

RESOLUTION NO. 2018-28

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF SEDONA, ARIZONA, APPROVING AND AUTHORIZING THE MAYOR TO EXECUTE AN INTERGOVERNMENTAL AGREEMENT WITH THE YAVAPAI-APACHE NATION FOR AN OPTION TO CERTAIN RECLAIMED WATER ENTITLEMENTS.

WHEREAS, the Yavapai-Apache Nation ("Nation") in cooperation with the City of Sedona ("City") is evaluating the potential for the development of a project in the Verde River Watershed (Project) for the potential discharge or recharge of highly treated, Class A+ reclaimed water produced by the City's Wastewater Reclamation Plant ("WWRP"); and

WHEREAS, the development of the Project represents a mutually beneficial opportunity for the City and the Nation, as it could provide water resources for the Nation, while also providing a definitive, low maintenance effluent management option for the City; and

WHEREAS, the Nation is investing substantial financial resources in the study and analysis of the Project to determine the legal and technical feasibility of this mutually beneficial Project; and

WHEREAS, the Nation requests additional assurances that the City will preserve for the Nation an exclusive option for certain existing and future reclaimed water entitlements while the Nation evaluates the technical feasibility of the Project; and

WHEREAS, the City desires to provide the Nation with an exclusive option to acquire certain existing and future reclaimed water entitlements produced by the City's WWRP;


NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND THE COUNCIL OF THE CITY OF SEDONA, ARIZONA, that the City of Sedona, through its Mayor and Council, hereby approves the Intergovernmental Agreement with the Yavapai-Apache Nation and authorizes the Mayor to execute said agreement on behalf of the City of Sedona, Arizona.

PASSED AND ADOPTED this 9th day of October, 2018 by the Mayor and Council of the City of Sedona, Arizona.




Sandra J. Moriarty, Mayor

ATTEST:



Susan L. Irvine, CMC, City Clerk

APPROVED AS TO FORM:



Robert L. Pickels, Jr., City Attorney

**INTERGOVERNMENTAL AGREEMENT BETWEEN THE CITY OF SEDONA AND
THE YAVAPAI-APACHE NATION FOR THE STUDY AND ANALYSIS OF
ALTERNATIVE USES OF RECLAIMED WATER SOURCES IN THE VERDE RIVER
WATERSHED AND FOR AN OPTION TO CERTAIN RECLAIMED WATER
ENTITLEMENTS**

THIS AGREEMENT is entered into this 18th day of October, 2018, by and between the CITY OF SEDONA, a municipal corporation of Arizona (“City”), and the YAVAPAI-APACHE NATION, a federally recognized Indian Tribe pursuant to the Indian Reorganization Act of 1934, 48 Stat. 484 *et seq.* (“Nation”), subject to the terms, conditions and recitals set forth as follows:

WHEREAS, the City and the Nation are collectively referred to as “Parties” or singularly referred to as “Party” in this Agreement; and

WHEREAS, the City is authorized to enter into this Agreement pursuant to Arizona Revised Statutes (“A.R.S.”) §§ 11-952 and 9-240; and

WHEREAS, the Nation is authorized to enter into this Agreement pursuant to Article V(b) of the Constitution of the Yavapai-Apache Nation; and

WHEREAS, the Nation, in cooperation with the City, is evaluating the potential for the development of a project in the Verde River Watershed (Project) for the potential discharge or recharge of highly treated, Class A+ reclaimed water produced by the City’s Wastewater Reclamation Plant (“WWRP”); and

WHEREAS, the development of the Project represents a mutually beneficial opportunity for the City and the Nation, as it could provide water resources for the Nation, while also providing a definitive, low maintenance effluent management option for the City; and

WHEREAS, the City has expressed an interest in pursuing effluent management options in partnership with the Nation that could include the development and permitting of the Project; and

WHEREAS, the Nation is investing substantial financial resources in the study and analysis of the Project in order to determine the legal and technical feasibility of this mutually beneficial Project; and

WHEREAS, the Nation requests additional assurances that the City will preserve for the Nation an exclusive option for certain existing and future Reclaimed Water Entitlements produced by the City’s WWRP while the Nation works with the City to fully develop the legal, technical, and financial information necessary to determine the feasibility of the Project while the Parties also engage in good faith negotiations

regarding the terms and conditions under which the City would agree to transfer its Reclaimed Water Entitlement to the Nation or its designee as part of the Project; and

