

ENGINE PROGRAM INTERGOVERNMENTAL AGREEMENT

Title: 2023 OSFM Engine Program

Agreement Number: PO-26000-00026632

This agreement (“Agreement”) is made by the State of Oregon, acting by and through its Department of the State Fire Marshal (“OSFM” or “State”), and **Gearhart Fire Department** (“Recipient”).¹

WHEREAS, the parties are authorized to enter into this Agreement pursuant to ORS 476.033 and ORS 176.132. Further, ORS 190.110 grants state agencies authority to enter into agreements with other governmental entities or American Indian tribes for the performance of any or all functions and activities that a party to the agreement, its officer, or agents have the authority to perform.

WHEREAS, Senate Bill 762 (2021), section 30b, requires OSFM to increase the State of Oregon’s wildfire readiness and response capacity to the extent OSFM receives funding for such increases, and such readiness and response increases include OSFM strategically placing fire apparatuses around the state with host Oregon fire agencies such as Recipient. The apparatuses are intended to assist Recipient with keeping fires small and away from communities.

WHEREAS, OSFM’s intention is to increase response capacity at the local, regional, and statewide levels by supplementing available apparatuses. Recipient will not be required to respond with OSFM’s apparatus to statewide mobilizations, provided the apparatus is being used at the local and/or regional levels.

WHEREAS, OSFM purchased the apparatus allocated from the appropriation funds. This Agreement sets forth the terms and conditions of Recipient’s receipt of the apparatus and includes the following exhibits, which are incorporated into this Agreement:

- Exhibit A: 2023 OSFM Engine Program Guidelines
- Exhibit B: Apparatus Description

SECTION 1 - GRANT

Upon receipt and acceptance of a completed Engine Program (“EP”) Application from Recipient, OSFM shall provide Recipient, and Recipient shall accept from OSFM, a temporary grant of the use of an apparatus to Recipient, as further described herein. Further, OSFM shall provide to such Recipient a reimbursement of eligible costs up to \$3,500.00 a year as further outlined in Section A, 2 of Exhibit A.

Conditions Precedent. OSFM’s obligations are subject to the receipt of the following items, in form and substance, satisfactory to OSFM and its counsel:

- (1) Receipt and OSFM written acceptance of a completed application;
- (2) This Agreement signed by an authorized officer of Recipient;
- (3) Compliance with requirements outlined in Exhibit A; and
- (4) Such other certificates, documents, opinions, and information as OSFM may reasonably require.

SECTION 2 - DISBURSEMENT

A. Disbursement. Upon satisfaction of all conditions precedent, OSFM shall disburse the Grant apparatus to Recipient.

B. Reimbursable Funds. Subject to the terms of this Agreement, OSFM will reimburse Recipient up to

¹ This IGA is for non-tribal local agencies. A separate tribe-specific IGA is to be used for tribal agencies.

\$3,500.00 per year for preventative maintenance, repairs, and tire replacements per requirements outlined in Section A, 2 of Exhibit A. Recipient shall submit an invoice to OSFM along with supporting receipts to the EP Coordinator at engineprogram@osfm.oregon.gov. Because apparatus tires are expensive, Recipient must obtain pre-approval from OSFM to purchase a tire or tires for the apparatus.

- C. Initial Term and Renewal Term. This Agreement becomes effective when signed by both parties (“Effective Date”) and, unless earlier terminated as provided herein, expires three years from the delivery date of an apparatus described in Exhibit B. OSFM may, by providing written notice of its intent to renew at any time during the Initial Term, renew this Agreement at the mutual agreement of both parties. During the Initial Term or the Renewal Term, the Parties may discuss transferring permanent ownership of the apparatus to Recipient. The decision to transfer permanent ownership of the apparatus is within OSFM’s sole discretion.

