

NAPA COUNTY AGREEMENT NO. _____

**EXCLUSIVE NEGOTIATION AGREEMENT
LAKE BERRYESSA CONCESSIONS**

THIS EXCLUSIVE NEGOTIATION AGREEMENT (the “**Agreement**”) is made and entered into effective as of _____, 2022 (the “**Effective Date**”), by and between Napa County, a political subdivision of the State of California, (“**County**”) and LB SMI, LLC, with offices located at 17330 Preston Road, Suite #220A, Dallas, TX 75252 (“**Concessionaire**”) who for valuable consideration, agree as follows:

Article 1 – Negotiation

1.1 Background. The United States constructed Monticello Dam and Lake Berryessa and associated diversion facilities and canals located in Solano, Yolo, and Napa Counties pursuant to the Reclamation Project Act of 1939, and acquired ownership of certain lands for the purpose of constructing, operating, and maintaining said facilities. The United States Bureau of Reclamation (“**BOR**”) and the County entered into Managing Agreement Number 20-LC-20-2623 (Napa County Agreement No. 200285B) dated March 9, 2020, for the administration, operation, maintenance and development of public recreation facilities, protection of natural and cultural resources, and provision of public health and safety at Lake Berryessa. County issued Request for Proposals No. CEO112103 (“**RFP**”) for resort concession areas at Berryessa Point (“**Property**”) adjacent to Lake Berryessa on November 24, 2021, and Concessionaire submitted the winning proposal. The Parties wish to enter into this Agreement to facilitate continued negotiations, environmental analysis, site investigation and due diligence of the Property for purposes of resort concessions as detailed in the RFP (the “**Project**”) in accordance with the terms and conditions set forth herein.

1.2 Good Faith Negotiations. The County and Concessionaire agree for the period set forth below, to negotiate diligently and in good faith, pursuant to this Agreement, to prepare a Disposition and Development Agreement or other management or concessionaire agreement (“**DDA**”) to be entered into between the County and Concessionaire with respect to the Property, generally as set forth in the proposals submitted by Concessionaire. County staff recommended Concessionaire as the most qualified firm that submitted a proposal that meets or exceeds the goals and objectives of the RFP and provides the highest monetary and other value to the County. The County agrees to negotiate exclusively with Concessionaire with respect to the Property during the Negotiation Period set forth below.

1.3 Period of Negotiations. The Parties agree to negotiate a DDA for the Property for a twenty-four (24) month period (“**Negotiation Period**”), commencing on the Effective Date. If the Parties have not reached agreement on a DDA by the end of 24 months, then this Agreement shall automatically terminate. Concessionaire shall have no further rights regarding the Property, and the County shall be free to negotiate with any other persons or entities with regard to such Property. The Negotiation Period (consisting of the Investigation and Approval Periods described below) may be extended by Concessionaire for up to six (6) months by delivering written notice thereof to the County, but any further extensions will require the mutual written

agreement of the Parties. The Negotiation Period shall consist of two periods, an Investigation Period and an Approval Period.

1.3.1 The “**Investigation Period**” shall be four (4) months starting on the Effective Date. The County shall use reasonable efforts to assist Concessionaire in obtaining copies of all written reports, studies, investigations, information or material in the BOR's possession or control and not previously delivered to Concessionaire relating to the condition or development of the Property (the “**Documents**”). By way of example, without limitation, the term “Documents” shall refer to surveys, topographic maps, engineering plans and specifications, soil boring tests, soils analysis, environmental reports, water table analysis, pending litigation and/or claims, and related correspondence. During the term of this Agreement, Concessionaire shall have full access to inspect the Property, perform all testing, and inspect all records relating to the Property, without unreasonably interfering with ongoing concessions activity or BOR operations. During the Investigation Period, the Concessionaire has the right to terminate this Agreement for any reason or no reason whatsoever. If Concessionaire terminates this Agreement, Concessionaire will repair any damage to the Property caused by such investigations in a timely manner and in a good workmanship manner.