WHEREAS, the City desires, during the term of this Agreement, to provide the Nation with an exclusive Option to acquire certain existing and future Reclaimed Water Entitlements produced by the City's WWRP, and the Nation desires to acquire such an Option, as more fully described in this Agreement;

NOW THEREFORE, in consideration of the covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each Party to the other, it is agreed as follows:

1. **Purpose of the Agreement.** The purpose of this Agreement is to set forth the terms and conditions under which the City and Nation will work together to explore the mutual benefits of the Project for their respective communities.
2. **Definitions.** The following terms shall have the following meanings unless the context requires otherwise:

Confidentiality Agreement means the Confidentiality and Non-Disclosure Agreement Between the Yavapai-Apache Nation and the City of Sedona, executed by the Sedona City Manager on June 14, 2017.

Confidential Information means the information defined as "Confidential Information" in Paragraph 1 of the Confidentiality Agreement.

Effective Date means the date that both Parties have taken all actions necessary to empower the Parties to enter into and bind themselves to the terms, requirements, and obligations of this Agreement, and said Agreement has been finally approved and fully executed by the Parties.

Option means an exclusive option to acquire all right, title, and interest to the City's Reclaimed Water Entitlement for delivery to the Nation or its designee at the WWRP, subject to the terms and conditions set forth in this Agreement.

Option Period means the three (3) year term of this Agreement and any successive one (1) year renewal terms, unless the Agreement is terminated as provided for in accordance with this Agreement.

Project means the potential permitting and construction of facilities and infrastructure needed to take delivery of the City's Reclaimed Water Entitlement at the City's WWRP for delivery and use in the Verde River Watershed for the benefit of the Yavapai-Apache Nation.

Reclaimed Water Entitlement means the existing and future Class A+ reclaimed water produced now or in the future by the WWRP in the approximate amount of

1,450 acre-feet annually (“AFA”). The Reclaimed Water Entitlement does not include (a) the reclaimed water needed to support the existing Sedona Wetlands Preserve that is comprised of six basins with a total water surface area of 12.2 acres or 9.6 million gallons located on approximately 27 acres of land in Effluent Management Area 2, south of the Sedona Wastewater Treatment facility; and (b) the amount of reclaimed water, if any, identified by the Parties during the good faith negotiations under Paragraph 6 of this Agreement that could be retained by the City for non-potable water use within the City’s limits consistent with the purposes of the Project.

Studies means the engineering, financial, environmental, technical, legal and other studies in existence today or that may be prepared by or for the Nation in the future in order to determine the feasibility of the Project.

Wastewater Reclamation Plant or WWRP means the wastewater reclamation plant and ancillary facilities owned by the City or its successors in interest located at 7500 W State Route 89A, Sedona, Arizona 86336 permitted by the Arizona Department of Environmental quality to treat 2.0 million gallons per day (MGD) of flow to Class A+ reclaimed water standards under Arizona law.

3. Effective Date; Term; and Termination.

- 3.1. This Agreement shall become effective on the Effective Date.
- 3.2. The Term of this Agreement shall be three (3) years unless terminated by either Party as provided for herein. The Agreement shall automatically renew for successive one (1) year terms, unless either Party provides written notice to the other not less than ninety (90) days before the end of the then current term of that Party’s decision to not renew the Agreement.
- 3.3. This Agreement may be terminated at any time by written mutual Agreement of the Parties.
- 3.4. If either Party fails to perform or violates any material obligation of this Agreement, and the default or breach is not cured within thirty (30) days of receiving written notice specifying the default or breach, the non-defaulting Party may terminate this Agreement.
- 3.5. Expiration or termination of this Agreement shall not relieve the Parties of any obligation accruing prior to such expiration or termination, except that the provisions of Paragraphs 7 and 8 shall survive the expiration or termination of this Agreement.

4. Responsibilities of the City.

- 4.1. The City hereby grants to the Nation the Option to acquire all right, title, and interest to the City’s Reclaimed Water Entitlement for delivery to the Nation or

its designee at the WWRP during the Option Period, subject to the terms and conditions set forth in this Agreement.