SECTION 3 - RESERVED

RESERVED

SECTION 4 – RECIPIENT’S REPRESENTATIONS AND WARRANTIES

Recipient represents and warrants to OSFM as follows:

A. Organization and Authority.

- (1) Recipient is a unit of local government validly organized and existing under the laws of the State of Oregon and has the necessary licensed and trained staff to perform its obligations under this Agreement.
- (2) Recipient has all necessary right, power and authority under its organizational documents and under Oregon law to (a) execute and deliver this Agreement, (b) incur and perform its obligations under this Agreement, and (c) receive the Grant apparatus and reimbursement funds.
- (3) This Agreement has been authorized by an ordinance, order or resolution of Recipient’s governing body.
- (4) This Agreement has been duly executed by Recipient, and when executed by OSFM, is legal, valid and binding, and enforceable in accordance with their terms.

- B. Full Disclosure. Recipient has disclosed in writing to OSFM all material facts that might prevent Recipient’s ability to perform all obligations required by this Agreement. Recipient has made no false statements of fact, nor omitted information necessary or relevant to OSFM’s decision to enter into this Agreement. The information contained in this Agreement is true and accurate in all respects.

- C. Pending Litigation. Recipient has disclosed in writing to OSFM all proceedings pending (or to the knowledge of Recipient, threatened), against, or affecting Recipient in any court or before any governmental authority or arbitration board or tribunal, that, if adversely determined, would prevent Recipient from performing its obligations required in this Agreement.

- D. No Defaults. No Defaults or Events of Default (defined below) exist or occur upon authorization, execution, or delivery of this Agreement.

- E. Compliance with Existing Agreements and Applicable Law. The authorization and execution of, and the performance of all obligations required by, this Agreement will not: (i) cause a breach of any agreement or instrument to which Recipient is a party; (ii) violate any provision of the charter or other document pursuant to which Recipient was organized or established; or (iii) violate any laws, regulations, ordinances, resolutions, or court orders related to Recipient or its properties or operations.

SECTION 5 - COVENANTS OF RECIPIENT

Recipient covenants as follows:

- A. Notice of Adverse Change. Recipient shall promptly notify OSFM of any adverse change in the activities, prospects, or condition (financial or otherwise) of Recipient related to Recipient's ability to perform all obligations required by this Agreement.
- B. Compliance with Laws. Recipient shall comply with all applicable laws, rules, regulations, and orders of any court or governmental authority that relate to this Agreement.
- C. Annual Report. Recipient shall provide an annual written report to OSFM (due on or before the yearly anniversary of this Agreement) in a format outlined by OSFM.
- D. Insurance. Recipient shall obtain the following insurance coverage throughout the entire term of this Agreement, including any option extension.
 - 1) The parties acknowledge and agree Recipient is a unit of local government as defined in ORS 190.003, and in order to meet the requirements of ORS 30.272 and ORS 30.273 may be commercially insured or self-insured.
 - 2) Commercial General Liability. Recipient shall obtain, and at all times keep in effect, commercial general liability insurance and property damage insurance covering its own acts and omissions under this Agreement. Recipient may satisfy these requirements in any manner allowed by ORS 30.282. Such liability insurance, whatever the form, shall be in an amount not less than the limits of public body tort liability specified in ORS 30.271. In the event of unilateral cancellation or restriction by the insurance company of Recipient's insurance policy referred to in this paragraph, Recipient, as applicable, shall immediately notify OSFM verbally and in writing.
 - 3) Worker's Compensation. Recipient shall ensure that all employers, including itself, that employ subject workers under this Agreement shall comply with ORS 656.017 and provide the required worker's compensation coverage, unless such employers are exempt under ORS 656.126.
 - 4) Personal Injury and Death. Recipient shall obtain an insurance policy covering personal injury and death relating to the apparatus with coverage limits not less than \$2 million for any single claimant and not less than \$4 million for multiple claimants.
 - 5) Automobile Liability. Recipient shall obtain an automobile liability insurance covering Recipient's owned or non-owned vehicles with a combined single limit of not less than \$2 million for bodily injury and property damage. This coverage may be written in combination with the commercial general liability insurance (with separate limits for commercial general liability and automobile liability).
 - Automobile Liability Broadened Pollution Liability Coverage Endorsement. If Recipient is transporting any type of hazardous materials under the Agreement, then endorsements CA 99 48 or equivalent and MSC-90 (if the Recipient is a regulated motor carrier) are required on the automobile liability insurance coverage.
 - 6) Additional Insureds. All liability insurance, except for worker's compensation, required under this Agreement must include the State of Oregon, its officers, employees, and agents as additional insureds, including additional insured status with respect to liability arising out of ongoing operations and completed operations, but only with respect to Recipient's activities to be performed under this Agreement. Coverage shall be primary and non-contributory with any other insurance and self-insurance.
 - 7) Certificate(s) and Proof of Insurance. Recipient shall provide to OSFM certificate(s) of

