

CITY OF BRIGHTON

PROFESSIONAL SERVICES AGREEMENT

for

Engineering Services for Water Resource Evaluation, Water Court Administrative Work, and Surface Water Analysis

THIS AGREEMENT made and entered into this _____ day of _____ in the year Two Thousand and Fifteen (2015) by and between the **CITY OF BRIGHTON, COLORADO**, a home rule municipal corporation, hereinafter referred to as the "**City**", and **WHITE SANDS WATER ENGINEERS, INC.**, a Colorado corporation, hereinafter referred to as "**Professional**".

WITNESSETH:

In consideration of the mutual covenants and obligations herein expressed, it is agreed by and between the parties hereto as follows:

1. **SCOPE OF WORK.** The Professional agrees to provide Engineering Services for Water Resource Evaluation, Water Court Administrative Work, and Surface Water Analysis and Water Court representation as more specifically set forth in the Scope of Services attached hereto as Exhibit "A", consisting of one (1) page and incorporated herein by this reference.
2. **PROFESSIONAL RESPONSIBILITY.** The Professional has held itself out to the City of Brighton as having the requisite expertise and experience to perform the required Services for the Project. Professional shall faithfully perform the Services required under this Agreement in accordance with standards of care, skill, training, diligence and judgment provided by highly competent professionals who perform Services of a similar nature to the Services described in this Agreement.
3. **THE WORK SCHEDULE.** The Services to be performed pursuant to this Agreement shall be performed through the 2015 calendar year, subject to renewal at the sole option of the City.
4. **TIME OF COMMENCEMENT AND COMPLETION OF SERVICES.** The Services to be performed pursuant to this Agreement shall be initiated upon the City's Notice to Proceed and continue through December 31, 2015 unless sooner terminated.
5. **EARLY TERMINATION BY CITY.** Notwithstanding the time periods contained herein, the City may terminate this Agreement at any time without cause by providing written notice of termination to the Professional. Such notice shall be delivered at least fifteen (15) days prior to the termination date contained in said notice unless otherwise agreed in writing by the parties.

All notices provided under this Agreement shall be effective when mailed, postage prepaid and sent to the following addresses:

If Professional:

White Sands Water Engineers, Inc.
110 N. Rubey Drive, Suite 202
Golden, CO 80403
303.495.7576

If City:

With Copy To:

Director of Utilities	City Manager	Procurement/Contracts Mgr
City of Brighton	City of Brighton	City of Brighton
500 South 4th Avenue	500 South 4th Avenue	500 South 4 th Avenue
Brighton, CO 80601	Brighton, CO 80601	Brighton, CO 80601
303.655.2033		303.655.2001

In the event of any such early termination by the City, the Professional shall be paid for services rendered and reimbursable costs incurred prior to the date of termination, subject only to the satisfactory performance of the Professional's obligations under this Agreement. Such payment shall be the Professional's sole right and remedy for such termination.

6. **COMPLIANCE WITH PATENT, TRADEMARK AND COPYRIGHT LAWS.** The Professional represents that all Services performed by Professional under this Agreement shall comply with all applicable patent, trademark and copyright laws, rules, regulations and codes of the United States. Professional shall not utilize any protected patent, trademark or copyright in performance of its Services unless Professional has obtained proper permission and all licenses, releases and other necessary documents. If Professional specifies any material, equipment, process or procedure, which is protected, Professional shall properly disclose such patents, trademarks and copyrights in the Construction Drawings or Technical Specifications.

The Professional releases, indemnifies and holds harmless the City of Brighton, its officers, agents, and employees from any and all claims, damages, suits, costs, expenses, liabilities actions or proceedings of any kind or nature whatsoever, of or by anyone whomsoever, in any way resulting from, or arising out of, directly or indirectly, the performance of Services under this Agreement which infringes upon and patent, trademark or copyright protected by law.

7. **DESIGN, PROJECT, INDEMNITY AND INSURANCE RESPONSIBILITY.** The Professional shall be responsible for the professional quality, technical accuracy, timely completion and the coordination of all Services rendered by the Professional. The Professional shall save, indemnify, defend, and hold harmless the City of Brighton, its officers, agents, and employees, from and against all liability, claims, judgments, suits, demands for damages to persons or property with respect to the liability coverages, except Professional Liability

coverage, specified herein which arise out of, result from or are in any manner connected with the Services to be performed under this Agreement, to the extent such injury, loss or damage is caused by, or is claimed to be caused by, the negligent acts, errors, or omissions of Professional, any subcontractor or subconsultant of Professional, or any officer, employee, or agent of Professional.

