Project located in Maricopa and Pinal Counties, Arizona. The DISTRICT, as Local Sponsor for the Buckhorn-Mesa Watershed Project, operates and maintains the Spook Hill FRS.
4. The property rights of the DISTRICT at the PROJECT consist of Right-of-Way Grant from the United States Bureau of Land Management (the “BLM”), Special Use Permit from the United States Forest Service (the “USFS”), and full property rights. The BLM Right-of-Way Grant lies within Section 8 of Township 1 North and Range 7 East of the Gila and Salt River Base and Meridian. The

USFS Special Use Permit lies within Section 19 of Township 2 North and Range 7 East. Exhibit A depicts the storm water reservoir areas of the upstream side of the PROJECT corridor segments for which the DISTRICT has full property rights. The corridor of Exhibit A of page 10 is hereinafter referred to as the IGA CORRIDOR.

5. The CITY understands that to construct improvements of any kind in Sections 8 and 19, the CITY will need to obtain the necessary property rights and permits from the BLM (for Section 8) and USFS (for Section 19), as well as Right of Way permits from the DISTRICT.
6. The CITY desires to have use of the IGA CORRIDOR for development of a trail system and other recreational facilities and for general public use. Horizontal-alignment concepts for a subject trail system were included in the 2005 Flood Pool Grading Plans of the SR 202L Red Mountain Freeway - Power Road to University Drive.

PURPOSE OF THE AGREEMENT

7. The purpose of this AGREEMENT is to identify and define the roles, responsibilities, liabilities, and rights of the DISTRICT and the CITY regarding establishment, recreational use, operation, and maintenance of City of Mesa trails and recreational features within the IGA CORRIDOR, and to identify those uses that will be allowed within the IGA CORRIDOR. The trail system, recreational facilities, and any other uses which are granted in a Right of Way Permit by the DISTRICT are herein referenced as the FACILITIES.

TERMS OF AGREEMENT

8. The DISTRICT shall grant and convey unto the CITY a Non-Exclusive Recreational Use Easement over the IGA CORRIDOR, for the following uses: (i) entry for hiking, equestrian use, walking and other non-motorized trail uses for the use and enjoyment of the general public, and (ii) construction, maintenance and operation of trails, landscaping, fencing, signage, lighting and other related appurtenant structures or improvements. The CITY may enter into sub-agreements with other agencies, organizations, and private entrepreneurs for use of the IGA CORRIDOR for recreational purposes, subject to the review and written approval of the DISTRICT. Any revenue generation and distribution related to the use of the IGA CORRIDOR as a result of this AGREEMENT shall be covered in a separate agreement. Any such sub-agreements shall be subject to all of the terms and conditions of this IGA and the failure of any such sub-agreement to include language making such sub-agreement subject to all of the terms and conditions of this IGA shall render such sub-agreement void *ab initio*.
9. Any use not specifically permitted by the issuance of a DISTRICT Right of Way Permit is prohibited.
10. The term of this Agreement is for twenty-five (25) years from the Effective Date and shall be renewable for successive twenty-five (25)-year terms unless otherwise terminated by the PARTIES.
11. In addition to obtaining a DISTRICT Right of Way Permit, the FACILITIES must comply with local and state building codes and with the DISTRICT's P.L. 83-566 Agreement with the NRCS, dated September 28, 1977.
12. The CITY shall:

