AMENDED
MEMORANDUM OF UNDERSTANDING
between
WASHINGTON COUNTY WATER CONSERVANCY DISTRICT,
IVINS CITY,
IVINS IRRIGATION COMPANY
SHIVWITS BAND OF PAIUTE INDIANS
and
CANADIAN CAPITAL CORP., KAYENTA HOMESITES, INC., R. TERRY MARTEN
for
DEVELOPMENT, OPERATION AND MAINTENANCE
of
IVINS RECREATION AND NATURE PARK AT IVINS RESERVOIR

This Agreement is made and entered into by and between the Washington County Water Conservancy District (the "District"), Ivins City (the "City"), the Ivins Irrigation Company, and, upon execution of a counterpart of this Agreement, the Shivwits Band of Paiute Indians (the "Band") and Terry Marten, Canadian Capital Corp. and/or Kayenta Homesites, Inc. ("Marten).

RECITALS

WHEREAS, the Washington County Water Conservancy District owns, operates and maintains the Ivins Reservoir in accordance with the Santa Clara Project Agreement, dated January 15, 2001, ("SCPA") for irrigation, water conservation and other purposes, and

WHEREAS, the City is the general governing authority over the area occupied by the Ivins Reservoir outside of the Shivwits Reservation and is interested in enhancing the recreational opportunities provided by the reservoir; and

WHEREAS, the Ivins Irrigation Company is designated to participate in recreation planning pursuant to the SCPA, and

WHEREAS, Shivwits Band of Paiute Indians owns a portion of the land on the west side of the Ivins Reservoir that would be included as part of the recreational area, and

WHEREAS, Marten is the owner and developer of land in the vicinity of Ivins Reservoir, is interested in enhancing the recreational opportunities provided by the reservoir and has shares of water in Ivins Irrigation Company that he is willing to devote to recreational benefits; and

WHEREAS, the parties desire to cooperate in the development and administration of

certain lands and facilities around Ivins Reservoir for recreational purposes.

NOW, THEREFORE, in consideration of the mutual covenants set forth herein, the parties agree as follows:

SPECIFIC TERMS

1. **Effective Date.** This Agreement becomes effective upon its execution by the District, the City and the Ivins Irrigation Company. The rights and obligations of the Band and of Marten shall accrue upon execution by that party of this Agreement.

2. **District's Transfer of Responsibility.** Subject to the terms, conditions, limitations, exceptions, and reservations contained in this Agreement, the District hereby transfers to the City and the City hereby accepts responsibility for the administration and management of the recreation resource and the operation, maintenance, repair, replacement, of all recreation facilities within and around the Ivins Reservoir on land owned by the District, including the water surface thereof, located within the boundary (hereinafter referred to as the Recreation Area) all as shown on Exhibit A attached hereto.

3. **Band's Transfer of Responsibility.** Subject to the terms, conditions, limitations, exceptions, and reservations contained in this Agreement, the Band hereby transfers to the City and the City hereby accepts responsibility for the administration and management of the recreation resource and the operation, maintenance repair, replacement, of all recreation facilities that are improved to serve the recreational purposes within and around the Ivins Reservoir on land owned by the Band, including the water surface thereof, located within the Recreation Area, all as shown on Exhibit A attached hereto, provided however that nothing herein is intended to waive or limit the Band's retention of its sovereign and inherent regulatory authority over activities on Reservation land within the Recreation Area, which the Band intends to exercise consistent with the stated purposes of this Agreement.

4. **Marten's Transfer of Responsibility.** Subject to the terms, conditions, limitations, exceptions, and reservations contained in this Agreement, the Marten hereby transfers to the City and the City hereby accepts responsibility for the administration and management of the

recreation resource and the operation, maintenance repair, replacement, of all recreation facilities that are improved to serve the recreational purposes within and around the Ivins Reservoir on land owned by Marten, all as shown on Exhibit A attached hereto.

