

**Agreement to Provide Maintenance for  
Drainage Facilities in the Black Arroyo Dam & Channel  
Rights-of-Way**

THIS AGREEMENT is made and entered into this 16<sup>th</sup> day of January, 2007, by and between the Albuquerque Metropolitan Arroyo Flood Control Authority, a political subdivision of the State of New Mexico ("AMAFCA"), and Calabacillas Group, LLC, a New Mexico Limited Liability Company, ("OWNER"); all entities are henceforth collectively referred to as the "PARTIES".

WHEREAS, the OWNER proposes to develop a 12-acre parcel adjacent to the Black Arroyo Dam and Outlet Channel (Arroyo) into a commercial development, and

WHEREAS, the OWNER will construct, as part of the Site Plan for Building Permit, a storm drain outfall with appropriate storm water quality measures ("IMPROVEMENTS") within AMAFCA rights-of-way, and

WHEREAS, the OWNER has requested that AMAFCA assume maintenance of the IMPROVEMENTS that will be constructed by the OWNER, and

WHEREAS, AMAFCA is agreeable to assumption of maintenance of the completed IMPROVEMENTS after acceptance by AMAFCA;

NOW THEREFORE, for good and valuable consideration, the receipt of which is hereby acknowledged, the PARTIES agree as follows:

**SECTION 1. OWNER, at its sole expense, agrees to:**

a. Cause to be designed, with engineer's seal and signature, and to be constructed the IMPROVEMENTS, consisting of a concrete rundown, a double Type "D" water quality inlet, headwall, cobble-lined overflow swale, a thirty-six inch (36") storm drain outfall to the Arroyo, and minor grading. The IMPROVEMENTS shall conform to the dimensions and location shown on Exhibit "A". Construction of the IMPROVEMENTS shall conform to AMAFCA specifications and requirements.

b. Provide final plans and specifications for construction of the IMPROVEMENTS to AMAFCA for review and approval prior to construction.

c. Provide for the inspection of construction, including administration, testing, and inspection, or other supervision of construction, by a registered engineer and testing firm hired by OWNER to assure construction is in conformance with the plans and specifications.

d. Reimburse AMAFCA for documented time spent at the job site by its staff for construction inspection. This time will be reimbursed at the rate of \$100.00 per hour, not to exceed a total combined amount of \$1,000.00.

e. Cause work to be halted and remedial measures taken should the work be out of compliance with the plans and specifications, and/or standard construction practice.

f. Obtain all necessary agency approvals for the project.

g. Notify AMAFCA's Field Engineer by phone call to 884-2215 and in writing by facsimile to 884-0214 at least 48 hours prior to beginning work on the IMPROVEMENTS and before final inspection.

h. Provide copies of all daily construction reports and testing reports to AMAFCA.

i. Provide an engineer's certification to AMAFCA that the IMPROVEMENTS have been constructed in accordance with the approved plans and specifications. Furnish as-built plans of the IMPROVEMENTS within 30 days of final acceptance.

j. Require its contractor to provide liability insurance during the period of construction naming AMAFCA as additional named insured. The amount of the liability insurance shall be at least \$2,000,000.00. Evidence of said insurance shall be provided to AMAFCA prior to commencement of construction of the IMPROVEMENTS.

k. Provide to AMAFCA an accounting of all costs, including engineering design, construction, inspection, testing, and construction management for construction of the IMPROVEMENTS for AMAFCA's use in GASB-34 reporting requirements for infrastructure.

## **SECTION 2. AMAFCA agrees to:**

a. Review and, if appropriate, approve plans and specifications for IMPROVEMENTS, as prepared by the OWNER's engineer. The vertical and horizontal limits of the IMPROVEMENTS will be substantially the same as shown in Exhibit "A".

b. Provide periodic inspection of the IMPROVEMENTS during the construction period by its staff to assure that construction is in conformance with the plans and specifications.

c. Accept the IMPROVEMENTS for continuous maintenance upon satisfactory completion of construction and confirm acceptance of same in writing by AMAFCA's Executive Engineer.