- 12.1 Be responsible for design, obtaining all permits, survey, utility relocations, construction, construction management, inspections, operation and maintenance, and all costs associated with the uses described in § 8.
- 12.2 Be responsible for the operation and maintenance of the recreational trail crossings under these arterial streets: McDowell Road, McKellips Road, and Brown Road.
- 12.3 Be responsible, within the IGA CORRIDOR and only for those areas affected by the FACILITIES, for: (i) removal of graffiti, trash, and debris; (ii) correcting any damage to the flood control features caused by the FACILITIES and the related uses; and (iii) maintaining the aesthetic and landscaping features of the FACILITIES in a condition deemed appropriate by the DISTRICT. If the CITY does not maintain the IGA CORRIDOR in a safe condition, the DISTRICT will notify the CITY and the CITY shall make any repairs necessary to restore the facility to a safe condition. If the CITY fails to make the repairs in a timely manner or an emergency repair situation arises, then the DISTRICT will make the repairs, and the CITY shall reimburse the DISTRICT for all reasonable, actual expenses incurred for such repairs within sixty (60) days after receipt of an invoice by the CITY. If the CITY fails to reimburse the DISTRICT as provided for in this Agreement, then this Agreement and the Easement is terminated and improvements shall be removed and the property returned to its original condition.
- 12.4 Be responsible for the overall management and regulation of the FACILITIES within the CITY'S standard practice and shall provide law enforcement support for the FACILITIES as needed. .
- 12.5 Be responsible for obtaining a DISTRICT Right of Way Permit for any improvements in the IGA CORRIDOR.
- 12.6 Jointly with the DISTRICT, inspect the FACILITIES periodically to ensure that the area's flood control, operation and maintenance capabilities and safety have not been reduced by the FACILITIES and related activities.
- 12.7 Perform remedial actions on the FACILITIES if notified in writing by the DISTRICT that there is interference with the flood control capabilities of the IGA CORRIDOR. Such remedies shall be subject to the DISTRICT's Right of Way Permit process. If the CITY does not begin the required modifications within a reasonable time period to be determined by the DISTRICT, for non-emergency situations not to exceed ninety (90) working days from notification, the DISTRICT may make the modifications, and the CITY shall reimburse the DISTRICT for its actual costs associated with such modifications within sixty (60) days.
- 12.8 Indemnify, defend, and hold harmless the DISTRICT, its agents, officers, employees, successors or assigns against any and all claims, actions, costs, expenses or reasonable attorneys' fees, caused by and/or related to the use of the IGA CORRIDOR, including all public recreational and other uses, except to the extent caused solely by the acts or omissions of the DISTRICT, its employees and agents
- 12.9 If the CITY does not self-insure, then the insurance coverage requirements are as follows.

- 12.9.1 Maintain, at its expense and in full force during the term of this Agreement, public liability and property damage insurance covering the IGA CORRIDOR and the CITY's occupancy and use thereof against claims for personal injury and death.
- 12.9.2 The following coverage amounts are required:
 - (1) No less than \$2,000,000 Bodily Injury – Each Person
 - (2) No less than \$4,000,000 Bodily Injury – Each Occurrence
 - (3) No less than \$2,000,000 Property Damage
- 12.9.3 The CITY shall obtain any additional insurance, adjusting for inflation, or other factors that may be required by the DISTRICT after a review by the DISTRICT and the CITY, especially if additional uses are added. The DISTRICT understands that if the CITY is self-insured then it will provide a Certificate of Self-Insurance to the DISTRICT.
- 12.9.4 The CITY shall furnish to the DISTRICT a certificate evidencing the fact that such insurance has been obtained and is in full force and effect during the entire term of this Agreement, and that such insurance cannot be cancelled without thirty (30) days prior written notice to the DISTRICT. It is agreed that any insurance maintained by the DISTRICT shall apply in excess of and not contribute with the insurance provided by said policy. The CITY's failure to maintain insurance as required by the DISTRICT constitutes a material default of this Agreement.

13. The DISTRICT shall:

- 13.1 Employ the Right-of-Way Use Permitting process for the FACILITIES and any future modifications.
- 13.2 Waive fees for the Right-of-Way Permits for the FACILITIES.
- 13.3 Participate in the final inspections of all FACILITIES and any future modifications.
- 13.4 Be responsible for the operation and maintenance within the IGA CORRIDOR of any and all structures and facilities necessary for flood control purposes, including annual removal of any sediment or debris that enters the IGA CORRIDOR due to flooding. The DISTRICT shall notify the CITY of maintenance activities which may impact recreational facilities. The DISTRICT shall not be liable for any damages to amenities as a result of DISTRICT maintenance activity except to the extent such damages are caused by the gross negligence or willful conduct of the DISTRICT.
- 13.5 Jointly with the CITY, inspect the FACILITIES periodically as required to ensure that the area's flood control, operation and maintenance capabilities and safety have not been affected in any way by the FACILITIES and related activities. The DISTRICT may choose to inspect the IGA CORRIDOR more frequently and will notify the CITY in writing of any deficiencies in the FACILITIES.
- 13.6 Indemnify, defend, and hold harmless the CITY, its agents, officers, employees, successors or assigns against any and all claims, actions, cost, expenses or reasonable attorneys' fees, caused by and/or related to the use of the IGA CORRIDOR, including all public recreational

and other uses, except to the extent caused solely by the acts or omissions by the CITY, its employees and agents.