1.3.2 The “**Approval Period**” shall be twenty (20) months commencing from the end of the Investigation Period, to complete the environmental analysis documents in accordance with the California Environmental Quality Act (“**CEQA**”) and the National Environmental Policy Act (“**NEPA**”) and secure all necessary permits, licenses, governmental approvals, including rezoning, if necessary, approval to extend utilities to the boundary of the Property, and all other governmental approvals, permits and licenses required for Concessionaire to commence and complete the development of the Property (the “**Governmental Approval**”). Concessionaire will use commercially reasonable efforts to obtain the Governmental Approvals. However, during the Approval Period Concessionaire has the right to terminate this Agreement for any reason or no reason whatsoever.

1.4 Concessionaire’s Representations and Warranties. Concessionaire hereby represents the following to the County, for the purpose of inducing the County to consummate the transactions contemplated hereby, all of which shall be true as of the Effective Date:

1.4.1 Concessionaire is a Delaware limited liability company, duly formed, validly existing, in and in good standing under the laws of the state of formation, and certified in good standing under the laws of the State of California by the California Secretary of State.

1.4.2 Concessionaire has the legal power, right and authority to enter into this Agreement, to consummate the transactions contemplated hereby, to take any steps or actions contemplated hereby, and to perform its obligations hereunder.

1.4.3 Concessionaire’s undertakings pursuant to this Agreement are for the purpose of negotiating diligently and in good faith to prepare a DDA to be entered into between the County and Concessionaire for the Property and not for speculation in land holding.

1.4.4 The persons executing this Agreement, the instruments referenced herein, and any other documents executed and delivered on behalf of Concessionaire have the full right, power and authority to do so and have been duly authorized to do so by Concessionaire, and no further action, nor any other persons are required to execute this Agreement on behalf of Concessionaire.

1.5 County's Representations and Warranties. The County hereby represents the following to Concessionaire, for the purpose of inducing Concessionaire to consummate the transactions contemplated hereby, all of which shall be true as of the Effective Date:

1.5.1 The Property is owned by the federal government. All of the County's rights, obligations, and interests in the Property, as granted by the BOR for development of concessions, are contained in Managing Agreement Number 20-LC-20-2623 ("**Managing Agreement**") dated March 9, 2020.

1.5.2 The County has not, and during the Negotiation Period will not, enter into any agreements which would be binding on Concessionaire upon the effective date of a DDA or which would adversely affect Concessionaire's ability to implement its proposals submitted in response to the RFP, other than Managing Agreement. Additionally, the County represents that it will negotiate exclusively with Concessionaire with respect to the Property during the Negotiation Period.

1.5.3 Neither this Agreement nor anything to be done by the County pursuant to this Agreement, including the transfer of the County's right to develop the Property as contemplated herein, will violate any contract, agreement or instrument to which the County is a party, except as would not have a material adverse effect on Concessionaire's ability to implement its proposals submitted in response to the RFP.

1.6 Consideration at Public Meeting. If the negotiations culminate in a DDA, such an agreement becomes effective only after and if the DDA and other documents have been considered and approved by the Board of Supervisors after a public meeting. However, County is not obligated to expedite any reviews, approvals, notices, meetings, or other matters, and nothing contained in this Agreement shall be construed to limit the County's discretion in their activities hereunder or to cause County to incur any liability or obligation in connection with any delays in the approval of a DDA.

1.7 No waiver of Public Agency Powers/Consent. County is a public agency, but is entering this agreement as a proprietary party and not in its regulatory role, and as such its police powers are entirely undiminished by any terms of this Agreement and are not waived or abrogated. In no way shall any consent by County in its regulatory capacity be deemed to constitute consent of County in its proprietary capacity, and vice versa.

Article 2 – Proposed Development

2.1 Development Concept and Essential Terms and Conditions. The proposed development to be negotiated hereunder shall be consistent with the proposal submitted by Concessionaire in response to the RFP, the Managing Agreement, BOR policies, and any other applicable law or governmental regulation. The Parties acknowledge that the Project (including aesthetics, constructability, financial feasibility, environmental requirements, development timetable and other considerations) shall be generally consistent with the design principles set forth below and will be part of the analysis to be undertaken by Concessionaire and the County during the Negotiation Period. The Concessionaire's general design concept provides for conceptual development, construction, and operation of concessions and other recreational opportunities at the Property, to be memorialized in the DDA. The essential terms and conditions of any such DDA entered into with Concessionaire shall be in general conformance with the following requirements:

2.1.1 On February 17, 2022, Concessionaire submitted a proposal to the County in response to the County's issuance of the RFP for concessions at the Property. The Concessionaire's proposal, which includes a pro forma detailing potential development costs and revenues, constitute the frame of reference for the development to be negotiated hereunder.

