

10. County's Option to Perform Maintenance and Repairs at Manager's Cost

If Manager is in default hereunder (after the expiration of the cure period set forth in *Section 21.1.6* below) because it fails to perform its maintenance or repair obligations hereunder, in addition to the remedies set forth in *Section 21.2*, County, without notice, may, but is not obligated to, perform Manager's obligations.

All reasonable costs and expenses reasonably suffered or incurred by County in performing these obligations, which will accrue interest at a per annum rate of six percent (6%), will be paid by Manager to County within thirty (30) calendar days of notice thereof. Any such default by Manager will not be considered cured until Manager has fully reimbursed County for the costs incurred in performing Manager's obligations hereunder plus interest.

11. CONCESSIONS AND RELATED ACTIVITIES

11.1 Authority of Manager

11.1.1. Permitted Contracts. Manager has the authority to operate and conduct, or contract with third parties to operate and conduct, concessions (including, but not limited to, food, drink, souvenirs, printed material and similar items), museums, campgrounds and related activities on the Property.

11.1.2. Contracts Not Permitted. Notwithstanding *Section 11.1.1*, Manager may not contract with any third party for trail rides or campground use without the prior written consent of the County Administrator or his designee. Manager may contract with any third parties for the operation and maintenance of Colossal Cave.

11.2 Permits

If food is served on the Premises, Manager will obtain all appropriate food permits and will comply with all Pima County health regulations.

11.3 Contracts Greater than One Year

All subcontracts with third parties for the operation of the Premises or the operation of concessions or other activities on the Premises which have a term of more than one (1) year will be subject to the prior approval of County's Board of Supervisors.

11.4 Copies of Contracts

Manager will provide County with copies of all contracts entered into by Manager relating to the Property.

12. Prohibited Activities

12.1 Activities Outside the Permitted Activities

Manager will not do or permit anything to be done on or about the Property, or bring or keep anything therein which is not within the permitted use of the Park as set forth in this Agreement.

12.2 Activities Not Insured or That Affect Insurance

Manager will not conduct any activity or permit any activity to be conducted on the Property which is not covered by the insurance policies provided pursuant to Section 17 herein without first obtaining the written consent of County and without providing additional insurance covering the activity or event and with coverage limits and carriers acceptable to County.

Manager will not do or permit anything to be done in or about the Property, or bring or keep anything therein which will in any way increase the existing rate of or affect any fire or other insurance upon the Property or any of its contents or cause a cancellation of any insurance policy covering the Property or any part thereof or any of its contents.

12.3 Storage

Manager will not store within the Property equipment, supplies, or scrap items, other than that to be used in the Property, or used in connection with activities described in this Agreement or in the operation of the Property.

12.4 Unlawful Activities

Manager will not use the Property, or permit anything to be done in, on, or about the Property, which will in any way conflict with any law, statute, ordinance or governmental rule or regulation now in force or which may hereafter be enacted or promulgated.

12.5 Cave Access and Research

Manager must receive prior written approval from the County Administrator or his designee before conducting research on or in the Property,

and provided that such research will not have a material adverse impact on the karst features and flora and fauna of Colossal Cave and other known caves.

The manager has no right to manage, enter, authorize others to enter, explore, monitor or research either the caves known as "*La Tetera*" and "*Arkenstone Cave*" or any and all other caves or karst discoveries on or about the Property, other than the currently mapped areas of Colossal Cave itself as depicted in "Exhibit G". If in the course of operating the Property, Manager or any employee or agent of Manager becomes aware of a karst, natural or cultural feature previously unknown to County, Manager will within two (2) business days provide written notice of the new discovery to County and will immediately secure the discovery and refrain from entering or disturbing the site.

All new discoveries will be kept confidential and will not be disclosed to any third party unless authorized in writing by the County Administrator. Manager will not permit the collection, removal or exportation of any natural or cultural items from the property without prior written approval of the County Administrator or his designee and in compliance with all applicable laws, rules and regulations.

13. Books, Records, and Reports

13.1 Manager will keep and maintain proper and complete books, records and accounts of all its operations conducted pursuant to this Agreement, in a manner approved by the Pima County Finance Director, which will be open for inspection and audit by County or its auditors, and the Arizona Auditor General, at all reasonable times.

