

## **AGREEMENT FOR SPECIALIZED LITIGATION ATTORNEY SERVICES**

This Agreement for Specialized Litigation Attorney Services ("Agreement") is made and entered by and between the MONTEREY COUNTY WATER RESOURCES AGENCY, ("MCWRA") and DOWNEY BRAND LLP ("DB").

### **RECITALS**

This Agreement is made with respect to the following facts:

A. MCWRA may contract for legal services when it is necessary and appropriate that special legal services be performed for the MCWRA, and their officers and employees.

B. MCWRA desires to retain DB on a non-exclusive basis to provide certain legal services to MCWRA with respect to the Interlake Tunnel and San Antonio Spillway Modification Project ("Project").

C. DB is specially trained, experienced, expert, and competent to perform the legal services required. MCWRA specifically seeks the expertise of David Aladjem and Kevin O'Brien, and enters into this agreement with the understanding that David Aladjem and Kevin O'Brien will be the primary DB attorneys providing services under this Agreement, although other attorneys in the firm may be utilized on an as-needed basis.

NOW, THEREFORE, the parties agree as follows:

### **1. EFFECTIVE DATE AND TERM**

1.01 The effective date of this Agreement shall be September 13, 2016 ("Effective Date"), and shall continue until completion of all work as further described herein unless earlier terminated as set forth below. This Agreement may be amended from time-to-time upon the mutual agreement of the parties.

### **2. SERVICES TO BE PERFORMED**

2.01. Services to be Performed by DB. MCWRA hereby hire DB on a non-exclusive basis to render independent legal services to MCWRA, subject to the terms of this Agreement. The primary attorney providing services hereunder shall be David Aladjem and Kevin O'Brien, although other attorneys in the firm may be utilized on an as-needed basis. DB shall perform said services faithfully and well. The services to be performed under this Agreement shall consist of research, analysis, the giving of legal advice, representation of MCWRA in administrative relating to the Project. DB shall perform only such services as are within the expertise of the individual attorneys on DB's staff, and DB will notify MCWRA promptly if any work requested is beyond such expertise. DB shall diligently provide such legal services as are

necessary and approved by MCWRA in a professional, timely manner. DB shall perform all of its services with due regard to ethical guidelines and MCWRA's interests.

(a) The proposed budget and the description of services are described in Attachment A. The services entail the CEQA process, consultation with the SWRCB and the actual hearing before the SWRCB.

2.02. No Conflicts of Interest.

(a) Subject to the conflict waiver set forth in sub-paragraph (b), below, DB does not have an actual or potential interest adverse to MCWRA, nor does DB presently represent a person or firm with an interest adverse to MCWRA with respect to any matters that are now or hereafter accepted.

2.03. Direction from and Consultation with County Counsel. DB shall coordinate and consult with, and receive direction from County Counsel in providing services under this Agreement. The primary attorneys from the County Counsel's Office working with DB with respect to this Agreement shall be Charles J. McKee, Leslie J. Girard, and Jesse J. Avila, although other deputies in the County Counsel's Office may be designated from time-to-time to work on matters subject to this Agreement. Unless otherwise directed by County Counsel, if DB prepares any court pleadings or other documents in the performance of services under this Agreement, including but not limited to resolutions, staff reports, and memoranda to the Board of Supervisors, Board of Directors, or other legislative or advisory bodies, DB shall provide such drafts to County Counsel for review and consultation prior to finalizing any such drafts.

2.04. Reporting Requirements. In connection with the performance of services hereunder, DB shall provide MCWRA with written Status Reports at least quarterly. The Status Reports shall be in such format as County Counsel shall direct. DB shall prepare other or additional written reports as may be requested by County Counsel.

2.05. Closing Report. If this Agreement is terminated as set forth herein, or if for any reason DB is no longer retained by MCWRA with respect to this matter, DB shall submit a Closing Report describing the status of the matter, setting forth any information needed by other counsel to handle the matter. The Closing Report will be expeditiously submitted, together with necessary executed Substitutions of DB attorneys, to County Counsel.

2.06. Oral Reports. DB shall immediately report orally to County Counsel, in person or by telephone, any event or discovery which is of an urgent nature or requires the immediate attention of MCWRA. DB shall promptly follow up such oral report with a Status Report or Status Update reiterating such event or discovery. DB shall immediately advise County Counsel in writing if an actual or potential conflict of interest arises or is discovered.