2.1.2 The Property is owned by the federal government and cannot be purchased by Concessionaire. The term of the Managing Agreement is fifty-five (55) years, and the parties anticipate the terms of the DDA will be co-terminus with the fifty-five (55) year term of the Managing Agreement, including a reasonable period to wind down operations if necessary. The Concessionaire will take possession of the Property “as is,” subject to any easements, covenants, and restrictions with no warranties of any kind, express or implied.

2.1.3 Concessionaire will design, construct, and operate the development on the Property at its own cost and expense, in accordance with a schedule of performance and the scope of development to be negotiated as part of the DDA and the plans and specifications prepared by Concessionaire and approved by the County and BOR.

2.1.4 Concessionaire will charge fees for concessions and other facilities developed pursuant to the DDA. Such fees will be subject to the approval of the County, which shall not be unreasonably withheld.

2.1.5 Concessionaire will secure all necessary planning, zoning and other entitlement and permit approvals for the proposed development as contemplated by the DDA at its own cost and expense.

2.1.6 Concessionaire shall be responsible for design and construction of any improvements in public rights-of-way adjacent to the Property, at Concessionaire's own cost and expense, unless the County and Concessionaire agree otherwise in writing.

2.1.7 Concessionaire will pay the County a percentage of the revenue generated at the Property to help offset the County's costs associated with the construction and operation of the development, such as costs associated with increased law enforcement and fire protection, unless the County and Concessionaire agree otherwise in writing.

2.1.8 Concessionaire may be required to provide a bond or other security to ensure construction is completed once commenced.

2.2 Concessionaire's Interim Submittals. Concessionaire shall submit to the County the following described work items to be used in connection with the negotiations, no later than eighteen (18) months after the Effective Date:

2.2.1 Concessionaire will complete an architectural program with an architect, including site plans, floor plans, elevation studies, and building sections for the Property. Submit notice to the County that the Concessionaire has determined that the Property is suitable or unsuitable for the proposed development.

2.2.2 Concessionaire will submit schematic package including refinement of the above tasks together with parking, presentation drawings and cost analysis and project pro forma, and complete draft permit applications.

2.2.3 Concessionaire will provide complete project information for the above tasks and as may be required for applications necessary for planning, zoning, and other entitlement and permit approvals for the proposed development as contemplated by the DDA, to the reasonable satisfaction of the County.

2.3 Concessionaire's Findings, Determinations, Studies, and Reports. From time-to-time, as requested by the County, Concessionaire agrees to make reasonable oral and written progress reports, and to submit to the County non-proprietary third-party reports and analyses, advising the County related to the development, including financial feasibility analyses, construction cost estimates, marketing studies and similar due diligence matters, completed for purposes of development of the Property, and all such reports and analyses shall include County as a party who may rely on such reports. Should negotiations not result in a DDA between the County and Concessionaire for the Property, the County may retain the non-proprietary third-party plans, studies, reports, and drawings prepared by or for Concessionaire with respect to development, any alternatives, financial feasibility analyses, construction cost estimates, marketing or pro forma studies and similar due diligence matters, including assignment of all reports. The County may use these plans, studies, reports, and drawings provided by the Concessionaire in any way deemed by the County to be of benefit to the successful implementation of concessions at the Property. Information to be reported to or submitted to the County shall include any non-proprietary third-party due diligence materials prepared for any prospective development partner, joint venture, or management entity. All costs incurred by Concessionaire in the preparation and presentation of such findings, determinations, studies, reports, or other requests by the County under this Agreement shall be at the sole cost and expense of Concessionaire.