13.2 Minutes of the meetings of the Board of Directors of Manager will be provided to County within ten (10) business days after each meeting.

13.3 Manager will provide County during each year of the term of this Agreement:

13.3.1 An annual report on the operation and activities of the Property.

13.3.2 If the Gross Revenues of the Property exceed one million dollars (\$1,000,000.00) in any year of the Term, the Renewal Term, or the Additional Renewal Term, a certified audit and annual financial report of the operations under the control of the Manager, for the preceding fiscal year, within sixty (60) calendar days of the conclusion of the Manager's fiscal year. Otherwise, Manager will provide a reviewed financial statement and may be subject to audit by the County.

13.3.3 Assistance in the County's preparation of a written inventory of all buildings, equipment and items of value on the Property belonging to or insured by the County, by October 31st of each year this agreement is in effect.

13.3.4 A proposed budget for the following year, by November 30th of each year this Agreement is in effect.

14. Security and Safety

Manager is responsible for all security and safety relating to the Property and will provide such security personnel and security and safety features sufficient to adequately protect the Property and persons on the Property from property damage or bodily injury.

15. Compliance with Laws

Manager will comply with all federal, state, and local laws, rules, regulations, standards and Executive Orders, without limitation to those designated within this Agreement. The laws and regulations of the State of Arizona govern the rights of the parties, the performance of this Agreement, and any disputes hereunder. Any action relating to this Agreement must be brought and maintained in a court of the State of Arizona in Pima County. Any changes in the governing laws, rules, and regulations during any term of this Agreement apply, but will not require an amendment.

16. Indemnification

16.1 To the fullest extent permitted by law, Manager will indemnify, defend, and hold harmless County and District and their officers, employees and agents from and against any and all losses, costs, or expenses (including reasonable attorney's fees) incurred or suffered by County or District as a result of any damages to property or injuries to persons (including death), or any suits, actions, legal administrative proceedings, claims or demands and costs attendant thereto, but only to the extent that such losses, costs or expenses result in vicarious/derivative liability to County or District arising out of any act, omission, negligence, misconduct, or other fault of the Manager, its officers, officials, agents, or employees. Manager obligations under this *Section 16* survive the expiration or earlier termination of this Agreement.

17. Insurance

17.1 Insurance Required

Manager will, at Manager's sole cost and expense, obtain and maintain, during the term of this Agreement and any renewals thereof, the following insurance policies:

- 17.1.1** Commercial General Liability Insurance with coverage at least as broad as ISO form CG 0 01 in an amount not less than \$5,000,000, covering the Property furnished to the Manager for exclusive use, endorsed to include Pima County as an additional insured with coverage at least as broad as ISO form CG 20 10, and covering all activities carried out on the Property. Manager may require that this insurance be carried by those users of the Property who actually carry out the activities being insured, but this does not relieve Manager of any responsibility for ensuring that the proper coverage is in place, and Manager will be liable to the County for any failure by such third party to furnish the required insurance. Subject to the breadth and limitations of coverage described above, this insurance policy must cover activities conducted on the Property to the extent that they are not covered by insurance policies of users of the Property.
- 17.1.2** Commercial Automobile Liability Insurance with coverage at least as broad as ISO form CA 00 01 in an amount not less than \$1,000,000 for vehicles actually used in the operations at the Property (as compared to be used for simple commuting).
- 17.1.3** Workers' Compensation Insurance with statutory limits, with Employers Liability coverage in an amount not less than \$1,000,000 per injury, illness, or disease.
- 17.1.4** Commercial Property, Boiler and Machinery Insurance with coverage at least as broad as ISO forms CP 00 01 and BM 00 20, covering selected items of Manager's personal property located at the Property.
- 17.1.5** Liquor Liability Insurance in an amount not less than \$3,000,000 per occurrence if alcohol is sold or provided at the Property, endorsed to include Pima County as an additional insured.
- 17.1.6** Special Events Insurance in an amount acceptable to the Pima County Risk Manager for any event held at the Property not covered by other insurance provided as required above. County reserves the right to increase the limits on coverage for unique or high risk Special Events.