Professional agrees to indemnify and hold harmless the City of Brighton, and its officers, agents and employees, from and against all liability, claims judgments, suits, demands for damages to persons or property with respect to the Professional Liability coverages specified herein which arise out of, result from or are in any manner connected with the Work to be performed under this Agreement, to the extent such injury, loss or damage is caused by, the negligent acts, errors or omissions of Professional, any Subcontractor or Subconsultant of Professional, or any officer, employee or agent of Professional.

Professional's duty to indemnify the City of Brighton shall arise at the time written notice of a claim is first provided to the City of Brighton regardless of whether claimant has filed suit on the claim. Professional's duty to indemnify the City of Brighton shall arise even if City of Brighton is the only party sued by claimant and/or claimant alleges that the City of Brighton's negligence was the sole cause of claimant's damages. Professional's indemnification obligation shall include, but not be limited to, any claim made against City of Brighton by (1) Professional's employee, subcontractor or subconsultant who has been injured on property owned by the City of Brighton; or (2) a third party claiming patent, copyright or trademark infringement.

The Professional shall maintain Insurance in the kinds and amounts set forth herein.

COMPENSATION. In consideration of the Services to be performed pursuant to this Agreement, the City agrees to pay Professional according to the following hourly rates: (i) Principal Engineers and Senior Project Managers \$180 to \$200; (ii) Project Managers and Staff Engineers \$110 to \$150. Outside expenses incurred directly in connection with the Professional's work for the City will be billed at cost plus 5 percent. Such expenses may include items such as sub-contractor fees (if any), travel costs for travel more than 50 miles away from Professional's office, and reproduction costs for large exhibits for trial and normal copying and printing required to provide Services.

The Professional shall submit a task list to the City Water Resources Engineer, including a detailed description of the proposed services to be rendered for each task, together with a 'not to exceed amount' for each individual task. Professional is not authorized to complete work and shall not commence work until and unless the City Water Resources Engineer has approved each task list item in writing.

The Parties acknowledge that new water court cases or new issues within ongoing cases could cause an increase beyond the initially approved task list. Professional shall notify the City Water Resources Engineer as soon as practicable and provide an updated task list that shall incorporate any anticipated changes. The updated task list must be approved by the City Water Resources Engineer prior to commencement of additional work.

The Professional shall bill its charges to the City periodically, but no more frequently than once each month. The itemized invoices from the Professional shall include:

- a. A list of the Professional's employees who worked on the Project during the billing period, the amount of time each worked with a description of work performed, and the associated billing rate of each employee; and
- b. An itemized list of reimbursable expenses and, where applicable, copies of invoices for outside services or materials.

The amounts of all such payments shall be based upon the Professional's City-verified progress in completing the Services to be performed pursuant hereto and upon the City's approval of the Professional's actual reimbursable expenses. The City shall make payment following acceptance of the work.

9. **CITY REPRESENTATIVE.** The City designates the Water Resources Engineer as its project representative who shall make, within the scope of his authority, all necessary and proper decisions with reference to the Project. All requests for contract interpretations, change orders, and other clarification or instruction shall be directed to the City Representative.
10. **PROFESSIONAL REPRESENTATIVE.** The Professional designates Ms. Jennifer Ashworth, P.E., as its project manager to manage and supervise the performance of this Agreement on behalf of the Professional. Associated with the project manager shall be staff members whose experience and qualifications are appropriate for this Project.
11. **PROJECT DOCUMENTS.** Upon conclusion of the Project and before final payment, the Professional shall provide to the City the final written work product(s). Upon final payment, all Project notes, reports, computer programs (non-proprietary), computer input and output, analyses, tests, maps, surveys, or any other final Project work products developed specifically for the Project are and shall remain the sole and exclusive property of the City. The Professional shall not provide copies of any material prepared hereunder to any other person or entity without the prior written consent of the City, unless required by law or court order to be disclosed.
12. **PROGRESS REPORT.** Professional shall comply with the requirements of the Scope of Work regarding progress meetings and the obligations related thereto. Failure to provide any required monthly report or conduct the required progress meetings may, at the option of the City, suspend the processing of any partial payment request.
13. **INDEPENDENT CONTRACTOR.** The Services to be performed by Professional are those of an independent contractor and not of an employee of the City of Brighton. The City shall not be responsible for withholding any portion of Professional's compensation hereunder for the payment of FICA, Workers' Compensation, other taxes or benefits or for any other purpose.