2.4 Environmental Studies. Concessionaire shall prepare all required environmental analysis documents in accordance with the CEQA and NEPA at its own cost and expense. Concessionaire's consultants and professionals to be used in preparing the CEQA/NEPA document shall be subject to approval of the County CEO or his designee pursuant to section 3.4. If the quality or pace of environmental review is inadequate as reasonably determined by the County CEO, then the County shall so inform Concessionaire and Concessionaire shall inform and direct its consultants to devote additional resources and/or correct the deficient work, but the cost of the consultant shall remain the Concessionaire's expense. The County and Concessionaire shall agree upon the scope of the CEQA/NEPA document prior to initiating preparation. The County and Concessionaire will meet at least monthly to discuss potential impacts and ongoing studies, review draft documents, respond to comments and other public input, towards the goal of submitting final environmental documents to the Board of Supervisors and BOR for consideration in conjunction with the DDA and any other necessary discretionary approvals for the project.

2.5 Community Outreach meetings. Concessionaire will conduct a series of public outreach meetings (minimum of 2) within the general Lake Berryessa community prior to finalizing the site plans and executing the DDA. Such meetings will be held at the sole cost of Concessionaire. The purpose of the meetings is to present Concessionaire's proposals and receive public input.

Article 3 – The Concessionaire

3.1 Nature of the Concessionaire. Concessionaire shall be LB SMI, LLC. However, the County acknowledges that the Concessionaire may intend to form a new entity controlled by Concessionaire that will be the Concessionaire entity that will be the party to the DDA which shall be permitted by the County in accordance with the conditions set forth in this Section 3.1. The County shall have the right to review and approve the organizational documents of such entity and the entities comprising such entity. The Concessionaire hereunder and under the DDA shall be an entity authorized to conduct business in the State of California by the California Secretary of State. Prior to submission of an executed DDA, Concessionaire shall submit a copy of any executed formation documents (e.g., limited liability company operating agreement, partnership agreement, etc.), as well as all organizational documents of each entity participating in the joint venture, for review and approval by the County, which approval shall not be unreasonably withheld. Such agreement may be redacted to remove financial terms or other confidential information contained therein, provided that such redactions do not limit the County's ability (as determined by the County, in its sole discretion) to complete a comprehensive evaluation of the organizational structure of Concessionaire and all entities participating in the joint venture.

3.2 Offices of the Concessionaire. Notices or materials to be provided to Concessionaire under this Agreement shall be sent to:

LB SMI, LLC
17330 Preston Road, Suite #220A

Dallas, TX 75252
Attn: Brian DeVoss and David Filler
bdevoss@suntex.com and dfiller@suntex.com

3.3 Principals and Employees of the Concessionaire. The Concessionaire's initial employees or representatives who are to be directly involved in this development and who have been designated to negotiate the DDA with the County, and to engage in the activities necessary to determine the feasibility of the Development are as follows:

David Filler, Vice President
LB SMI, LLC
17330 Preston Road, Suite #220A
Dallas, TX 75252
dfiller@suntex.com

3.4 Concessionaire's Consultants and Professionals. Concessionaire's third party consultants and professionals for the CEQA and NEPA reports (other than its attorneys) shall be subject to the reasonable approval of the County CEO or his designee, which approval shall not be unreasonably withheld. The CEO or his designee shall not withhold, condition, or delay their approval of any of the foregoing persons unless the CEO or his designee reasonably determines that a proposed person does not have sufficient financial, technical, or operational capabilities or experience to perform the work or such person is reasonably believed to not be of good character or reputation.

Article 4 – Evaluation of Property

4.1 Due Diligence. During the Negotiation Period, Concessionaire may conduct due diligence on the Property to determine the feasibility of utilizing the Property for the Project as proposed by Concessionaire. This may include, but not be limited to:

4.1.1 Compiling and reviewing existing data with respect to the Property from any governmental authorities and any other third parties who may have relevant information.

4.1.2 Performing any necessary or desirable non-invasive analyses, examinations, investigations, tests and inspections of the Property and existing improvements, including but not limited to, surveys, inspections, and environmental studies.

4.1.3 Performing invasive analyses, examinations, investigations, tests, and inspections if, and solely to the extent, recommended as a result of the non-invasive due diligence, and subject to the County's prior written approval, which shall not be unreasonably withheld or delayed.