17.2 Insurance Certificates and Copies of Policies

Manager will provide County with current certificates of insurance which will show County and District as an additional insured where required. All certificates of insurance must provide for guaranteed thirty (30) calendar days written notice of cancellation, non-renewal or material change.

Manager will cause certified copies of its insurance policies and the policies of Third Parties using the Property to be delivered to the County.

17.3 Waiver of Subrogation

Each party waives its claims and subrogation rights against the other for losses typically covered by property insurance coverage.

17.4 Changes to Insurance Requirements

County retains the right to reasonably increase the limits or types of coverage from time to time as determined in the best interests of County by the Pima County Risk Manager.

17.5 Injury Reports

Manager will provide notice to County, on a form approved by Pima County Risk Management, of any significant injury, defined as any injury likely to result in head or spinal injury, loss of a limb or organ, or serious burns or scarring, or requiring medical evacuation or treatment by paramedics within one (1) business day of Manager becoming aware of such injury. Pima County's Risk Manager may reasonably redefine the reporting requirement by written notification to Manager. Manager will retain records related to significant injuries for not less than seven (7) years and will fully cooperate in any investigation of injuries or damage by Pima County Risk Management or its insurers, agents or contractors. Nothing in this section will constitute as a request by County, or a requirement, that Manager provide any information in contravention of the *Health Insurance Portability and Accountability Act (HIPPA)*.

18. Environmental Compliance

18.1 Protection of Cultural and Paleontological Resources

Colossal Cave Preservation Park Historic District (Historic District) was listed on the *National Register of Historic Places* in 1992. The Historic District boundary is depicted as "Exhibit F". In planning and analysis for the *Sonoran Desert Conservation Plan*, Colossal Cave was identified as a Priority Cultural Resource for preservation. It is County policy to conserve and protect cultural resources that are located on land owned by Pima County, and to mitigate any negative effects that Pima County's operations and land-use planning decisions may have on cultural resources (Pima County Board of Supervisors Policy C3.17). This particularly applies to the Historic District, which is listed on the *National Register of Historic Places*.

Any development, alteration or ground disturbance within the Property, which is located entirely within the Historic District, must be reviewed and approved by the County, and may require consultation with the *Arizona State Historic Preservation Office* and other agencies in order to assess the potential and mitigate any adverse effects to individual resources and to the historic district as a whole.

18.2 Hazardous Materials Prohibited; Clean Air Act

Manager will not cause or permit any Hazardous Material (as hereinafter defined) to be brought upon, kept, or used in or about the Property by Manager, its Partners, agents, employees, contractors or invitees, without the prior written consent of County other than such Hazardous Materials which are necessary or useful to Manager's operation of the Property and such materials will be used, kept and stored in a manner that complies with all laws regulating any such Hazardous Materials. Manager's operations on the Property must comply with applicable provisions of the Clean Air Act, 42 U.S.C. 7401 et seq. and Arizona Revised Statutes, Title 49, Chapter 3.

18.3 Indemnity. If :

18.3.1 Manager breaches the obligations stated in *Section 18.1*, or

18.3.2 the presence (whether consented to by County or otherwise) of Hazardous Material on the Property or on or in the soil or ground water under or adjacent to the Property caused or permitted by Manager, its Partners, agents, employees, contractors or invitees results in contamination of the Property or such soil or ground water, or

18.3.3 contamination of the Property or such soil or ground water by Hazardous Material otherwise occurs for which Manager is legally liable to County for damage resulting therefrom, or

18.3.4 contamination occurs elsewhere in connection with the transportation by Manager of Hazardous Material to or from the Property, then Manager will indemnify, protect, defend and hold County harmless from any and all claims, judgments, damages, penalties, fines, costs, expenses, liabilities or losses (including, without limitation, diminution in value of the Property or any part thereof, damages for the loss or restriction on use of usable space or of any amenity of the Property or any part thereof, damages arising from any adverse impact on marketing of space with respect to the Property or any part thereof, and sums paid in settlement of claims, attorney's fees, consultant fees and expert

fees) which arose or arises during or after the term of this Agreement as a result of such contamination.