insurance for all required insurance before OSFM delivers any apparatus under this Agreement. The certificate(s) shall list the State of Oregon, OSFM, its officers, employees, and agents as a certificate holder and an endorsed additional insured, and include copies of all required additional insured endorsements (or their equivalent).

- E. Repair/Replacement Costs. Recipient shall keep the apparatus in good working order, subject to inspection by OSFM, as explained in Exhibit A. During any term of this Agreement, if apparatus is lost, stolen, or damaged beyond repair, Recipient shall be liable to OSFM for the replacement cost of apparatus. If apparatus is damaged but repairable, Recipient shall pay all costs of repair. Recipient shall be liable for all costs related to the apparatus during any term of this Agreement. Nothing in this section shall affect OSFM's provision of reimbursement funds as provided in Section 2 above.
- F. Books and Records. Recipient shall keep accurate books and records of the uses of the Grant apparatus and reimbursement funds and maintain them according to generally accepted accounting principles.
- G. Inspections; Information. Recipient shall permit OSFM and any party designated by OSFM to inspect and make copies, at any reasonable time, of any accounts, books and records, including, without limitation, its records regarding receipts, disbursements, agreements, investments, and any other related matters related to this Agreement. Recipient shall supply any related reports and information as OSFM may reasonably require. Recipient shall keep apparatus in response-ready condition, see Storage and Readiness section of Exhibit A.
- H. Records Maintenance. Recipient shall retain and keep accessible all books, documents, and records that are directly related to this Agreement for a minimum of six years beyond the later of the final and total expenditure or disposition of the Grant. If there are unresolved issues at the end of such period, Recipient shall retain the books, documents, papers, and records until the issues are resolved.
- I. Notice of Default. Recipient shall give OSFM prompt written notice of any Event of Default (defined below in Section 6) as soon as the fire chief of Recipient, or their representative, becomes aware of its existence or reasonably believes an Event of Default is likely.
- J. Indemnification and Hold Harmless.
 - 1) Subject to the limitations in the Oregon Tort Claims Act and the Oregon Constitution, Recipient shall indemnify and hold harmless OSFM and its officers, employees, volunteers, and agents against all damages, liabilities, losses and costs arising from actions, suits, claims or demands attributable to acts or omissions of Recipient, and Recipient's officers, employees, and agents in the performance of this Agreement. The provisions of this paragraph shall survive the termination of this Agreement.
 - 2) Subject to the limitations in the Oregon Tort Claims Act and the Oregon Constitution, OSFM shall indemnify and hold harmless Recipient and its officers, employees, volunteers, and agents against all damages, liabilities, losses and costs arising from actions, suits, claims or demands attributable to acts or omissions of OSFM, and OSFM's officers, employees, and agents in the performance of this Agreement. The provisions of this paragraph shall survive the termination of this Agreement.
- K. Hazardous Waste. Recipient shall not cause or permit any hazardous waste relating to the apparatus to be spilled, leaked, disposed of or otherwise released into the environment. Recipient shall comply with all environmental laws and exercise the highest degree of care in the use, handling, and storage of hazardous substances related to the apparatus, and shall take all practical measures to minimize the quantity and toxicity of hazardous substances used, handled, or stored on or near the apparatus.

SECTION 6 - DEFAULTS

Any of the following constitutes an "Event of Default":

- A. A false or misleading representation made by or on behalf of Recipient in this Agreement or in any

document provided by Recipient related to this Agreement.