14. **INSPECTION.** The City, through its authorized representatives, has the right at all reasonable times to inspect or otherwise evaluate the work performed or being performed under this Agreement.
15. **CHANGES.** The City may, from time to time, require changes in the Scope of the Work to be performed hereunder, which changes shall be agreed upon by the Parties in writing. In the event such changes cause an increase or decrease in the work to be performed by the Professional or the time for such performance, the compensation to be paid to the Professional and time of performance shall be equitably adjusted. The value of any such extra work or change shall be determined according to established hourly billing rate.
16. **SUSPENSION.** Without terminating this Agreement or breaching the obligations hereunder, the City may, at its sole discretion, suspend the Services of the Professional hereunder. Such suspension may be accomplished by giving the Professional written notice, which shall set forth the reasons for the suspension, seven (7) days in advance of the suspension date. Upon receipt of such notice, the Professional shall cease its work in as efficient a manner as possible in order to keep its total charges to the City for services under the Agreement to a minimum. In the event that the period of suspension exceeds ninety (90) days, either party may terminate this Agreement.
17. **PERSONAL SERVICES.** It is understood that the City enters into this Agreement based on the special abilities of the Professional and that this Agreement shall be considered as an agreement for personal services. Accordingly, the Professional shall neither assign any responsibilities nor delegate any duties arising under this Agreement without the prior written consent of the City.
18. **ACCEPTANCE NOT WAIVER.** The City's approval of reports, and work or materials furnished hereunder, shall not in any way relieve the Professional of responsibility for the quality or technical accuracy of the work. The City's approval or acceptance of, or payment for, any part of the Services shall not be construed to operate as a waiver of any other rights or benefits provided to the City under this Agreement.
19. **DEFAULT.** Each and every term and condition hereof shall be deemed to be a material provision of this Agreement. In the event either party should fail or refuse to perform according to the terms of this Agreement, such party may be declared in default.
20. **REMEDIES.** In the event a party has been declared in default, such defaulting party shall be allowed a period of ten (10) days within which to cure said default. In the event the default remains uncorrected, the party declaring default may elect to (a) terminate the Agreement and seek damages; (b) treat the Agreement as continuing and require specific performance; or (c) avail itself of any other remedy available at law or in equity. If the non-defaulting party commences legal or equitable actions against the defaulting party, the defaulting party shall pay the non-defaulting party for the non-defaulting party's reasonable attorney fees and costs incurred in connection therewith.
21. **BINDING EFFECT/AMENDMENT.** This writing, together with all exhibits hereto, constitutes the entire agreement between the parties and shall be binding upon said parties, their officers,

employees, agents and assigns and shall inure to the benefit of the respective survivors, heirs, personal representatives, successors and assigns of said parties. This Agreement may be amended only by the mutual consent of the parties in writing.

22. **LAW/SEVERABILITY.** The laws of the State of Colorado shall govern the construction, interpretation, execution and enforcement of this Agreement. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision of this Agreement.

23. **ILLEGAL ALIENS.**

A. At all times during the performance of the contract, the Professional shall strictly adhere to all applicable Federal, State and City laws prohibiting the employment of or contracting with undocumented workers or illegal aliens.

B. The Professional shall not knowingly employ or contract with an undocumented worker or illegal alien to perform work under this Agreement or knowingly contract with a subcontractor who knowingly employs or contracts with undocumented workers (illegal aliens) to perform work under this Contract.

C. The Professional shall take affirmative action to insure that it does not employ or contract with undocumented workers or illegal aliens to perform work on this public contract for services with the City by participation in either of the following options:

OPTION 1-E-VERIFY PROGRAM

(1) Execute a Memorandum of Understanding with the Social Security Administration and Department of Homeland Security for participation in the E-Verify Program for the verification of immigration status of employees hired after the date of execution of the Memorandum of Understanding.

(2) Verify or attempt to verify through participation in the E-Verify Program that the Professional does not and will not employ undocumented workers or illegal aliens.

(3) The Professional shall comply with all terms and conditions of the Memorandum of Understanding related to the E-Verify Program, and in particular shall not use the process for verification of immigration status to verify and applicant employment eligibility; submit a request for verification until after the employee is hired and the Form I-9 is completed and submitted; or, to reverify employees hired prior to the date of the Memorandum of Understanding.