The foregoing obligation of Manager to indemnify, protect, defend and hold County harmless includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal, restoration or other response work required by any federal, state, or local governmental agency or political subdivision because of Hazardous Material present, as a result of any action or inaction on the part of Manager, its agents, employees, contractors or invitees, in the Property or the soil or ground water on, under or adjacent to the Property or elsewhere in connection with the transportation by Manager of Hazardous Material to or from the Property.

18.4 Clean-Up

Without limiting the foregoing, if the presence of any Hazardous Material on or in the Property, or the soil or ground water under or adjacent to the Property caused or permitted by Manager, or its Partners, agents, employees, contractors or invitees results in any suspected contamination of the Property, the soil or ground water under or adjacent to the Property, Manager will promptly notify County in writing and take all actions, at Manager's sole cost and expense, as are necessary to return the Property, or such soil or ground water to the condition existing prior to the introduction of any such Hazardous Material to the Property, or to such soil or ground water; provided that County's approval of such actions must first be obtained, which approval will not be unreasonably withheld so long as such actions would not potentially have any material adverse long- term or short-term effect on the Property.

18.5 Pre-existing Contamination

Any Hazardous Materials contaminating the Property prior to possession of the Property by Manager will not result in liability for Manager under this Section 18 except to the extent such contamination is aggravated by the action or inaction of Manager.

18.6 Notices Regarding Environmental Conditions

Manager shall, within ten (10) business days following receipt thereof, provide County with a copy of:

- 18.6.1** any notice from any local, state or federal governmental authority of any violation or administrative or judicial order or complaint having been filed or about to be filed against Manager or the Property alleging any violation of any local, state or federal environmental law or regulation or requiring Manager to take any action with respect to any release on or in the Property or the soil or ground water under or adjacent to the Property of Hazardous Material, or
- 18.6.2** any notices from a federal, state or local governmental agency or private party alleging that Manager may be liable or responsible for cleanup, remedial, removal, restoration or other response costs in connection with Hazardous Material on or in the Property or the soil or ground water under or adjacent to the Property or any damages caused by such release.

18.7 Hazardous Material

As used herein, the term "Hazardous Material" means any hazardous or toxic substance, material or waste which is or becomes regulated by any local governmental authority, the State of Arizona or the United States Government. The term "'Hazardous Material'" includes, without limitation, any material or substance that is:

- 18.7.1** defined as a "hazardous waste" under *NRS 459.400 et seq.*,
- 18.7.2** petroleum,
- 18.7.3** asbestos,
- 18.7.4** designated as a "hazardous substance" pursuant to *Section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321)*,
- 18.7.5** defined as a "hazardous waste" pursuant to *Section 1004 of the Federal Resource Conservation and Recovery Act, 42 U.S.C. 6901 et. seq. (42 U.S.C. 6903)*,
- 18.7.6** defined as a "hazardous substance" pursuant to *Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et. seq. (42 U.S.C. 9601) or*
- 18.7.7** defined as a "regulated substance" pursuant to *Subchapter IX, Solid Waste Disposal Act (Regulation of Underground Storage Tanks), 42 U.S.C. 6991 et seq.*

18.8 Survival

Manager's and County's obligations under this Section 18 survive the expiration or earlier termination of this Agreement and vacation of the Property.

19. Utilities, Services and Taxes

19.1 Manager Responsible for Utilities

19.1.1 Utilities Other Than Water Manager will pay the costs of all utility services on the Property, except water.

19.1.2. Water County currently operates and maintains two wells that provide water to the Property, and County will be responsible for maintenance of the wells. Manager will be responsible for the distribution system from the wells to the rest of the property. If the wells are not working, County will provide water for the cave area portion of the Property only for up to, but not longer than thirty (30) calendar days. In the event Tucson Water or another water company provides potable water to the Property, Manager must connect to such water provider, and Manager will be solely responsible for all fees to connect to such water provider and for payment of the monthly utility fees to the provider/utility company for such water. Manager will install and utilize low water use fixtures and in-line anti-siphoning devices for any rehabilitation, upgrades, or new construction projects located on the Property.

Manager is responsible to pay for the costs to provide and the use of all gas, heat, light, power, water, wastewater charges, telephone service, garbage removal, pest and termite service, security services and all other services and utilities supplied to the Property and any buildings located within the Property, together with any taxes thereon.