## **SECTION 3. All PARTIES agree:**

a. All PARTIES will strive for prompt action and timely response.

b. If any situation arises which adversely affects any PARTY's participation in this Agreement, said PARTY will immediately notify the other PARTIES in writing.

c. Any circumstance, including the above, which materially affects this Agreement will be promptly and equitably resolved by all PARTIES, and, if necessary, an amendment to this Agreement shall be executed.

d. Unresolvable differences shall be referred to binding arbitration under the provisions of the New Mexico Uniform Arbitration Act.

e. The OWNER, after consultation with AMAFCA, shall execute change orders and resolve contract claims relating to design and construction of the IMPROVEMENTS. The OWNER shall assume financial commitments resulting from any change order or resolution of a contract claim from construction of said projects, unless such change order or claim is the result and effected by actions of AMAFCA in expanding the size or capacity of the project beyond the originally approved design. Notwithstanding anything to the contrary, this Agreement requires the OWNER only to construct the drainage improvements shown on Exhibit "A" in accordance with this Agreement and AMAFCA's generally applicable standards.

f. All storm drainage facilities will be designed and constructed to City of Albuquerque and AMAFCA standards and, as constructed, shall meet all applicable codes.

g. This Agreement shall not be assignable by any PARTY of the PARTIES to this Agreement without the written consent of the other PARTIES of the Agreement.

h. This Agreement may be modified only by mutual written agreement of the PARTIES hereto.

i. The PARTIES understand and agree that the obligations of each PARTY under this Agreement shall be performed in compliance with the applicable laws, statutes and ordinances. Nothing herein is intended to constitute any agreement for the PARTIES to perform any activity in violation of the Constitution or Laws of the State of New Mexico.

j. All notices with respect to this Agreement shall be in writing and shall be delivered personally, sent via confirmed fax, or sent postage prepaid by United States Mail, certified mail, return receipt requested, to the addresses set forth below or such other addresses as hereafter specified in writing by each PARTY to the other:

Albuquerque Metropolitan Arroyo  
Flood Control Authority  
2600 Prospect Ave. NE  
Albuquerque, NM 87107  
FAX: (505) 884-0214

Calabacillas Group, Inc.  
401 Coors Blvd. NW  
Albuquerque, NM 87121  
FAX: (505) 831-4865

k. If any clause or provision in this Agreement is illegal, invalid, or unenforceable, under present or future laws effective during the term of this Agreement, then and in that event, it is the intention of the PARTIES hereto that the remainder of this Agreement shall not be affected thereby.

l. It is specifically agreed between the PARTIES executing this Agreement that this Agreement does not, and is not intended to, create in the public, or any member thereof, any rights whatsoever, such as, but not limited to, the rights of a third party beneficiary, or to authorize anyone not a party to this Agreement to maintain a suit(s) for wrongful death(s), bodily and/or personal injury(ies) to person(s), damage(s), and/or any other claim(s) whatsoever pursuant to the provisions of this Agreement.

m. Each individual signing for each of the PARTIES hereunder warrants and represents that he/she is an authorized agent of such PARTY, on whose benefit he/she is executing this Agreement, and is authorized to execute the same.

n. Each PARTY agrees to execute such other and further instruments and documents as may be necessary or proper in order to complete the transactions contemplated by this Agreement and further agrees to provide such other documents that may be necessary pursuant to this Agreement.

o. If construction of the IMPROVEMENTS does not begin within a period of two years after the date of this Agreement, the Agreement shall be null and void.

p. In the event of any dispute regarding this Agreement, the prevailing PARTY shall be entitled to reimbursement of its costs and reasonable attorney's fees.

#### **SECTION 4. SUCCESSORS AND ASSIGNS:**

The Agreement and the rights, interests, and obligations hereunder shall be binding upon and shall inure to the benefit of the PARTIES hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed as of the day and year set forth above.

**AMAFCA**

By: John P. Kelly  
John P. Kelly, Executive Engineer  
(as authorized by the AMAFCA Board of Directors  
at its meeting of December 14, 2006)

**Calabacillas Group, LLC**

By: [Signature]  
Title: Manager

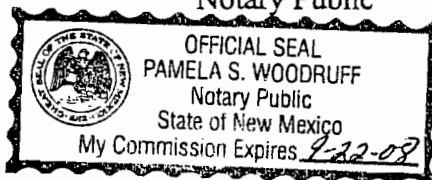
**ACKNOWLEDGEMENTS**

STATE OF NEW MEXICO )  
 ) ss.  
COUNTY OF BERNALILLO )

This instrument was acknowledged before me on January 16, 2007 by  
John P. Kelly as Executive Engineer of the Albuquerque Metropolitan Arroyo Flood Control  
Authority, a Political Subdivision of the State of New Mexico.