////

### **3. COMPENSATION**

3.01. Compensation to DB. As consideration for DB's performance of services under this Agreement, MCWRA shall pay to DB the fees and necessary expenses calculated in accordance with the hourly rate and expense method of billing. Fees and expenses are to be charged in accordance with the terms of this Agreement and in accordance with the hourly rates for partners, associates, and paralegals of DB and any other terms governing fees set forth in Exhibit B, attached hereto and incorporated herein by reference. DB may request to modify the amounts set forth in Exhibit B from time-to-time but not more than once every twelve (12) months. County Counsel shall have the authority to negotiate and agree to such modifications. DB will be compensated for travel time from Sacramento to Monterey and return to Sacramento only, such time to be billed at one-half (1/2) the normally billing rate for the person travelling. DB will be reimbursed for the actual expenses related to the travel, as set forth in paragraph 3.03

3.02. Budget. The initial budget for this Agreement shall be an amount not to exceed Fifty Thousand dollars (\$250,000). The budget shall be revised from time-to-time as necessary to reflect additional fees and expenses required for services, and this Agreement shall be amended accordingly to provide for such budget increases. Proposed budget increases must be approved by MCWRA before increased charges or expenditures are accrued. DB shall notify County Counsel in writing when fifty percent (50%) and seventy-five percent (75%) of the budget has been spent. If MCWRA does not approve additional fees and expenses required by the representation of the Defendants beyond the initial and revised budget, MCWRA hereby consent to DB's withdrawal as counsel in the matter.

#### **3.03. Reimbursement for Expenses.**

(a) MCWRA shall reimburse DB for all actual and necessary expenses for the following items:

- (1) Postage;
- (4) Actual travel expenses, as more fully described in (b) below;
- (5) Consultant and expert witness fees;
- (6) Photocopying;
- (7) Computerized legal research; and
- (8) Other expenses when approved by County Counsel in advance.

(b) DB will not be reimbursed for any non-attorney staff time or overtime for secretarial, clerical, or word processing costs connected with preparing required status reports, time spent to provide information for a fee audit, or for work not authorized by County Counsel. Travel authorized by County Counsel will be reimbursed as follows: Transportation, meals and lodging not to exceed MCWRA / COUNTY per diem unless authorized in advance. Authorized air travel shall be reimbursed at actual fare for economy or coach class. DB will be compensated for travel time from Sacramento to Monterey and return to Sacramento only, such time to be billed at one-half (1/2) the normally billing rate for the person travelling.

3.04. Monthly Claims by DB. Not later than ten days after the last day of each month, DB shall submit to County Counsel a claim, on a form or in a format approved by County Counsel, setting forth in detail the time and expense items incurred by DB during the previous month, for which payment is sought, and setting forth such other information pertinent to the claim as County Counsel may require. The fees and charges shall be calculated correctly, contain no charges previously billed, and be consistent with the approved hourly fee schedule and budget maximum set forth in Exhibit B. The following information shall be set forth accurately in or attached to the billing invoice:

(a) County Counsel file number or other identification of subject matter for which DB rendered services;

(b) Staffing level, hourly rate, and detailed time and activity descriptions for each attorney, paralegal, and/or planner, including but not limited to time spent with respect to conferences, correspondence, telephone calls, hearings, meetings, research, project review, depositions, document filing, and trials; and

(c) Invoices supporting all outside costs.

3.05. Payment of Monthly Claims by MCWRA. MCWRA, through County Counsel, shall certify DB's claim, either in the requested amount or in such other amount as County Counsel approves in conformity with this Agreement. County Counsel shall promptly submit such certified claim to the Auditor, Risk Manager or third party claims administrator for MCWRA. The Auditor, Risk Manager or third party claims administrator shall thereafter pay the balance of the certified claim not later than 45 days after receipt of the certified claim.

3.06. Disputed Payment Amount. If for any claim a lesser amount than the amount requested is certified for payment, and if DB desires to dispute the amount so certified, DB must submit a written notice of protest to County Counsel within 20 days after DB's receipt of the certification. The parties shall then promptly meet to review the dispute and resolve it on a mutually acceptable basis. No court action may be taken on such dispute until the parties have met and attempted to resolve the dispute in person.

3.07. Conflicting Payment Provisions. The provisions regarding payment set forth in this portion of the Agreement prevail over any conflicting provisions that may be found in any of the exhibits to this Agreement.

