

THIRD

REIMBURSEMENT AND FUNDING AGREEMENT

between

THE COUNTY OF MONTEREY

and

THE MONTEREY COUNTY WATER RESOURCES AGENCY

for

**PRELIMINARY ENGINEERING AND DESIGN; SPILLWAY MODIFICATION
FEASIBILITY; TECHNICAL SUPPORT; ENVIRONMENTAL CONSULTING; AND
PROGRAM MANAGEMENT, RELATING TO THE INTERLAKE TUNNEL PROJECT**

This Third Reimbursement and Funding Agreement is entered into as of the Effective Date herein by and between the County of Monterey (“County”), a political subdivision of the State of California, and the Monterey County Water Resources Agency (“Agency”), a public agency created pursuant to the Monterey County Water Resources Agency Act (Cal. Water Code, Appendix Chap. 52.)

WHEREAS, the Monterey County Water Resources Agency owns and controls two reservoirs: Lake San Antonio, located in the County of Monterey, and Lake Nacimiento, located in the County of San Luis Obispo (collectively, the “Lakes”); and,

WHEREAS, the Lakes provide water storage for, and flood control protection to, the Salinas Valley Groundwater Basin (“Basin”) downstream of the Lakes, and also improve water supply and groundwater recharge in the Basin, which contribute to the economic viability of the Salinas Valley (“Valley”), improves municipal and industrial water supply, and contributes to agricultural production of the Valley and the County as a whole; and,

WHEREAS, the Agency has previously undertaken projects to improve water storage and groundwater recharge within the Basin, including the Salinas Valley Water Project, which, in part, implemented modifications to the spillway in the dam at Lake Nacimiento, and in the operation of the dams and spillways at the Lakes; and,

WHEREAS, despite these projects, the current drought conditions will have long-term significant impacts including exacerbating seawater intrusion, and jeopardizing municipal, industrial, agricultural water supplies in the Valley, and additional appropriate projects are necessary to ensure the continued economic viability and agricultural production in the Valley, especially in light of future conditions as may be affected by global climate change; and,

WHEREAS, the watershed of Lake Nacimiento generally experiences more runoff from storms and thus provides more water for storage than does the watershed of Lake San Antonio and, as a result, water otherwise available for storage at Lake Nacimiento is lost due to volumes exceeding its storage capacity; and,

WHEREAS, the Agency has proposed two projects: 1) to connect Lake Nacimiento and Lake San Antonio by an underground tunnel or pipeline that would be constructed within a right-of-way or other easement acquired by the Agency for that purpose; and, 2) to construct spillway modifications at Lake San Antonio dam, (collectively, the Projects”); and,

WHEREAS, the Projects will maximize overall water storage at the Lakes by allowing the conveyance of water to Lake San Antonio for storage that may otherwise overflow from Lake Nacimiento, thus improving the benefits provided by the Lakes and the Salinas Valley Water Project to the Basin and the Valley, mitigating the impact of the drought, and improving water supplies and the economic viability of the Valley and its agricultural production, all benefitting the County and state; and,

WHEREAS, since the Agency did not have the resources to undertake preparatory measures to begin environmental review for the Projects such as preliminary engineering and design, water rights analysis, and initial program management, and due to the benefits accruing to the County as a whole from the Projects, the County entered into a Reimbursement and Funding Agreement with the Agency on July 2, 2014 in an amount not to exceed \$500,000, agreeing to reimburse the necessary funds for such preparatory work on the condition that the County shall be repaid such funds if the Projects are financed through an assessment district or other financing mechanism; and,

WHEREAS, at a December 9, 2014, Special Joint Meeting, the Monterey County Board of Supervisors, Board of Supervisors of the Monterey County Water Resources Agency and the Water Resources Agency Board of Directors authorized the Agency to proceed with the Projects; and,

WHEREAS, on March 17, 2015 the Board of Supervisors of the Agency and the Board of Supervisors of the County authorized a Second Reimbursement and Funding Agreement between the County and the Agency for Preliminary Engineering and Design; Further Water Rights Analysis; Spillway Modification Feasibility; Technical Support to the Monterey County Water Resources Agency during design; Environmental Consulting Services; and Program Management, relating to the Interlake Tunnel Project; and, increased the amount reimbursable to the Agency to include the additional scope of work by an additional \$600,000 for FY 2015, for a total of \$1.1 million; and

WHEREAS, the Agency is considering changing the project delivery method for the Interlake Tunnel Project from design-build as authorized by Assembly Bill 155 to a Public Private Partnership (“P3”) as authorized by Government Code sections 5956 – 5956.10 (“California Infrastructure Financing Act”), and utilizing P3 for the Lake San Antonio dam spillway modifications; and,

WHEREAS, additional work is also necessary at this time to continue preliminary work on the Projects including Phase 1 environmental consulting work and the technical support to the Agency

during design and environmental consulting work; and,

WHEREAS, the Agency does not currently have the funds needed to pay for this additional work;

NOW THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the County and the Agency agree as follows:

1. Reimbursement and Funding.

Subject to all other terms of this Third Reimbursement and Funding Agreement (“Agreement”) the County shall reimburse to the Agency up to the additional sum of \$971,000 (the “Reimbursement”) for the purpose of funding to perform Environmental Consulting Services Phase I work and Program Management Services for activities up to and including the 218 process, such additional sum to be in addition to the sum of \$500,000 that was to be reimbursed under the First Reimbursement Agreement, and \$600,000 to be reimbursed under the Second Reimbursement Agreement.