4.1.4 Contacting utility providers who will furnish water, sewer, electric power, telephone service or any other utility to the Property as to any matters which may affect or be necessary to the development.

4.1.5 Evaluating all statutory and regulatory restrictions and controls with respect to development on the Property, which may require contacting local, state, or federal agencies with potential jurisdictional authority concerning development on the Property to ascertain any such restrictions and controls.

4.2 Indemnification. Concessionaire shall take all safety measures that are reasonably necessary to prevent injury to persons or property resulting from Concessionaire's due diligence activities on the Property. The County may immediately terminate the access provided hereunder if it determines, in its sole discretion, that Concessionaire's activities may cause unreasonable risk to human health or property. Concessionaire shall defend, indemnify and hold the County, its officers and employees harmless from and against any cost, loss, liability, damage, claim, action, suit or proceeding arising from or relating to any physical damage or personal injury caused by such entry and the negligent acts or omissions of Concessionaire or its employees, agents, or contractors in performing due diligence at the Property; provided however, in no event shall Concessionaire be required to indemnify the County to the extent damage is related to or arising from the active or sole negligence, or willful misconduct of the County, its officers or employees.

4.3 Insurance. Concessionaire and its contractors, consultants, agents, and representatives shall carry, maintain, and keep in full force and effect, with an insurance company authorized to do business in California (1) a policy or policies of broad-form comprehensive general liability insurance written on an occurrence basis with minimum limits of \$2,000,000.00 combined single limit coverage against any injury, death, loss or damage as a result of wrongful or negligent acts by Concessionaire and its contractors, consultants, agents, and representatives and their respective officers, employees, agents, and independent contractors in performance of services under this Paragraph 4.3; (2) property damage insurance with a minimum limit of \$1,000,000.00; (3) automotive liability insurance, with minimum combined single limits coverage of \$1,000,000.00; and (4) worker's compensation insurance as required by law. County shall be added as an additional insured on the policy(ies) as to comprehensive general liability, property damage, automotive liability, and worker's compensation coverages, and such insurance shall include a waiver of subrogation. Concessionaire and its contractors, consultants, agents, and representatives shall deliver to County a copy of the certificates of insurance effectuating the insurance required hereunder, or such other evidence as County may reasonably require, prior to entry by Concessionaire and its contractors, consultants, agents, and representatives onto the Property, which certificates shall provide that such insurance shall not be terminated or modified without at least thirty (30) days' prior written notice to County.

Article 5 – Acknowledgements and Reservations

5.1 Need for DDA. The Parties acknowledge and agree that this Agreement is for the sole purpose of stating the intention of the Parties to negotiate and enter into a DDA. Other than with respect to those provisions of this Agreement which expressly state the agreement of the Parties and to which the parties are bound, the Parties have not reached agreement on the matters described herein for negotiation, and do not intend to be bound unless and until a final written

DDA is executed by both Parties. This Agreement is merely an agreement to enter into a period of negotiations and due diligence according to the concepts presented herein.

5.2 No Further Obligations. Unless otherwise expressly set forth in this Agreement, the County and Concessionaire agree that neither the County nor Concessionaire shall be under any further obligation to each other regarding the Property, the Project, or the development of the proposed concessions if this Agreement expires, is terminated for any reason, or a DDA is not executed by both the County and Concessionaire.

5.3 County Not Responsible for Costs. Except as otherwise may be mutually agreed to in writing by the Parties, as part of this Agreement or a DDA, the County shall not be liable for any costs associated with the preparation of any reports, studies, analysis, architectural plans, and any other documentation to be prepared by Concessionaire or its consultants or contractors, or planning or development of the Property pursuant to or arising from this Agreement, or costs of negotiations or legal fees expended by Concessionaire.

5.4 Limitations of this Agreement. Nothing contained in this Agreement shall constitute a waiver, amendment, promise or agreement by the County (or any of its departments or boards) as to the granting of any approval, permit, consent, or other entitlement in the exercise of the County's regulatory capacity or function. Concessionaire acknowledges and agrees that no County staff, consultant, or agent has the authority to bind the County, and the County will not be bound to any agreement nor to any course of action except after approval and execution of a DDA. The final form of any proposed DDA to be negotiated may contain matters not contemplated by this Agreement.