- 4.2. If the Nation elects to exercise its Option to acquire the Reclaimed Water Entitlement under subparagraph 4.1, the Nation shall promptly notify the City in writing of its intent to exercise its Option prior to the expiration of the Option Period. Failure of the Nation to provide such notice prior to the expiration of the Option Period shall be deemed a waiver by the Nation of its Option.
- 4.3. During the Option Period, the City shall work in good faith with the Nation and promptly provide the information reasonably requested by the Nation, in order to allow the Nation and its consultants and representatives to conduct the necessary Studies to determine the legal, technical, and financial feasibility of the Project.
- 4.4. During the Option Period, the City shall not grant, or offer to grant, to any party other than the Nation, any right to or expectation in the Reclaimed Water Entitlement.

5. Responsibilities of the Nation.

- 5.1. The Nation shall use commercially reasonable efforts to complete the Studies during the Option Period, subject to any time limitations or other restrictions that may be imposed by federal or state agencies or under applicable law.
- 5.2. The Nation shall provide the City with an update on the progress of the Studies at least semi-annually or at more frequent intervals at the reasonable request of the City. As more fully provided in paragraph 7 of this Agreement, the City agrees not to use for any purpose, disclose to any third party, or publish any data or information disclosed to the City during the progress updates required by this paragraph without prior written consent of the Nation or properly issued order from a court of competent jurisdiction. In the event of a legal challenge to compel the City to disclose any confidential data or information, the City shall provide the Nation with notice in advance of any legal proceeding so that the Nation may have an opportunity to intervene on its own behalf.
- 5.3. The Nation shall notify the City at any time during the Option Period if the Nation determines not to exercise its Option granted under paragraph 4.1. The Option shall terminate upon receipt by the City of such notice under this paragraph.

6. Negotiations for the Transfer of City's Ownership Interest in the Reclaimed Water Entitlement. Upon notice by the Nation pursuant to paragraph 4.2 of its decision to exercise the Option pursuant to paragraph 4.1, or earlier if mutually agreed to by the Parties, the City and the Nation shall enter into good faith negotiations regarding the terms and conditions for the City to transfer all right, title,

and interest in the City's Reclaimed Water Entitlement to the Nation or its designee. If the Parties cannot in good faith reach agreement on the terms under which the City will transfer ownership of the Reclaimed Water Entitlement to the Nation or its designee within six (6) months after the date the Nation has chosen to exercise its Option, or the Nation chooses to not exercise its Option during the Option Period as provided for in paragraph 5.3, the City shall be relieved of any obligation to the Nation regarding City's Reclaimed Water Entitlement.

7. **Confidentiality.** The provisions of the Confidentiality Agreement shall be applied to any Confidential Information disclosed by either Party to the other in connection with this Agreement.
8. **Ownership of Confidential Information.** Each Party owns its Confidential Information shared pursuant to this Agreement. Nothing in this Agreement shall be construed to alter or transfer any such ownership interest from one Party to another.
9. **Liability.** Except as otherwise provided in this Agreement, each Party shall assume liability for its own negligence and any damages that result from that negligent action or inaction.
10. **Insurance.**
 - 10.1. The City shall carry sufficient insurance to cover the activities outlined in this Agreement, and shall hold the Nation harmless and indemnify the Nation from any and all liability that may result from the negligent acts or omissions of the City's employees or agents.
 - 10.2. The Nation shall carry sufficient insurance to cover the activities outlined in this Agreement, and shall hold the City harmless and indemnify the City from any and all liability that may result from the negligent acts or omissions of the Nation's employees or agents.
11. **Notices.** All notices, demands, consents, approvals, requests or other communications which either Party to this Agreement may desire or be required to give hereunder (collectively, "Notices") shall be in writing and shall be given to the following:

City: City Manager
City of Sedona
102 Roadrunner Dr.
Sedona, Arizona 86336

Nation: Chairperson
Yavapai-Apache Nation
2400 W. Datsi Street
Camp Verde, Arizona
86322

With a Copy to: Attorney General
2400 W. Datsi Street
Camp Verde, Arizona
86322

12. **Costs.** The Parties shall each bear their own costs associated with meeting their respective obligations under this Agreement.

13. **Dispute Resolution.** The City and Nation agree that any and all disputes, claims or controversies arising out of or in relation to the performance, interpretation, application, or enforcement of the this Agreement, including but not limited to breach thereof (“dispute”), that cannot be resolved informally by the Parties will be submitted to a qualified, neutral mediator who will work to achieve with the Parties a mutually acceptable resolution of the dispute. The mediator is not empowered to impose a solution on the Parties.

13.1. Either Party may commence mediation by providing the other Party with a written request for mediation, setting forth the subject of the dispute and the relief requested. Thereafter, the Parties will cooperate with one another in selecting a qualified mediator and in scheduling the mediation proceedings.