19.2 Interruption of Services

County is not liable to Manager if any utilities or services, whether or not furnished by County hereunder, are interrupted or terminated because of necessary repairs, installation or improvements, or any other cause beyond County's reasonable control, nor will any such interruption or termination relieve Manager of any of its obligations under this Agreement. County will have no liability to Manager if any utility service is interrupted or terminated by the utility provider or otherwise.

19.3 Taxes

Manager is be responsible for payment of all taxes, whether personal property taxes, income taxes, or any other taxes, if any, that are or may be assessed relating to the Property or any use of the Property by Manager.

20. Entry by County or District

County or District may enter the Property upon reasonable advance notice to Manager to inspect the same, and to perform ecological, hydrological, flood damage and cultural resources monitoring and assessments. County will use reasonable efforts to not interrupt Manager's operation of the Attractions on the Property.

County at any and all times will have the right to use any and all means which County may deem proper to open gates or doors in an emergency in order to obtain entry to the Property, without liability to Manager, except for any failure to exercise due care for Manager's property or personnel.

21. Default and Remedies

21.1 Default.

The occurrence of any one or more of the following events constitutes a default and breach of this Agreement by Manager and may result in the termination of the Agreement if actions as indicated in 21.1.6 are not followed:

21.1.1 Non-Operation of Park The vacating or abandonment of the construction, operation or maintenance of the Property, or any portion thereof, by Manager, where such failure continues for a period of ten (10) business days after County sends notice of such default to Manager.

21.1.2 Financial The failure by Manager to appropriately account for revenues and expenditures or any failure to use Gross Revenues as required in Section 3 above, where such failure continues for a period of ten (10) business days after County sends notice of such default to Manager.

21.1.3 Insurance The failure by Manager to maintain insurance policies as set forth above for any time; in which event Manager must immediately cease all operations at the Property until such insurance is obtained. In the event of such a default, County may, in County's sole discretion, obtain necessary insurance coverage in which event Manager shall, within ten (10) business days of demand, reimburse and pay to County the full amount of any costs and premiums expended by County to obtain such coverage, including any deductibles or losses within a self-insurance retention.

21.1.4 Minimum Rent and Additional Annual Fee The failure by Manager to timely pay the Minimum Rent pursuant to Section 3.1 or the Additional Annual Fee pursuant to Section 3.2, where such failure continues for a period of ten (10) business days after County sends notice of such default to Manager.

21.1.5 Gross Negligence Manager or any Partner, employee or agent of Manager acts in a grossly negligent or intentionally wrongful manner and such action results in significant injury to any person, as described in Section 17.5 above, or substantial damage to any improvements on the Property which County is required to repair under the terms of this Agreement.

21.1.6 Other Covenants The failure by Manager to observe or perform any other of the covenants, conditions or provisions of this Agreement to be observed or performed by Manager, where such failure continues for a period of thirty (30) calendar days after written notice thereof by County to Manager; provided, however, that if the nature of Manager's default is such that more than thirty (30) calendar days are reasonably required for its cure, then Manager will not be in default if Manager commences such cure within said thirty (30) calendar day period and thereafter diligently prosecutes such cure to completion, provided such cure is completed within one hundred and twenty (120) calendar days of the notice by County.

21.1.7 Repeated Defaults More than three (3) material defaults by Manager, as set forth in Subsections 21.1.1 to 21.1.6 above, in any two (2) year calendar period, even if Manager cures the defaults within the applicable cure periods set forth above.

21.2 Remedies

Either party may pursue any remedies provided by law and in equity for the breach of this Agreement. No right or remedy is intended to be exclusive of any other right or remedy and each is cumulative and in addition to any other right or remedy existing at law or in equity or by virtue of this Agreement, including without limitation, the right to recover all future Rent, subject to the duty to mitigate.

22. General Provisions

22.1 Conflict of Interest

This Agreement is subject to cancellation pursuant to A.R.S. § 38-511 which is incorporated herein by reference.