Article 6 – General Provisions.

6.1 Compliance with County Policies on Waste, Harassment, Drug/Alcohol-Free Workplace, and Computer Use. Concessionaire hereby agrees to use commercially reasonable efforts to comply, and require its employees and subcontractors to comply, with the following policies, copies of which are on file with the Clerk of the Board of Supervisors and incorporated by reference herein. Concessionaire also agrees that it shall use commercially reasonable efforts to not engage in any activities, or permit its officers, agents, and employees to do so, during the performance of any of the services required under this Agreement, which would interfere with compliance or induce violation of these policies by County employees or contractors.

(a) Waste Source Reduction and Recycled Product Content Procurement Policy adopted by resolution of the Board of Supervisors on March 26, 1991.

(b) County of Napa “Policy for Maintaining a Harassment and Discrimination Free Work Environment” revised effective August 23, 2005.

(c) County of Napa Drug and Alcohol Policy adopted by resolution of the Board of Supervisors on June 25, 1991.

(d) Napa County Information Technology Use and Security Policy adopted by resolution of the Board of Supervisors on April 17, 2001. To this end, all employees, and subcontractors of Concessionaire whose performance of services under this Agreement requires

access to any portion of the County computer network shall sign and have on file with County's ITS Department prior to receiving such access the certification attached to said Policy.

(e) Napa County Workplace Violence Policy, adopted by the Board of Supervisors effective May 23, 1995 and subsequently revised effective November 2, 2004, which is located in the County of Napa Policy Manual Part I, Section 37U.

6.2 No Waiver. The waiver by either Party of any breach or violation of any requirement of this Agreement shall not be deemed to be a waiver of any such breach in the future, or of the breach of any other requirement of this Agreement.

6.3 Interpretation; Venue.

6.3.1 Interpretation. This Agreement shall be interpreted and governed by the laws of the State of California without regard to the choice of law or conflicts.

6.3.2 Venue. This Agreement is made in Napa County, California. The venue for any legal action in state court filed by either Party to this Agreement for the purpose of interpreting or enforcing any provision of this Agreement shall be in the Superior Court of California, County of Napa, a unified court. The venue for any legal action in federal court filed by either Party to this Agreement for the purpose of interpreting or enforcing any provision of this Agreement lying within the jurisdiction of the federal courts shall be the Northern District of California.

6.4 Compliance with Laws. Concessionaire shall observe and comply with all applicable federal, state, and local laws, ordinances, and codes.

6.5 Severability. If any provision of this Agreement, or any portion thereof, is found by any court of competent jurisdiction to be unenforceable or invalid for any reason, such provision shall be severable and shall not in any way impair the enforceability of any other provision of this Agreement.

6.6 Entirety of Contract. This Agreement, including any documents expressly incorporated by reference whether or not attached hereto, constitutes the entire agreement between the Parties relating to the subject of this Agreement and supersedes all previous agreements, promises, representations, understandings, and negotiations, whether written or oral, among the Parties with respect to the subject matter hereof.

6.7 Counterpart and Facsimile Signatures. This Agreement may be signed in counterparts and by facsimile signatures, all of which when taken together shall constitute one and the same Agreement.

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IN WITNESS WHEREOF, this Agreement is executed by the County, acting by and through the Chair of the Board of Supervisors, and by Concessionaire through its duly authorized officer.

LB SMI, LLC

DocuSigned by:
David Filler
By: _____
FE8B2D02A8BC42A...

NAME: David Filler

NAPA COUNTY, a political subdivision of
the State of California

By: _____
RYAN GREGORY, Chair
Board of Supervisors

<p>APPROVED AS TO FORM Office of County Counsel</p> <p>By: <u>Thomas C. Zeleny</u> Interim County Counsel</p> <p>Date: <u>June 23, 2022</u></p>	<p>APPROVED BY THE NAPA COUNTY BOARD OF SUPERVISORS</p> <p>Date: _____ Processed By: _____ Deputy Clerk of the Board</p>	<p>ATTEST: NEHA HOSKINS Clerk of the Board of Supervisors</p> <p>By: _____</p>
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