5. **Plan of Development.** A Plan of Development shall be maintained in accordance with this Memorandum of Understanding Agreement, subject to revision by the City with input from representatives of all parties through meetings held on an ad hoc basis. The City will make no revisions to the plan without approval from the parties. Any construction plans shall be prepared with input and collaboration with the parties.

6. **Safety.** The City, in connection with the recreation responsibilities transferred, agrees that it shall assume, without reimbursement therefor, responsibility for the safety of the general public, including but not limited to the disposal of floatable debris in the reservoir and undermined or fallen trees within the reservoir area, to the extent necessary to maintain the Recreation Area in a condition suitable for use by the public. To the extent that debris accumulates due to District activities or such that it interferes with District operations, the District will dispose of such debris. In the event of a catastrophic event that creates conditions that interfere with public safety and District operations, the District and the City shall work jointly to rehabilitate and restore the facility to its intended purposes.

The City shall, within the limits of its administration, make and enforce all applicable state laws, including rules and regulations for the use of the Recreation Area as are necessary and desirable to protect the health and safety of persons using the area and for the preservation of law and order in the interest of public safety.

In the event that the Recreation Area becomes unsafe due to floods, fluctuating, water levels, waterborne pathogens, flood debris, fire, or any other unforeseen hazard, the City shall have the primary authority and responsibility to close the area to public use. All parties shall be responsible to notify the City of any foreseeable or known hazards as soon as possible.

7. **Water Storage for Santa Clara Project Purposes.** The rights of the City under this Agreement are subordinate to the rights of District, its agents, employees, or assigns, relating to

the use of lands and water areas within the Recreation Area for any purposes authorized by the District.

8. **District's Authority.** The District shall retain primary authority over all areas owned by the District outside of the Recreation Area for the purpose of Project operation and maintenance of its facilities, but such operation and maintenance shall not preclude use of such areas for recreation purposes pursuant to the terms of this Agreement when and if such use is specifically approved by the District. Provided that the City will exercise its jurisdictional authority over any public in the area of the District's primary jurisdiction to ensure that there is no interference with District facilities or functions.

9. **Band's Authority.** The Band shall retain primary authority over all areas outside of the Recreation Area. Furthermore, the Band retains authority to exclude individuals from the Reservation that cause depredation to persons or property on the Reservation and regulate activities that impact cultural, natural, or historic resources on the Reservation land within the Recreation area, or the Band's political integrity, economic security, or health and welfare interests that may be impacted by activity on that land.

10. **City's Authority.** The City shall hold primary authority over all areas within the Recreation Area for recreation purposes in accordance with the terms and conditions of this Agreement and subject to the following:

a. the right of officers, employees, agents and permittees of the underlying property owner to full ingress for passage over and egress from all such lands at all times and places.

b. the right of the District to construct, install or place any facility it deems necessary or appropriate in fulfillment of current or future operations of the Ivins Reservoir and the Santa Clara Project or any other District project or facility, including but not limited to wells, pump houses and pipelines, on any lands within the Recreation Area owned by the District, after consultation with the City, with the agreement to restore and repair any recreation facilities that are removed, destroyed, or damaged in the construction and operation of such facilities.

11. **Design, Contract Specifications etc.** The City will provide as necessary experienced personnel for installation of facilities, survey, planning, design, contract specifications, contract award/administration and inspection including the preparation of as-built drawings and compilation of operation manuals, for the recreation facilities. The parties will meet periodically with City representatives to discuss design alternatives, and also meet to review schematic designs, preliminary designs, and contract documents.

12. **Adjustment to Recreation Areas.** If future needs arise which a land owning party determines will require changes in land use for reasonable purposes within the area administered by the City for recreation, the City will be consulted and consideration will be given to means of minimizing adverse effects relating to the City's responsibility and investments. If the land use change is selected by the land owning party in order to reduce capital costs, reduce operational costs, or generate funds, the City shall be compensated for any resulting damage to recreational facilities, provided however that there shall be no compensation to the City for facilities not paid for by the City and provided that the amount paid for compensation shall not exceed the amount of the funds saved or generated by the land owning party over a ten-year period.