22.2 Waiver/Full and Complete Performance

The waiver by County or Manager of any term, covenant or condition herein is not a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein. The subsequent acceptance of Rent hereunder by County is not a waiver of any preceding default by Manager of any term, covenant or condition of this Agreement, other than the failure of Manager to pay the particular Rent so accepted regardless of County's knowledge of such preceding default at the time of the acceptance of such Rent. Failure of County or Manager to insist upon strict performance of any provision or to exercise any remedy hereunder is not a waiver by such party of any breach relating to such provision or giving rise to such remedy. No provision of this Agreement will be waived unless such waiver is in writing and signed by the party against whom such waiver is sought to be enforced. Nothing herein requires or obligates County to accept any partial payment of the then current and owed Rent due or partial performance of obligations under this Agreement. County may, in its sole discretion, accept partial payments of amounts due or partial performance of obligations hereunder. Such acceptance of partial payments of Rent due or partial performance of obligations hereunder will in no way be considered or constitute a waiver by County of any failure on the part of Manager to timely pay Rent due or perform the obligations hereunder nor will such acceptance be considered an accord and satisfaction of the Rent then due under this Agreement.

22.3 Marginal Headings

The marginal headings and Section titles to the Sections of this Agreement are not a part of this Agreement and have no effect upon the construction or interpretation of any part hereof.

22.4 Time

Time is of the essence for this Agreement and each and all of its provisions in which performance is a factor.

22.5 Successors and Assigns

The covenants and conditions herein contained, subject to the provisions as to assignment, apply to and bind the successors and assigns of the parties hereto.

22.6 Recordation

Any party may record this Agreement in the Office of the Pima County Recorder.

22.7 Entire Agreement, Amendment and Modification

This Agreement constitutes the entire agreement between the parties and contains all of the agreements of the parties hereto with respect to any matter covered or mentioned in this Agreement. No provision of this Agreement may be amended or added to except by an agreement in writing signed by the parties hereto or their respective successors in interest. This Agreement is not effective or binding on any party until fully executed by both parties hereto.

22.8 Partial Invalidity

Any provision of this Agreement which is invalid, void, or illegal in no way affect, impair or invalidate any other provision hereof and such other provisions will remain in full force and effect unless an essential purpose of this Agreement would be defeated by loss of the invalid, void, or illegal provision.

22.9 Attorneys' Fees

In the event of any action or proceeding brought by any party against the other under this Agreement, the prevailing party will be entitled to recover its expenses and costs, including its attorneys' fees and expert witness fees, in such action or proceeding, including costs of appeal, if any, in such amount as the court may adjudge reasonable.

22.10 Approvals

Unless otherwise provided herein, whenever the approval of a party is required by this Agreement, such approval must be given within thirty (30) calendar days, in writing. If such written approval is not given with such time period, the request is considered disapproved and denied. Unless otherwise noted herein, when the approval or consent of County is required hereunder, it means the written consent of the County Administrator or his designee. The approval of the Board of Supervisors of the County and the Board of Directors of the District are required for any extension or amendment of this Agreement.

22.11 Notices

Wherever this Agreement requires or permits notice or demand to be given by either party to the other, such notice or demand must be in writing and given or served either personally or by either regular mail, certified mail (return receipt requested), or by commercial delivery service such as Federal Express or United Parcel Service, addressed to the parties at the addresses specified below and to the following individuals.

Notice will be effective upon personal delivery, three (3) business days after deposit, postage prepaid, in the U.S. mail, or one (1) business day after overnight delivery via commercial delivery service. Either party may change such address by written notice to the other as herein provided.

If notice is to County or District:

C.H. Huckelberry
Pima County Administrator
130 W. Congress, 10th Floor
Tucson, AZ 85701

With copy to:

Tom Moulton, Director
Economic Development and Tourism
33 N. Stone Ave., Suite 830
Tucson, AZ 85701

Chris Cawein, Director
Natural Resources Parks and Recreation
3500 W River Road
Tucson, AZ 85741

If notice is to Manager:

Armand P. Ortega, Manager
Brian Held, General Manager
Colossal Cave, LLC
16721 E. Old Spanish Trail
Vail, AZ 85641

22.12 Authority of Manager

Each individual executing this Agreement on behalf of Manager represents and warrants that he or she has full authority to do so and that this Agreement binds the corporation. If any court or administrative agency determines that County or District does not have authority to enter into this Agreement, County or District are not liable to Manager or any third party by reason of such determination or by reason of this Agreement.