#### **4. INDEMNIFICATION AND INSURANCE**

4.01. Indemnification. DB shall indemnify, defend, and hold harmless MCWRA, its officers, agents, and employees from any claim, liability, loss, injury or damage arising out of, or in connection with, DB'S and/or its agents', employees' or subcontractors' negligent acts or omissions in the performance of this Agreement, excepting only loss, injury or damage caused

by the gross negligence or willful misconduct of MCWRA, or its officers or employees. It is the intent of the parties to this Agreement to provide the broadest possible coverage for MCWRA. DB shall reimburse the MCWRA for all costs, attorneys' fees, expenses and liabilities incurred with respect to any litigation in which DB is obligated to indemnify, defend and hold harmless the MCWRA under this Agreement.

4.02. Evidence of Coverage. Prior to commencement of this Agreement, DB shall provide a "Certificate of Insurance" certifying that coverage as required herein has been obtained. Individual endorsements executed by the insurance carrier shall accompany the certificate. In addition, DB upon request shall provide a certified copy of the policy or policies. This verification of coverage shall be sent to County Counsel unless otherwise directed. This approval of insurance shall neither relieve nor decrease the liability of DB.

4.03. Qualifying Insurers. All coverage's, except surety, shall be issued by companies which hold a current policy holder's alphabetic and financial size category rating of not less than A- VII, according to the current Best's Key Rating Guide or a company of equal financial stability that is approved by MCWRA's Purchasing Manager.

4.04. Insurance Coverage Requirements. Without limiting DB's duty to indemnify, DB shall maintain in effect throughout the term of this Agreement a policy or policies of insurance with the following minimum limits of liability:

(a) Commercial General Liability Insurance, including but not limited to premises and operations, including coverage for Bodily Injury and Property Damage, Personal Injury, Contractual Liability, Broad form Property Damage, Independent Contractors, Products and Completed Operations, with a combined single limit for Bodily Injury and Property Damage of not less than \$1,000,000 per occurrence.

☐ Exemption/Modification (Justification attached; subject to approval).

(b) Business automobile liability insurance, covering all motor vehicles, including owned, leased, non-owned, and hired vehicles, used in providing services under this Agreement, with a combined single limit for Bodily Injury and Property Damage of not less than \$1,000,000 per occurrence.

☐ Exemption/Modification (Justification attached; subject to approval).

(c) Workers' Compensation Insurance, if DB employs others in the performance of this Agreement, in accordance with California Labor Code section 3700 and with Employer's Liability limits not less than \$1,000,000 each person, \$1,000,000 each accident and \$1,000,000 each disease.

☐ Exemption/Modification (Justification attached; subject to approval).

(d) Professional liability insurance, if required for the professional services being provided, (e.g., those persons authorized by a license to engage in a business or profession regulated by the California Business and Professions Code), in the amount of not less than

\$1,000,000 per claim and \$2,000,000 in the aggregate, to cover liability for malpractice or errors or omissions made in the course of rendering professional services. If professional liability insurance is written on a “claims-made” basis rather than an occurrence basis, the DB shall, upon the expiration or earlier termination of the Agreement, obtain extended reporting coverage (“tail coverage”) with the same liability limits. Any such tail coverage shall continue for at least three years following the expiration or earlier termination of this Agreement.

☐ Exemption/Modification (Justification attached; subject to approval).

(e) Other Insurance Requirements. All insurance required by this Agreement shall be with a company acceptable to MCWRA, and issued and executed by an admitted insurer authorized to transact Insurance business in the State of California. Unless otherwise specified by this Agreement, all such insurance shall be written on an occurrence basis, or, if the policy is not written on an occurrence basis, such policy with the coverage required herein shall continue in effect for a period of three years following the date DB completes its performance of services under this Agreement.

Each liability policy shall provide that MCWRA shall be given notice in writing at least thirty days in advance of any endorsed reduction in coverage or limit, cancellation, or intended non-renewal thereof. Each policy shall provide coverage for DB and additional insureds with respect to claims arising from each subcontractor, if any, performing work under this Agreement, or be accompanied by a certificate of insurance from each subcontractor showing each subcontractor has identical insurance coverage to the above requirements.

Commercial general liability and automobile liability policies shall provide an endorsement naming the MCWRA of Monterey, its officers, agents, and employees as Additional Insureds with respect to liability arising out of the DB’s work, including ongoing and completed operations, and shall further provide that such insurance is primary insurance to any insurance or self-insurance maintained by the MCWRA and that the insurance of the Additional Insureds shall not be called upon to contribute to a loss covered by the DB’s insurance. The required endorsement form for Commercial General Liability Additional Insured is **ISO Form CG 20 10 11-85 or CG 20 10 10 01 in tandem with CG 20 37 10 01 (2000)**. The required endorsement form for Automobile Additional Insured endorsement is **ISO Form CA 20 48 02 99**.