13.2. The Parties agree to participate in the mediation in good faith and to share equally in the costs of mediation.

13.3. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the Parties, their agents, employees, experts and attorneys, and by the mediator or its employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any litigation or other proceeding involving the Parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

13.4. Any legal action arising from a dispute under this Agreement that cannot be resolved through mediation shall be resolved as follows: (a) Any claims against the Nation arising under this Agreement shall be resolved according to the laws of the Yavapai-Apache Nation and the Nation’s Tribal Courts shall have exclusive jurisdiction over any action filed by the City against the Nation under this Agreement. This Agreement shall not be construed as a waiver of sovereign immunity of the Yavapai-Apache Nation or the Nation’s employees, officers and agents, except to the limited extent provided in this subparagraph 13.4; and (b) Any claim brought by the Nation against the City shall be resolved according to the laws of the State of Arizona in the Arizona Superior Court for Yavapai County.

14. Miscellaneous.

- 14.1. This Agreement shall not be construed to imply authority to perform any tasks, or accept any responsibility, not expressly set forth herein.
- 14.2. In their respective performances under this Agreement, the Parties shall comply with all applicable laws, statutes, rules, regulations and ordinances including without limitation, those governing wages, hours, employment discrimination and safety.
- 14.3. This Agreement constitutes the entire agreement between the Parties. All prior and contemporaneous agreements, understandings, negotiations, representations and understandings of the Parties, oral or written, are hereby superseded by this Agreement.
- 14.4. Except as otherwise specifically provided herein, no change or addition is to be made to this Agreement except by written amendment approved by the Yavapai-Apache Nation and City of Sedona.
- 14.5. No waiver by any Party of a breach of this Agreement will be construed as a waiver of a succeeding breach of the same or any other covenant of this Agreement. No delay in exercising any right granted by this Agreement will constitute a waiver of that right. No waiver shall be effective unless it is in writing and is signed by the Party asserted to have granted such waiver.
- 14.6. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original; but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument.
- 14.7. The captions used in this Agreement are inserted for convenience in reference only and are not to be used to interpret or construe this Agreement.
- 14.8. The recitals to this Agreement are hereby affirmed by the Parties as true and correct and are incorporated in and made a part of this Agreement by this reference.
- 14.9. Each of the Parties represents and warrants to the other that it has full power and authority to enter into and perform this Agreement, and that the person signing on behalf of each has been properly authorized and empowered to bind the Party on whose behalf each such individual is signing.
- 14.10. This Agreement is the result of negotiations by and between the Parties and has been reviewed by attorneys for the Yavapai-Apache Nation and by the Sedona City Attorney. Therefore, any ambiguity in this Agreement is not to be construed against either Party.

- 14.11. Any Notice by any Party to the other shall be considered duly served and delivered in person to the office of the authorized representative listed in paragraph 11, or if deposited in the U.S. mail, properly stamped with required postage, and addressed to the authorized representative listed in paragraph 11. Any Party may change its representative or the address thereof by giving the other written notice.
- 14.12. Failure or unreasonable delay by any Party to perform or act in accordance with any term or condition of this Agreement shall constitute a breach of this Agreement.
- 14.13. Each of the Parties hereto shall execute and deliver all such documents and perform all such acts as are reasonably necessary, from time to time, to carry out the matter contemplated in this Agreement.
- 14.14. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture or other arrangement between or among the Parties. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, organization or corporation not a Party hereto, and no such other person, firm, organization or corporation shall have any right or cause of action hereunder.
- 14.15. Neither Party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the written consent of the other Party.
- 14.16. In the event any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law.
- 14.17. This Agreement may be canceled without penalty pursuant to A.R.S. § 38-511 in the event there is a conflict of interest as described therein by any person significantly involved in negotiating this Agreement on behalf of the respective Parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officials on the aforementioned date.

THE CITY OF SEDONA

By: *Paula J. Moriarty*
Title: MAYOR
Date: 10/23/18

YAVAPAI-APACHE NATION

By: _____
Title: _____
Date: _____

APPROVED AS TO FORM:

By: *[Signature]*
Title: CITY ATTORNEY
Date: 10/23/18

APPROVED AS TO FORM:

By: _____
Title: _____
Date: _____

ATTEST:

By: *Susan D. Clwine*
Title: CITY CLERK
Date: 10/23/18