- B. Recipient fails to perform any obligation required under this Agreement, and that failure continues for a period of 10 business days after receipt of written notice identifying such failure. OSFM may agree in writing to an extension of time if it determines Recipient instituted and has diligently pursued corrective action.

SECTION 7 - REMEDIES

- A. Remedies. Upon any Event of Default, OSFM may pursue any or all remedies in this Agreement and any other remedies available at law or in equity to enforce the performance of any obligation of Recipient. Remedies may include, but are not limited to any one or more of the following:
- (1) Terminating OSFM's commitment and obligation to make the Grant.
 - (2) Barring Recipient from applying for future awards.
 - (3) Seeking return of the apparatus.
- B. No Remedy Exclusive; Waiver; Notice. No remedy available to OSFM is intended to be exclusive, and every remedy will be in addition to every other remedy. No delay or omission to exercise any right or remedy will impair or is to be construed as a waiver of such right or remedy. No single or partial exercise of any right, power, or privilege under this Agreement will preclude the exercise of any other right, power, or privilege. OSFM is not required to provide any notice in order to exercise any right or remedy, other than notice required in section 6 of this Agreement.

SECTION 8 - MISCELLANEOUS

- A. Time is of the Essence. Recipient agrees that time is of the essence under this Agreement.
- B. Relationship of Parties; Successors and Assigns; No Third-Party Beneficiaries.
- (1) The parties agree that their relationship is that of independent contracting parties and governmental entities and that Recipient is not an officer, employee, or agent of the State of Oregon as those terms are used in ORS 30.265. Each party agrees that the other party has no direct control over the work of the performing party or the manner in which the work is performed other than what is obligated in this Agreement.
 - (2) Nothing in this Agreement gives, or is construed to give, directly or indirectly, to any third persons any rights and benefits greater than those enjoyed by the general public.
 - (3) This Agreement will be binding upon and inure to the benefit of OSFM, Recipient, and their respective successors and permitted assigns.
 - (4) Recipient may not assign or transfer any of its rights or obligations or any interest in this Agreement without the prior written consent of OSFM. OSFM may grant, withhold or impose conditions on such consent in its sole discretion. In the event of an assignment, Recipient shall pay, or cause to be paid to OSFM, any fees or costs incurred because of such assignment, including but not limited to attorneys' fees of OSFM's counsel. Any approved assignment is not to be construed as creating any obligation of OSFM beyond those in this Agreement, nor does assignment relieve Recipient of any of its duties or obligations under this Agreement.
- C. Disclaimer of Warranties; Limitation of Liability. Recipient agrees that:
- (1) OSFM makes no warranty or representation regarding the apparatus or any provision of this Agreement. Recipient receives apparatus as is, although there may be a manufacturer's warranty accompanying the apparatus.

- (2) Other than indemnity liability set forth in this Agreement, OSFM and its agents are not liable or responsible for any direct, indirect, incidental, special, consequential or punitive damages in connection with or arising out of this Agreement.

D. Notices and Communication. Except as otherwise expressly provided in this Agreement, any communication between the parties or notices required or permitted must be given in writing by personal delivery, email, or by mailing the same to Recipient or OSFM at the addresses set forth below, or to such other persons or addresses that either party may subsequently indicate pursuant to this Section.

Any communication or notice by personal delivery will be deemed effective when actually delivered to the addressee. Any communication or notice so addressed and mailed will be deemed to be received and effective five days after mailing. Any communication or notice given by email becomes effective 1) upon the sender's receipt of confirmation generated by the recipient's email system that the notice has been received by the recipient's email system or 2) the recipient's confirmation of receipt, whichever is earlier. Notwithstanding this provision, the following notices may not be given by email: notice of default or notice of termination.