OPTION 2-STATE OF COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT PROGRAM ("DEPARTMENT PROGRAM")

(1) The Professional shall notify the Department and the City of Brighton of its intent to participate in the Department Program, and the Professional's consent in writing to the Department conducting random audits of the affidavits of the Professional filed with the City and the related documents maintained by the Professional.

(2) The Professional shall within twenty days after hiring new employees to perform work on this public contract for services with the City, filed with the Department an affidavit affirming that the Professional has examined the legal work status of such

employees, retained file copies of the required documents related thereto, and has not altered or falsified the documents for such employees.

(3) The Professional shall provided a written, notarized copy of the affirmation to the City on or before its filing with the Department.

If the Professional has not entered in to a Memorandum of Understanding to participate in the E-Verify Program and is awarded the contract herein proposed, the Professional shall participate in the Department Program and comply with all requirements thereof during the term of the contract.

D. The Professional shall require all subcontractors of the Professional to certify in writing to the Professional that the subcontractor does not knowingly employ or contract with undocumented workers or illegal aliens and further to agree in writing not to knowingly employ or contract with an undocumented worker or illegal alien to perform work under this public contract for services.

(1) The Professional shall not enter into a contract with a subcontractor that fails to certify to the Professional that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this public contract for services.

(2) If the Professional obtains actual knowledge that a subcontractor performing work under the public contract for services knowingly employs or contracts with an illegal alien, the Professional shall:

(a) Notify the subcontractor and the City within three days that the Professional has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and

(b) Terminate the subcontract with the subcontractor if within three days of receiving the notice required pursuant to subsection D (2) (a), the subcontractor does not terminate the employment or contract with the illegal alien; except that the Professional shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

E. The Professional shall comply with any reasonable request by the City or the Colorado Department of Labor and Employment made in the course of an investigation that the City or the Department is undertaking for the purpose of determining the immigration status of all newly hired employees or contractors working on this Contract, including, but not limited to:

(1) Inspections and/or interviews at such locations as this Contract is being performed;

(2) Review documentation related to the immigration status and/or employment eligibility of any newly hired employees or contractors performing work on this public contract for services; or,

(3) Any other reasonable steps that are necessary to determine whether a Professional or subcontractor is complying with the provisions of this Contract related to the employment of or contracting with undocumented workers or illegal aliens.

F. The Professional shall, upon request, provide to the City copies of documentation and verification of immigration status and employment eligibility received by the Professional for itself or from subcontractors; and, if requested, copies of information received from a subcontractor submitted to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

G. If a Professional violates a provision of this Section 23, **Illegal Aliens**, the City may terminate the Contract for a breach of the Contract. If the Contract is so terminated, the Professional shall be liable for actual and consequential damages to the City.

24. INSURANCE

The Professional will be required to furnish a Certificate of Insurance including Professional Liability. The City will be named as Additional Insured on Commercial General Liability and Auto Liability policies and listing the name of the Project and project number if applicable.

- A. The Professional agrees to procure and maintain in full force and effect during the term of the Agreement, at its own cost, the following coverages:
1. Workers' Compensation insurance as required by the Labor Code of the State of Colorado and Employers' Liability Insurance.
 2. Commercial General or Business Liability Insurance with minimum combined single limits of One Million (\$1,000,000) each occurrence and One Million (\$1,000,000) general aggregate.
 3. Automobile Liability Insurance with minimum combined single limits for bodily injury and property damage of not less than One Million (\$1,000,000) for any one occurrence, with respect to each of the Professional's owned, hired or non-owned vehicles assigned to or used in performance of the Services. In the event that the Consultant's insurance does not cover non-owned automobiles, then the Consultant guarantees to the City that the requirements of this paragraph shall be met by each employee, subcontractor or other agent of the Professional who utilizes an automobile in providing services to the City of Brighton under this Agreement.
 4. Errors and Omissions Insurance with limits of liability of at least One Million Dollars (\$1,000,000) per claim and in the aggregate.
- B. If approved by the City of Brighton prior to the commencement of any work or services under this Agreement, evidence of qualified self-insured status may be substituted for one or more of the foregoing insurance coverages.
- C. Professional shall procure and maintain, and shall cause any subcontractor of the Professional to procure and maintain, the minimum insurance coverages listed herein. Such coverages shall be procured and maintained with forms and insurers acceptable to the City of Brighton. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by the Professional in connection with providing any work or services under this Agreement. In the case of any claims made, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.