The Reimbursement shall be provided to the Agency within 30 days working days of the receipt by the County of Agency documentation verifying covered expenditures. Documentation shall be submitted to the County Administrative Office as set forth in paragraph 11 (D), below.

2. Effective Date and Term.

The effective date of this Agreement shall be either the date last signed by either of the parties, or January 1, 2016, whichever is earlier. This Agreement shall be effective until the all funds are repaid by the Agency to the County pursuant to paragraph 3 or the Agreement is terminated early pursuant to paragraph 4.

3. Repayment.

To the extent permitted by law, at such time as the Projects are financed, either by way of an assessment district, grants, or other financing mechanism, or any combination thereof, and whether financed in whole or in part (but not including any Reimbursement provided pursuant to this agreement), the Agency shall repay to the County the Reimbursement (or the portion thereof having been paid to the Agency at the time of financing of the Projects). Notwithstanding the foregoing, the County shall have no obligation to provide any Reimbursement beyond June 30, 2016 for any expenses incurred by the Agency under the first and second Reimbursement and Funding Agreements, dated July 2, 2014 and April 9, 2015, respectively, or this Third Reimbursement and Funding Agreement. Any repayment of the Reimbursement from the Agency to the County required by this Agreement shall be made within fifteen working days of the occurrence of the event requiring repayment.

4. Early Termination.

Should the County Board of Supervisors, in its sole discretion, determine that the Projects: A) have been abandoned by the Agency; B) are unlikely to be approved; or C) are unlikely to be financed in whole or in part, then the County Board of Supervisors may terminate this Agreement upon ten days written notice to the Agency. The County shall have no obligation to make any further Reimbursement for work performed after the date of termination, and any Reimbursement already paid to the Agency shall not be repaid and shall be considered a County Contribution without repayment.

5. No Additional Payments.

Except as may be specifically agreed to in writing by the County, or as specifically set forth in this Agreement, the County shall not be liable to the Agency for any further reimbursements, payments, costs or expenses of any kind with respect to the Projects other than Reimbursement outlined in this Agreement.

6. No Further Obligations.

Nothing in this agreement binds the County to any further obligations with respect to the Projects.

7. Duty to Defend and Indemnify.

In the event that any third party initiates litigation concerning the validity of this Agreement or the authority of the County or the Agency to undertake any of the actions required to be performed pursuant to this Agreement, the Agency agrees to defend and indemnify the County from any such action. This obligation to defend and indemnify does not extend to the negligent performance of actions required to be performed pursuant to this agreement.

8. Lead Agency.

Nothing in this Agreement shall obligate the County to be the Lead Agency for purposes of the California Environmental Quality Act regarding the Projects. The Agency shall be the Lead Agency for all such purposes.

9. Compliance with County Policies.

The Agency shall ensure that any third-party contracts funded by the agreement comply with all County travel and expense policies.

10. Insurance and Indemnification.

The Agency participates in the County's general liability and worker's compensation insurance pool. The Agency agrees to continue that participation for the term of this Agreement

unless the County agrees in writing that the Agency may obtain its own insurance coverage. In the event that the Agency obtains its own insurance coverage, it shall maintain such insurance from qualifying insurers as the County may approve (such approval not to be unreasonably withheld) in such amounts and with such limits, and upon such other terms, as is the custom or practice for the County regarding similar agreements.

The Agency shall indemnify, defend, and hold harmless the County, its officers, agents, and employees from any claim, liability, loss, injury or damage arising out of, or in connection with the Agency's negligent acts or omissions, or those of its officers, employees, agents, contractor or subcontractors, in the performance of this Agreement or in the performance of work funded by the Advance, excepting only loss, injury or damage caused by the negligence or willful misconduct of the County, its officers or employees. The Agency shall reimburse the County for all costs, attorneys' fees, expenses and liabilities incurred with respect to any litigation in which the Agency is obligated to indemnify, defend and hold harmless the County under this Agreement. The Agency shall ensure that any third-party contract funded by the Advance contains defense and indemnification provisions in favor of the County, and provides insurance coverage to the County on the same or similar terms as to the Agency. The County shall have the right to review any third-party contracts to ensure that the appropriate defense and indemnification provisions, and insurance coverages, are provided.