If to OSFM: Engine Program Coordinator
Department of the State Fire Marshal
3991 Fairview Industrial Dr SE
Salem, OR 97302
Ph: 971-372-1244
Email: engineprogram@osfm.oregon.gov

If to Recipient: Josh Como
Fire Chief
Gearhart Fire Department
PO BOX 2530
Gearhart, OR. 97138
(503) 738-7838
JoshComo@CityofGearhart.com

- E. No Construction against Drafter. This Agreement is to be construed as if the parties drafted it jointly.
- F. Severability. If any term or condition of this Agreement is declared by a court of competent jurisdiction as illegal, invalid or unenforceable, that holding will not invalidate or otherwise affect any other provision.
- G. Amendments, Waivers. This Agreement may not be amended without the prior written consent of OSFM (and when required, the Department of Justice) and Recipient. No waiver or consent is effective unless in writing and signed by the party against whom such waiver or consent is sought to be enforced. Such waiver or consent will be effective only in the specific instance and for the specific purpose given.
- H. Dispute Resolution; Attorney Fees. The parties shall attempt to resolve any dispute arising out of or relating to this Agreement by first meeting and conferring in an attempt to informally resolve a dispute. If the parties are unable to resolve the dispute by mutual agreement, they shall refer the dispute to a mutually acceptable mediator. A final mediated resolution shall be final and binding. If litigation arises under this Agreement between the parties, to the extent permitted by the Oregon Constitution and the Oregon Tort Claims Act, the prevailing party in any dispute arising from this Agreement is entitled to

recover its reasonable attorneys' fees and costs at trial and on appeal. Reasonable attorneys' fees cannot exceed the rate charged to OSFM by its attorneys.

- I. Choice of Law; Designation of Forum; Federal Forum. The laws of the State of Oregon (without giving effect to its conflicts of law principles) govern all matters arising out of or relating to this Agreement, including, without limitation, its validity, interpretation, construction, performance, and enforcement.

Any party bringing a legal action or proceeding against any other party arising out of or relating to this Agreement shall bring the legal action or proceeding in the Circuit Court of the State of Oregon for Marion County (unless Oregon law requires that it be brought and conducted in another county). Each party hereby consents to the exclusive jurisdiction of such court, waives any objection to venue, and waives any claim that such forum is an inconvenient forum.

Notwithstanding the prior paragraph, if a claim must be brought in a federal forum, then it must be brought and adjudicated solely and exclusively within the United States District Court for the District of Oregon. This paragraph applies to a claim brought against the State of Oregon only to the extent Congress has appropriately abrogated the State of Oregon's sovereign immunity and is not consent by the State of Oregon to be sued in federal court. This paragraph is also not a waiver by the State of Oregon of any form of defense or immunity, including but not limited to sovereign immunity and immunity based on the Eleventh Amendment to the Constitution of the United States.

- J. Integration. This Agreement (including all exhibits, schedules or attachments) constitutes the entire agreement between the parties on the subject matter. There are no unspecified understandings, agreements or representations, oral or written, regarding this Agreement.

- K. Survival. The following provisions survive expiration or termination of this Agreement: Sections 5.E., 5.F., 5.G., 5.I., 7 and 8.

- L. Execution in Counterparts. This Agreement may be signed in several counterparts, each of which is an original and all of which constitute one and the same instrument.

Recipient, by its signature below, acknowledges that it has read this Agreement, understands it, and agrees to be bound by its terms and conditions.

STATE OF OREGON
acting by and through its
Department of the State Fire Marshal

Gearhart Fire Department

By: Mariana Ruiz-Temple

By: Joseph M. [Signature]

Date: 12/12/2023

Date: 12/7/2023

APPROVED AS TO LEGAL SUFFICIENCY IN ACCORDANCE WITH ORS 291.047:

Approved by e-mail dated 11/17/2023
Bryan Quesenberry
Assistant Attorney General

EXHIBIT A – 2023 OSFM ENGINE PROGRAM GUIDELINES

The 2023 OSFM Engine Program Guidelines, attached as a separate attachment, is hereby incorporated into this Agreement.

EXHIBIT B – APPARATUS DESCRIPTION

The apparatus that is the subject of this Agreement is described as follows:

Type of apparatus: Water Tender

Approximate value of apparatus: \$340,000