14. The CITY understands and agrees that the primary purpose of the IGA CORRIDOR is to convey flood and storm water, and further acknowledges the necessity of the DISTRICT's review and approval of the plans for the facilities, landscaping, and maintenance of the FACILITIES to ensure that the flood control capabilities in the IGA CORRIDOR are not reduced, diminished, or altered in any way by the activities of the CITY in the performance of its functions.
15. The CITY understands and agrees that the primary purpose of any and all maintenance roads within the IGA CORRIDOR are for flood control purposes, and all other uses as allowed in accordance with this agreement are secondary uses. The CITY shall ensure (i) that the allowed shared use of the maintenance road by the public shall not interfere with the DISTRICT's use of the maintenance road and (ii) that the maintenance road is not damaged in any way by the FACILITIES.
16. It is specifically understood that the DISTRICT shall have the sole, absolute, and unrestricted discretion and authority, without liability to the CITY, or any third parties for damages of any kind, to flood the IGA CORRIDOR and any recreational facilities. The IGA CORRIDOR and improvements may be flooded with no advance warning.
17. It is specifically understood and agreed that should repair, modification, or maintenance of the DISTRICT's flood control facilities be necessary and require temporary closure of the FACILITIES, as solely determined by the DISTRICT, the CITY shall, upon receiving such notice from the DISTRICT, cause the recreational facilities to be temporarily closed. The CITY shall be responsible for restricting public access to the IGA CORRIDOR during this time period. The DISTRICT shall give the CITY thirty (30) days written notice for non-emergency closures. The CITY, or its contractors, agents or assigns, will not hold the DISTRICT responsible for any lost profits or other losses resulting from such temporary closures, regardless the duration of any such closure.
18. Either PARTY to this Agreement may with mutual written agreement of both parties delegate responsibilities to another party. Any delegation, however, shall not relieve the delegating party of its original responsibilities as defined herein.
19. Any water rights acquired by the DISTRICT for the IGA CORRIDOR remain the sole property of the DISTRICT.
20. The CITY agrees that the DISTRICT is not responsible for any damage to any improvements in the IGA CORRIDOR caused by the impoundment or movement of water and water-borne materials, including damage due to erosion and/or deposition of sediment and debris. The CITY also agrees that the DISTRICT may need to remove, or have the CITY remove, specific improvements in order for the DISTRICT to make structural repairs. The DISTRICT will not be responsible for damage caused by removal of or for replacing these improvements to make structural repairs to flood control facilities except to the extent damaged by gross negligence on the DISTRICT's part. The DISTRICT shall not be responsible for loss of access and use of the IGA CORRIDOR during periods of time when the IGA CORRIDOR may be functioning and holding and/or conveying flood and storm water.
21. The CITY understands that use of the IGA CORRIDOR for public recreational purposes is not an exclusive right. In the event that other entities express an interest in utilizing the same IGA CORRIDOR for compatible recreational purposes, the CITY agrees to accommodate these additional uses to the degree practical with the understanding that the other entities will be subject to

the DISTRICT's Right of Way Permit process. The DISTRICT shall require the other entities to indemnify the CITY for damages or injuries caused by the other entities employees, agents, invitees, contractors, and assigns.

22. The CITY and the CITY's agents shall not cause any Hazardous Substance or Regulated Substance (as those terms are hereinafter defined) to be used, stored, generated, or disposed of on, in or about the IGA CORRIDOR by the CITY or the CITY's agents, without first obtaining the DISTRICT's written consent thereto, which consent the DISTRICT may give or withhold in its sole discretion. If consent is given, such material shall only be held and stored in compliance with all applicable state, federal, or local governmental statutes, laws, permits, ordinances, codes, and regulations.