13. **Variation in Water Level**. The fulfillment of the Santa Clara Project purposes will require that the level of the reservoir be fluctuated to meet use demand. The District reserves the right to vary the water level to any extent deemed necessary or desirable for the purposes of Project operations. Marten and the City may, however, dedicate water rights or shares they own in Ivins Irrigation Company to be held in the reservoir at any time consistent with applicable water law.

14. **Agency, Sovereign Immunity.** Nothing in this Agreement shall be construed or interpreted as authorizing any party, its agents or employees, to act as agent or representative for or on behalf of or to incur any obligation of any kind on behalf of the other party or to waive the sovereign immunity of the Band, the City or the District.

15. **Reservations.** The privileges herein granted to the City are limited to the management and administration of the recreation resource and are subject to:

a. existing rights, privileges, easements and rights-of-way or other interests in the lands to which the title of the District may be subject, and the City agrees not to interfere with such rights, privileges, or interests.

b. compliance with the Plan.

16. Third Party Contracts and Permits by the City. The City may issue and administer licenses, permits, and contracts to persons or associations for the purpose of regulating the public recreation resource and concession contracts under which services are made available to the recreating public in the area. All such leases, licenses, permits and contracts shall be submitted to the underlying property owner for approval before issuance, and all instruments used for such purposes throughout the area shall be subject to applicable terms of this Agreement and shall contain language recognizing the purpose of the Reservoir and effecting releases and indemnifications to and for the District, the Band and the City, their successors and assigns, officers, agents, and other employees engaged in the construction, operation, and maintenance of Project works. The term of such licenses, permits, or contracts shall not exceed 20 years or one year less than the duration of this Agreement with the City and such licenses, permits, and contracts shall contain the following provisions:

> "In the event of the termination of the Agreement between the underlying property owner, and the City, the underlying property owner shall be deemed to stand in the stead of the City as grantor for the remainder of the term of this Agreement; provided, however, in the event of such termination, the underlying property owner at any time within 90 days thereafter may terminate the license, permit, or contract by giving to the licensee, permittee, or contractor 30 days written notice thereof and in such event the licensee, permittee, or contractor shall have the privilege of selling or removing, for a period of thirty (30) days after termination of this license, permit, or contract, or such longer period as may be determined by underlying property owner to be reasonable, improvements which have been constructed on the premises at the sole cost or expense of the licensee, permittee, or contractor; otherwise, after the expiration of such period of time, the title to such shall vest in underlying property owner."

17. Third Party Contracts and Permits by the Band. The Band may issue and administer licenses, permits, and contracts to persons or associations for the purpose of regulating the

concession contracts under which services are made available to the recreating public within the area of its own property. All such leases, licenses, permits and contracts shall be submitted to the City for review before issuance, and all instruments used for such purposes throughout the area shall be subject to applicable terms of this Agreement and shall contain language recognizing the purpose of the Reservoir and effecting releases and indemnifications to and for the Band, the District and the City, their successors and assigns, officers, agents, and other employees engaged in the construction, operation, and maintenance of Project works.

18. Liability of Contractors and Permittees. All contractors and permittees shall be required to carry such public liability and property damage insurance as is customary among prudent operators of similar businesses under comparable circumstances.

19. Title to Land, Improvements, and Restoration

a. all improvements constructed in whole or in part with expenditures by the City shall be and remain the property of the City, subject to the following provisions.

b. upon commencement of this Agreement, and from time to time thereafter, the City shall notify the underlying property owner, in writing, of those structures and improvements installed or constructed by the City at its sole cost or expense and shall keep a current and accurate inventory of such structures and improvements installed or constructed solely at its own expense.

c. the underlying property owner will be granted the first option to purchase such property at the fair market value. If the underlying property owner does not elect to purchase such property, for a period of ninety (90) days after termination of this Agreement, the City shall have the privilege of salvaging and/or removing structures or facilities on the premises installed or constructed by the City at its sole cost or expense. After the expiration of such period, the title to all remaining such City-financed structures or facilities shall vest in the underlying property owner. The exercise of the privilege of removal of structures or facilities shall include the obligation to restore the land occupied by such structures or facilities to its original condition.