Prior to the execution of this Agreement by MCWRA, DB shall file certificates of insurance with County Counsel showing that DB has in effect the insurance required by this Agreement. DB shall file a new or amended certificate of insurance within five calendar days after any change is made in any insurance policy, which would alter the information on the certificate then on file. Acceptance or approval of insurance shall in no way modify or change the indemnification clause in this Agreement, which shall continue in full force and effect.

DB shall at all times during the term of this Agreement maintain in force the insurance coverage required under this Agreement and shall send, without demand by

MCWRA, annual certificates to County Counsel. If the certificate is not received by the expiration date, County Counsel shall notify DB and DB shall have five calendar days to send in the certificate, evidencing no lapse in coverage during the interim. Failure by DB to maintain such insurance is a default of this Agreement which entitles MCWRA, at its sole discretion, to terminate this Agreement immediately.

## **5. TERMINATION**

5.01. Termination by MCWRA. MCWRA may terminate this Agreement on their respective behalf at any time for its convenience and without cause. Upon such termination, DB shall promptly comply with the provisions of paragraph 2.05. DB shall be paid all sums then due and owing for services performed through the effective date of the termination, subject to all other provisions of this Agreement.

5.02. Termination by DB. DB may terminate this agreement at any time upon giving thirty (30) days written notice to MCWRA. Upon such termination, and unless MCWRA notifies DB in writing that it will not need a substitute counsel, DB shall continue to provide such services as MCWRA may require until such time as MCWRA is able to identify a substitute counsel to render necessary services. MCWRA shall not unreasonably delay in identifying such substitute counsel, or in providing written notice that it will not require a substitute counsel. DB shall also immediately comply with the provisions of paragraph 2.05. DB shall be paid all sums due and owing for services performed through the effective date of the termination, subject to all other provisions of this Agreement.

## **6. GENERAL PROVISIONS**

6.01. Non-assignment. DB shall not assign or transfer this Agreement, or any part thereof, without the written consent of MCWRA, nor shall DB assign any monies due or to become due to DB hereunder without the previous written consent of MCWRA.

6.02. Independent Contractor. Nothing in this Agreement shall be construed or interpreted to make DB anything but an independent contractor and in all DB's activities and operations pursuant to this Agreement, DB shall for no purposes be considered an employee or agent of MCWRA.

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

6.04. Nondisclosure of Information. DB shall not disclose, without express written consent of MCWRA, any information relating to MCWRA business which has been submitted by MCWRA to DB pursuant to the services to be rendered pursuant to this Agreement. In the

event that this Agreement is terminated, DB shall immediately return to MCWRA all papers, documents and the like belonging to MCWRA, respectively.

6.05. Notices.

(a) Notices permitted or required to be given to the respective parties under this Agreement shall be deemed given (1) when personally delivered to County Counsel or to DB's principal partner contact; (2) when personally delivered to the party's principal place of business during normal business hours (i.e., to the office of the County Counsel in Salinas, California, or to DB'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.

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

To MCWRA

Charles J. McKee  
ATTN: Jesse J. Avila, Deputy  
Office of the County Counsel  
County of Monterey  
168 West Alisal Street, Third Floor  
Salinas, California 93901  
Phone Number: (831) 755-5045  
Fax Number: (831) 755-5283  
avilajj@co.monterey.ca.us

To DB:

Kevin O'Brien  
Downey Brand LLP  
621 Capitol Mall, 18<sup>th</sup> Floor  
Sacramento CA 95814  
Phone Number:  
Fax Number: 916-441-4021  
kobrien@downeybrand.com

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

6.06. Subcontracting. DB shall not subcontract or otherwise assign any portion of the work to be performed under this Agreement without prior written approval of MCWRA. Any and all subcontracts shall be subject to the provisions contained in this Agreement.

6.07. 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.

6.08. Nonwaiver. No covenant or condition of this Agreement can be waived except by the written consent of MCWRA. Forbearance or indulgence by MCWRA in any regard whatsoever shall not constitute a waiver of the covenant or condition to be performed by DB.



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

6.09. 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.

6.10. 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.

6.11. 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.