Pamela S. Woodruff  
Notary Public

My Commission Expires:  
9-22-08

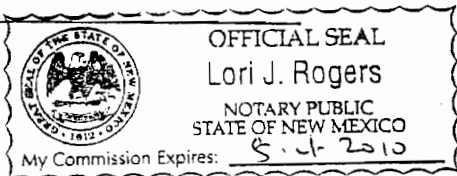


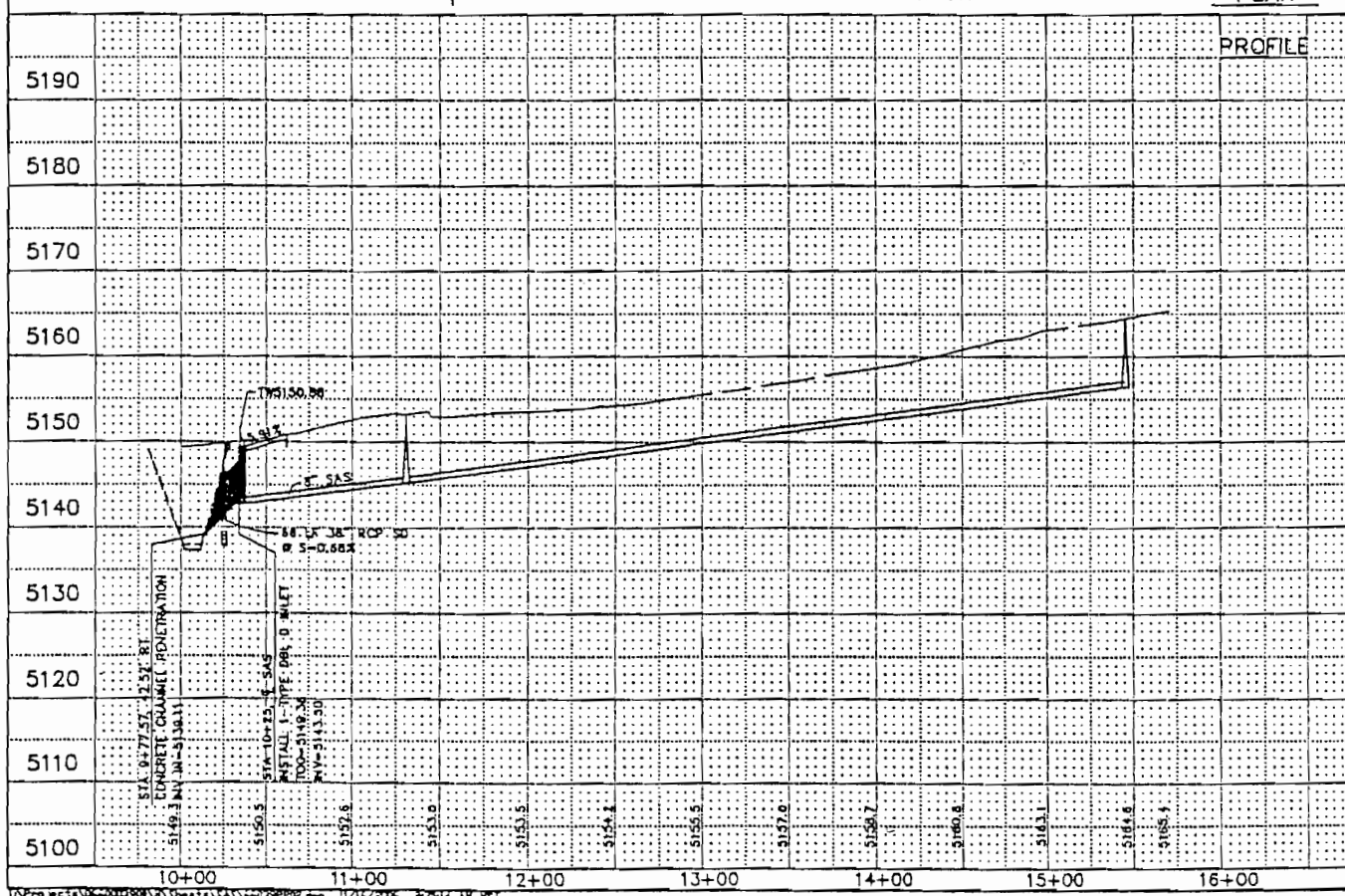
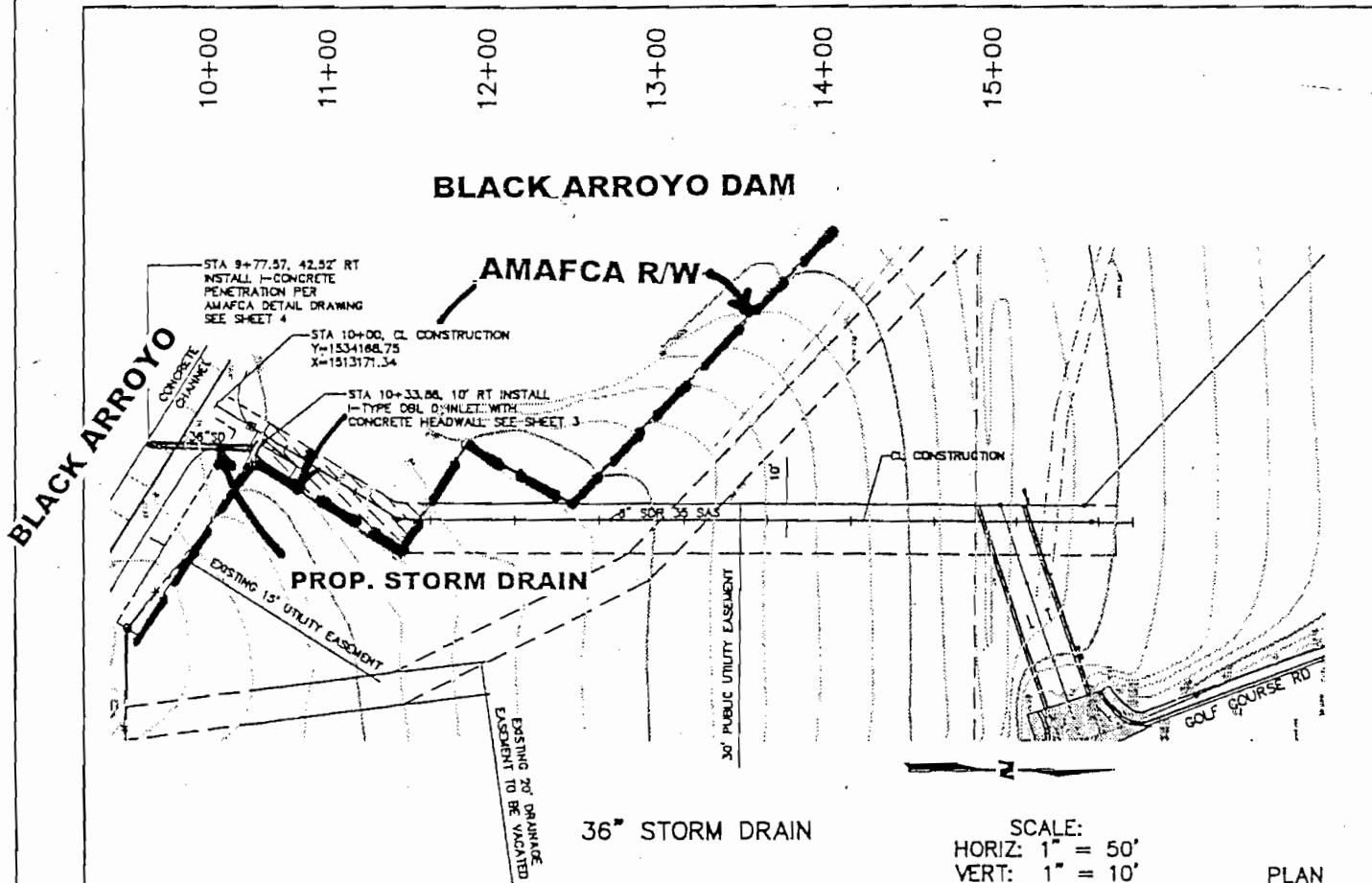
STATE OF NEW MEXICO )  
 ) ss.  
COUNTY OF BERNALILLO )

This instrument was acknowledged before me on January 9<sup>th</sup>, 2007 by  
Joni McClintic as managing member of Calabacillas Group,  
LLC, on behalf of said Company.

[Signature]  
Notary Public

My Commission Expires:





**EXHIBIT "A"**