20. Review of Administration. Upon request of any party, the parties hereto will review the

administration, operations, and development of the Recreation Area under this Agreement. All parties may make inspections of the area at any time and consult with the City concerning development, operation, and land use.

21. **District Right of Removals.** There is reserved to District, its agents, contractors, lessees, or permittees the right to remove from District-owned lands within the Recreation Area any and all materials necessary for the construction, operation, and maintenance of Project works and facilities in accordance with the provisions of this agreement.

22. **Risk – Damages.** Each party shall be responsible for its own actions and negligence and shall indemnify and hold the other parties, their nominees, agents, and employees free and harmless against any and all damages and expenses (including legal fees), claims, out of or in any manner connected with the development, administration, operation, and maintenance or use by anyone of the recreational facility at the reservoir over which the City has control as set forth in this Agreement.

GENERAL TERMS

23. Authorization. Each individual executing this Agreement does represent and warrant to each other so signing (and each other entity for which another person may be signing) that he or she has been duly authorized to sign this Agreement in the capacity and for the entities set forth where he or she so signs.

24. **Utah Law to govern.** This Agreement has been drawn and executed in the State of Utah. All questions concerning the meaning and intention of any of its terms or its validity shall be determined in accordance with the laws of the State of Utah.

25. **Binding on successors in interest.** This Agreement shall bind the parties hereto and their successors, heirs, assigns and representatives and the obligations of the parties shall survive closing and shall not merge with any document of title.

26. **Recitals.** The Recitals contained in this Agreement are incorporated into the Agreement.

27. **Inducement.** The making and execution of this Agreement has not been induced by any representation, statement, warranty, or agreement other than those herein expressed.

28. **Integration.** All agreements heretofore made in the negotiation and preparation of this Agreement between the parties hereto are superseded by and merged into this Agreement, no statement or representation not

embodied herein shall have any binding effect upon the parties hereto and there shall be no amendments hereto except those in writing signed by the parties hereto.

29. **Time is of the essence.** Time is of the essence with regard to this Agreement as to each covenant, term, condition, representation, warranty and provision hereof.

30. **Number and gender.** The singular shall be interpreted as the plural, and vice versa, if such treatment is necessary to interpret this Agreement in accord with the manifest intention of the parties hereto. Likewise, if either the feminine, masculine or neuter gender should be one of the other genders, it shall be so treated.

31. **Paragraph headings.** The paragraph and subparagraph headings used herein are for convenience only and shall not be considered in the interpretation of this Agreement.

32. **Partial validity.** If any portion of this Agreement shall be held invalid or inoperative, then insofar as is reasonable and possible:

a. The remainder of this agreement shall be considered valid and operative, and,

b. Effect shall be given to the intent manifested by the portion held invalid or inoperative.

33. **Waiver.** The waiver by any party to this Agreement of a breach of any provision of this Agreement shall not be deemed to be a continuing waiver or a waiver of any subsequent breach, whether of the same or any other provision of this Agreement. Any waiver shall be in writing and signed by the waiving party.

34. **Necessary Acts and Cooperation.** The parties hereby agree to do any act or thing and to execute any and all instruments required by this Agreement and which are necessary and proper to make effective the provisions of this Agreement.

35. **Ambiguities.** This agreement has been negotiated and drafted by all parties hereto and the general rule of contract construction that 'ambiguities shall be construed against the draftsman' shall have no application to this agreement.