6.12. Exhibits. The following exhibits are attached hereto:

Exhibit A – Budget and Description of Services, Interlake Tunnel and Spillway  
Modification Project, Downey Brand Professional Services Agreement  
Exhibit B – Fees and Expenses

**IN WITNESS WHEREOF**, Monterey County Water Resources Agency, Monterey County, and Downey Brand LLP have caused this Agreement to be executed:

DATED: \_\_\_\_\_

WATER RESOURCES AGENCY OF MONTEREY  
COUNTY

By \_\_\_\_\_  
Charles J. McKee  
County Counsel

DATED: \_\_\_\_\_

DOWNEY BRAND LLP

By \_\_\_\_\_  
David Aladjem  
Partner

APPROVED AS TO FORM AND LEGALITY

CHARLES J. MCKEE, Monterey County Water Resources Agency Counsel

By \_\_\_\_\_  
Jesse J. Avila  
Deputy County Counsel

## EXHIBIT A

### BUDGET AND DESCRIPTION OF SERVICES Interlake Tunnel and San Antonio Spillway Modification Project Downey Brand Professional Services Agreement (Comprehensive Legal Review)

Task	Partner Hours	Cost (blended rate @\$350/hr)	Associate Hours	Cost (blended rate @\$280/hr)	Costs	Total
Consultation during EIR preparation (1 full day meeting/month, plus bi- weekly conference calls)						
Review of Administrative Draft EIR (screencheck)	150	\$52,500	50	\$14,000	\$0	\$66,500
Consultation on preparation of Final EIR	40	\$14,000	100	\$28,000	\$0	\$42,000
Consultation on preparation of certification/approval documents	100	\$35,000	100	\$28,000	\$0	\$63,000
Miscellaneous	25	\$8,750	100	\$28,000	\$0	\$36,750
<b>Subtotal</b>	25	\$8,750	50	\$14,000	\$1,000	\$23,750
	340	\$119,000	400	\$112,000	\$1,000	\$232,000
Contingency -- 25%						
	85	\$29,750	100	\$28,000	\$250	\$58,000
<b>Total</b>	425	\$148,750	500	\$140,000	\$1,250	\$290,000
<b>SWRCB Coordination</b>	75	\$26,250	50	\$14,000	\$1,000	\$41,250
<b>SWRCB Hearing</b>						
Uncontested hearing						25000
Limited hearing						100000
Full evidentiary hearing						\$250,000
						to
						\$500,000

**EXHIBIT B**  
**FEES AND EXPENSES**

MCWRA shall pay DB the fees and necessary expenses for services performed under this Agreement. The fees and expenses shall be calculated and charged in accordance with the hourly rates and expense method of billing identified below.

<u>Attorney</u>	<u>Hourly Rate</u>
Aladjem, David	\$380.00
Carroll, Dan	\$380.00
Granquist, Nicole	\$380.00
O'Brien, Kevin	\$380.00
Saxton, Steve	\$380.00
Stallard, Liz	\$365.00
Thorne, Melissa	\$365.00
Nikkel, Meredith	\$325.00
Pearson, Amanda	\$305.00
Smith, Rebecca	\$295.00
Cameron, Dave	\$280.00
Boulton, Ashley	\$255.00
Bivins, Sam	\$220.00
Heckman, Chris	\$220.00
Sandra Collier (paralegal)	\$190.00

DB may request to modify the amounts set forth in this Exhibit A from time-to-time but not more than once every twelve (12) months. County Counsel shall have the authority to negotiate and agree to such modifications.

DB shall be reimbursed for all actual and necessary expenses for the following items:

- (1) Postage;
- (4) Actual travel expenses, as more fully described in (b) below;
- (5) Consultant and expert witness fees;
- (6) Photocopying;
- (7) Computerized legal research; and
- (8) Other expenses when approved by MCWRA Counsel in advance.

DB will not be reimbursed for any non-attorney staff time or overtime for secretarial, clerical, or word processing costs connected with preparing required status reports, time spent to provide information for a fee audit, or for work not authorized by County Counsel.

Travel authorized by County Counsel will be reimbursed as follows: Transportation, meals and lodging not to exceed MCWRA / COUNTY per diem unless authorized in advance. Authorized air travel shall be reimbursed at actual fare for economy or coach class. DB will be compensated for travel time from Sacramento to Monterey and return to Sacramento only, such time to be billed at one-half (1/2) the normally billing rate for the person travelling. DB will be reimbursed for the actual expenses related to the travel in accordance with the above terms.

DB will bill monthly for work performed and costs advanced. DB will bill all overhead expenses, such as long distance telephone charges, facsimile transmission charges, photocopying and delivery expenses, as costs advanced. All overhead expenses will be billed at DB's cost.