22.1 As used herein, "Hazardous Substance" shall have the meaning set forth in the Federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., as amended 1986, or the Arizona Environmental Quality Act, A.R.S. § 49-101 et seq., (July 1, 1987) and "Regulated Substance" shall have the meaning set forth in Subtitle 1 of the federal Resource Conservation and Recovery Act (Underground Storage Tanks), 42 U.S.C. § 6991 et seq., as amended 1986, or the Arizona Underground Storage Tank Law, A.R.S. § 36-3301 et seq., (1986).

22.2 In the event the CITY causes the presence of Hazardous Substances or Regulated Substances on, in, or about the IGA CORRIDOR results in contamination of the IGA CORRIDOR, then the CITY shall take any and all necessary actions to return the IGA CORRIDOR to the condition existing prior to the presence of any such Hazardous Substance or Regulated Substance. The parties expressly acknowledge and agree that the CITY's obligations hereunder shall not apply to any contamination caused by the presence of Hazardous Substances or Regulated Substances placed, used, stored, generated, or disposed of on, in or about the IGA CORRIDOR by the DISTRICT or any other entity except for the CITY.

23. All notices, requests, demands or other communications ("Notices") required by this Agreement or otherwise given in respect of any transactions contemplated hereby, shall be in writing and served by personal delivery, telephonic facsimile or deposited with the United States Postal Service certified mail, return receipt requested, with proper postage affixed, addressed and directed to the party to receive the same as follows:

(i) If to the DISTRICT: Flood Control District of Maricopa County
Chief Engineer and General Manager
2801 West Durango Street
Phoenix, AZ 85009-6399

If to the CITY: City of Mesa
Transportation Director
300 E Sixth Street.
Mesa, Arizona 85211-1466

- (ii) Except as otherwise specifically stated in this Agreement, all Notices shall be effective upon delivery and shall be deemed delivered on the date and time of delivery if delivered in person, upon the time and date of confirmed transmission if delivered by telephonic facsimile or if deposited with the U.S. Postal Service, on the second business day following the date of mailing. Any party may designate a different person or entity or change the

place to which any Notice shall be given as herein provided, which Notice shall be effective after the same is actually received by the other party.

- (iii) Both parties shall send written notification to the other of any address changes over the life of the Agreement.
- 24. In the case of any dispute over any items in this Agreement, the parties agree to use commercially reasonable efforts to enter into good faith negotiations to resolve the disputed matters. However, this shall not limit the rights of the parties to seek any remedies provided by law.
- 25. The DISTRICT shall take reasonable and necessary actions within its authority to ensure that only storm water is discharged into the IGA CORRIDOR, and that such discharges comply at the point of discharge with any applicable requirements of the Clean Water Act, National Pollutant Discharge Elimination System, or any other applicable discharge requirements, including any permit requirements. The DISTRICT shall indemnify the CITY against any liability resulting from noncompliance with appropriate discharges. The CITY shall not discharge any substance into the IGA CORRIDOR without prior DISTRICT approval.
- 26. Each party to this Agreement will pay for and not seek reimbursement for its own personnel and administrative costs associated with this agreement, including but not limited to the following, unless specifically identified otherwise in this Agreement: permitting, management and administration.
- 27. The personnel of the DISTRICT or of the CITY will not for any purpose be considered employees or agents of the other and each party assumes full responsibility for the actions of its personnel while performing services under this agreement, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding income taxes and social security), worker's compensation and disability benefits.
- 28. This Agreement is subject to cancellation by either party pursuant to the provisions of Arizona Revised Statutes § 38-511.
- 29. Attached to this Agreement or contained herein, are the written determinations by the appropriate attorneys for the parties to this Agreement, that these agencies are authorized under the laws of the State of Arizona to enter into this Agreement and that it is in proper form.
- 30. If legislation is enacted after the effective date of this Agreement, which changes the relationship, or structure of one or more parties to this Agreement, the parties agree that this Agreement shall be renegotiated at the written request of either party.

CITY OF MESA
An Arizona Municipal Corporation

By: _____
_____, City Manager Date

Attest:

By: _____
_____, City Clerk Date

The foregoing Intergovernmental Agreement IGA FCD 2016A010 has been reviewed pursuant to Arizona Revised Statutes § 11-952 by the undersigned City Attorney who has determined that it is in proper form and within the power and authority granted to the City of Mesa under the laws of the State of Arizona.

By: _____
_____, City Attorney Date

EXHIBT A – IGA CORRIDOR