36. **No Third Party Beneficiaries.** This Agreement is not intended to be a third-party beneficiary contract for the benefit of any third parties, including but not limited to any customer of any party, and no such persons shall have any cause of action against any party for any breach or default by any party hereunder. In addition, no third parties shall have any rights hereunder that would, in any way, restrict the parties' right to modify or renew this Agreement at any time or in any manner.

37. **Counterparts.** This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

38. **Rights and Remedies.** The parties shall have all rights and remedies provided under applicable federal or state law for a breach or threatened breach of this Agreement, subject to Paragraph 14. These rights and

remedies shall not be mutually exclusive, and the exercise of one or more of these rights and remedies shall not preclude the exercise of any other rights and remedies. Each party confirms that damages at law may be an inadequate remedy for a breach or threatened breach of any provision hereof and the respective rights and obligations of the parties hereunder shall be enforceable by specific performance, injunction, or other equitable remedy. Nothing in this Agreement shall be construed to waive the sovereign immunity of the District, the City or the Shivwits Band of Paiutes.

39. **Default.** Except as specifically provided for herein, a default by any party in an obligation set forth herein shall not result in, or be the basis for, the termination or rescission of this Agreement.

40. **Indemnity Clause.** Each party agrees to indemnify, save harmless, and release the other party and all its officers, agents, volunteers, and employees from and against any and all loss, damages, injury liability, suits, and proceedings arising out of the performance of this Agreement which are caused in whole or in part by the negligence of the that party's officers, agents, volunteers, or employees, but not for claims arising from the other party's sole negligence.

41. **Notice.** Any notice to be given or payment to be made hereunder shall have been properly given or made when received by the District, the City, the Band or Marten, as the case may be, or when deposited in the United States mail, certified or registered, postage prepaid, addressed as follows:

WASHINGTON COUNTY WATER CONSERVANCY DISTRICT
ATTN. General Manager
533 East Waterworks Drive
St. George, UT 84770

IVINS CITY
ATTN: DIRECTOR OF PARKS AND RECREATION
55 North Main Street
Ivins, UT 84738

SHIVWITS BAND OF PAIUTE INDIANS
ATTN: Jetta Wood
6060 West 3650 North
Ivins, UT 84738

IVINS IRRIGATION COMPANY
ATTN: Kay Ence
80 West 100 South
Ivins, UT 84738

R. Terry Marten
800 Kayenta Parkway
Ivins, UT 84738

42. Term. The term of this Agreement shall continue for a period of fifty (50) years from the date hereof, unless sooner terminated as provided in as set forth below. The City shall be given preferential consideration in negotiating a new agreement upon termination of a 50-year period of satisfactory operation.

43. Termination. This Agreement shall terminate and all rights of the City, except as hereafter provided, shall cease upon:

a. expiration of term;

b. the failure of the City to observe any of the conditions, exceptions, or reservations set out in this Agreement, in which event the District shall give written notice to the City of the obligations that are in default or the provisions of this Agreement that have been violated, and the City shall have 120 days in which to correct the default or violation. Unless the City shall have corrected such default or violation or is showing satisfactory evidence of progressing toward correcting the default or violation, this Agreement shall terminate on the ninety-first (91st) day following service of the written notice herein provided.

44. Exhibits.

Exhibit A – Ivins Reservoir Recreation Area Map

SIGNATURES ON FOLLOWING PAGE

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DATED: 2-11-16

WASHINGTON COUNTY WATER CONSERVANCY DISTRICT

RONALD W. THOMPSON, General Manager

DATED: _____

IVINS CITY

_____

CHRIS HART, Mayor

DATED: _____

IVINS IRRIGATION COMPANY

_____

KAY ENCE, President

DATED: 2/10/16

SHIVWITS BAND OF PAIUTE INDIANS

JETTA WOOD, Chairwoman

DATED: _____

CANADIAN CAPITAL CORP., KAYENTA HOMESITES, INC, AND TERRY MARTEN

_____

By _____

R. TERRY MARTEN, individually and as President of Canadian Capital Corp. and Kayenta Homesites, Inc.