The County shall indemnify, defend, and hold harmless the Agency, its officers, agents, and employees from any claim, liability, loss, injury or damage arising out of, or in connection with the County's negligent acts or omissions, or those of its officers, employees, agents or subcontractors, in the performance of this Agreement, excepting only loss, injury or damage caused by the negligence or willful misconduct of the Agency, its officers, employees, agents or contractors. The County shall reimburse the Agency for all costs, attorneys' fees, expenses and liabilities incurred with respect to any litigation in which the County is obligated to indemnify, defend and hold harmless the Agency under this Agreement.

11. General Provisions.

A. No Assignment. The Agency shall not assign or transfer this Agreement, or any part thereof, without the written consent of the County, nor shall the Agency assign any monies due or to become due to the Agency hereunder without the previous written consent of the County.

B. Independent Contractor. Nothing in this Agreement shall be construed or interpreted to make the Agency, its employees, agents or contractors anything but independent contractors, and in all the Agency's activities and operations pursuant to this Agreement, the Agency, its employees, agents and contractors shall not, for any purposes, be considered employees or agents of the County.

C. Authority to Bind the County. It is understood that the Agency, in the performance of this Agreement, has no authority to bind the County to any agreements or undertakings with respect to any and all persons or entities with whom the Agency deals in the course of business.

D. Notices.

(i) Notices permitted or required to be given to the respective parties under this Agreement shall be deemed given (1) when personally delivered to the County Administrative Officer or to the Agency General Manager; (2) when personally delivered to the party's principal place of business during normal business hours (i.e., to the Monterey County offices in Salinas, California, or to the Agency's office), by leaving the notice with any person apparently in charge of the office and advising such person of the import and contents of the notice; (3) 24 hours after the notice is transmitted by fax machine to the other party, to the fax number indicated below; or (4) 3 days after the notice is deposited in the U.S. mail (by first class, certified, registered, or express mail), with postage fully prepaid, addressed to the party as indicated below.

(ii) Notices mailed to the parties shall be addressed as follows:

To the County:

Lew C. Bauman
County Administrative Officer
County of Monterey
168 W. Alisal St.
Salinas, CA 93901
Phone: (831) 755-5113
Fax: (831) 757-5792

To the Agency:

David E. Chardavoine
General Manager
Water Resources Agency
893 Blanco Circle
Salinas, CA 93901-4455
Phone: (831) 755-4860
Fax: (831) 424-7935

All notices, whether to the County or the Agency, shall be copied to:

County Counsel
168 W. Alisal St.
Salinas, CA 93901
Phone: (831) 755-5045
Fax: (831) 755-5283

The mailing addresses and fax numbers specified in this paragraph may be changed by either party, by giving notice to the other in the manner provided herein.

E. Modifications. This Agreement may be modified or amended only by written agreement of the parties. No waiver or modification of this Agreement or of any covenant, condition, or limitation herein contained shall be valid unless in writing and duly executed by the parties hereto.

F. No Waiver. No covenant or condition of this Agreement can be waived except by the written consent of the County. Forbearance or indulgence by the County in any regard whatsoever shall not constitute a waiver of the covenant or condition to be performed by the Agency. The County

shall be entitled to invoke any remedy available to the County under this Agreement or by law or in equity despite said forbearance or indulgence.

G. Sole Agreement. This Agreement contains the entire agreement of the parties relating to the rights herein granted and the obligations herein assumed. Any oral representations or modifications concerning this Agreement shall be of no force or effect excepting a subsequent modification in writing, signed by the parties hereto.

H. Venue. If any party herein initiates an action to enforce the terms hereof or declare rights hereunder, the parties agree that venue thereof shall be the County of Monterey, State of California.

I. Construed Pursuant to California Law. The parties hereto agree that the provisions of this Agreement will be construed pursuant to the laws of the State of California.

J. Except as set forth in this Agreement, the First Reimbursement and Funding Agreement, dated July 2, 2014, and the Second Reimbursement and Funding Agreement, dated April 9, 2015, remain in full force and effect.

IN WITNESS WHEREOF, the County and the Agency have caused this Agreement to be executed:

DATED: _____

COUNTY OF MONTEREY

By _____

Lew C. Bauman
County Administrative Officer

APPROVED AS TO FORM AND LEGALITY

CHARLES J. MCKEE, County Counsel

By _____

Leslie J. Girard
Chief Assistant County Counsel

DATED: _____

WATER RESOURCES AGENCY

By _____

David E. Chardavoyne
General Manager, Water Resources Agency

APPROVED AS TO FORM AND LEGALITY

CHARLES J. MCKEE, County Counsel

By _____

Jesse J. Avila
Deputy County Counsel