- D. A Certificate of Insurance shall be completed by the Professional's insurance agent(s) as evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect, and shall be subject to review and approval by the City of Brighton prior to commencement of any work or services under this Agreement. The Certificate shall identify this Agreement and shall provide that the coverages afforded under the policies shall not be cancelled, until at least thirty (30) days prior written notice has been given to the City of Brighton. The completed Certificate of Insurance shall be sent to:

City of Brighton
500 South 4th Avenue
Brighton, CO 80601
Attention: Sharon L. Williams, CPPB
Procurement & Contracts Manager

- E. Failure on the part of the Professional to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a Material Breach of Contract upon which the City of Brighton may immediately terminate this Agreement, or at its discretion the City of Brighton may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the City of Brighton shall be repaid by the Professional to the City of Brighton upon demand, or the City of Brighton may offset the cost of the premiums against any monies due to Professional from the City of Brighton.
- F. The City of Brighton reserves the right to request and receive a copy of any endorsement required to comply with the above requirements. Professional agrees to execute any and all documents necessary to allow the City of Brighton access to endorsements pertaining to this particular Project.
- G. The parties hereto understand and agree that the City of Brighton, its officers, and its employees, are relying on, and do not waive or intend to waive by any provision of this Contract, the monetary limitations (presently \$350,000 per person and \$990,000 per occurrence) or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, C.R.S. 24-10-101 et seq., as from time to time amended, or otherwise available to the City of Brighton, its officers or its employees.
- H. In addition to procuring and delivering to the City such written Certificates of Insurance, demonstrating that the Professional has obtained and will maintain all policies of insurance coverage in the amounts required herein, the Professional shall also cause the City to be named as an Additional Insured party entitled to coverage under the general liability and auto liability policies of insurance, and for that purpose the Professional shall obtain and maintain, or cause to be obtained and maintained, any and all necessary policy endorsements, additional coverage documents, or other instruments or Certificates, such as will provide such insurance coverage to the City at all times during the Professional's performance of the Project.
- I. All Certificates of Insurance shall be submitted on an Acord 25-S form or most current.

*THE CITY OF BRIGHTON, COLORADO,
a home rule municipal corporation*

BY: _____
Richard N. McLean, Mayor

ATTEST:

Natalie Hoel, City Clerk

APPROVED AS TO FORM:

Margaret R. Brubaker, Esq.
City Attorney

White Sands Water Engineers, Inc.
a Colorado corporation

BY: Edward J. Armbruster

Edward J. Armbruster
Above Name Typed or Printed

TITLE: President

ATTEST:

Corporate Secretary (Corporate Seal)

EXHIBIT "A"

SCOPE OF SERVICES

Engineering Services for Water Resources and Water Rights
Water Court Administrative Work and Surface Water Analysis

The Professional, being familiar with all of the requirements of this Agreement, shall furnish all labor, material, tools, equipment, transportation, services and all other things necessary for the completion of the Services in accordance with the requirements and intent of the Agreement documents within the time of completion as set forth herein.

The Engineering Services performed will be at Brighton's direction, on an 'as-needed' basis, and may be the result of requirements and recommendations from Brighton's staff or its water rights attorneys. The Services performed may be dependent upon how negotiations proceed between Brighton and other entities during existing and future Water Court cases. The Professional Services performed may include, but are not limited to, any of the following:

- Engineering analyses, studies, and reports to define and support water rights cases, either as the applicant or objector;
- Negotiations with objectors in existing and future Water Court cases where Brighton is the Applicant;
- Negotiations on Brighton's behalf in existing or future Water Court cases where Brighton participates as an objector;
- Negotiations on Brighton's behalf in connection with developing or refining Brighton's water supply through operational, intergovernmental, or other agreements with other entities;
- Engineering analyses, studies, and reports in support of existing or future Substitute Water Supply Plans;
- Engineering analyses, studies, and reports to project future water demands;
- Engineering analyses, studies, and reports to determine additional sources of water supply;
- Engineering analyses, studies, and reports to evaluate specific water rights, ditch company shares, or water supply projects offered for sale or lease to Brighton;
- Accounting forms to track and document Brighton's diversion, delivery, use, and returns of its water supplies;
- Trial preparation;
- Expert testimony at trial or depositions;
- Presentations at public meetings; and
- Presentations to Brighton's Council on water supply and water rights.

All of the Services are contingent upon the City's prior approval as set forth in Paragraph 8 of this Agreement