

**AGREEMENT FOR PROFESSIONAL SERVICES**

*Between*

**Gandy Marley, Inc. (CLIENT)**

*And*

**CMB Environmental & Geological Services, Inc. (CMB)**

**Contract No. 2004/12/01**

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THIS AGREEMENT is made on the 1<sup>st</sup> day of December, 2004\_\_\_\_, by and between Gandy Marley Inc. (Hereinafter called "CLIENT"), and Clayton M. Barnhill, DBA CMB Environmental & Geological Services, Inc. (Hereinafter called "CMB"), a New Mexico Corporation with its principal place of business in Roswell, New Mexico.

WHEREAS CLIENT desires that CMB perform professional services related to conducting a environmental consulting services associated with Gandy Marley Commerical Landfarm located in sections 4, 5, 8, & 9 T.11S. R. 31 E. Chaves Co., New Mexico hereinafter referred to as the "PROJECT," and

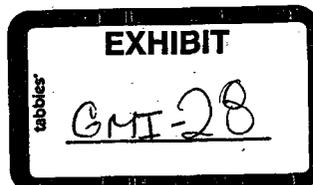
WHEREAS CMB has agreed to perform such services,

NOW, THEREFORE, for and in consideration of the mutual covenants hereinafter contained, subject to the following terms and conditions, and to the attached Additional Conditions of Agreement for Professional Services, CLIENT and CMB do hereby covenant and agree as follows:

PART I - SERVICES

Conduct Environmental Consulting services as described on the attached proposal to CLIENT, and all addenda attached thereto.

PART II - COMPENSATION



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CMB will perform the services for the fee schedules shown on the attached Proposal for Professional Services, and all attachments thereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and date first above written.

FOR: CMB ENVIRONMENTAL &  
GEOLOGICAL SERVICES, Inc.:

BY: 

Clayton M. Barnhill

FOR: Gandy Marley Incorporated

BY: 

Larry Gandy

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## 1.0 - DESCRIPTION OF SERVICES

### 1.1 General

1.1.1 CMB agrees to provide professional services for the PROJECT as more completely described in the Agreement for Professional Services entered into between CMB and CLIENT on this same date, and, as appropriate, in any Addenda to that Agreement jointly entered into between CMB and CLIENT.

1.1.2 Hereinafter, the term "Agreement" shall refer both to the Agreement for Professional Services entered into between CMB and CLIENT on this date, and to any Addenda to that Agreement.

### 1.2 Pertaining to CMB's Services

1.2.1 CMB's investigation shall be performed, within the limits and constraints prescribed by CLIENT, in a manner consistent with that level of care and skill ordinarily exercised under similar circumstances by other professional consultants practicing in this or similar localities. No other representations to CLIENT, expressed or implied, and no warranty or guarantee is included or intended in the Agreement, or in any report, opinion, document, professional advice or otherwise.

1.2.2 CMB agrees to maintain insurance for general liability, worker's compensation, and environmental impairment errors and omissions insurance for

services performed by CMB on PROJECT. The foregoing insurance shall cover CMB only.

1.2.3 CMB agrees to hold CLIENT harmless from any liens for materials and labor furnished by CMB in connection with CMB's work.

1.2.4 CMB reserves the right to enter into sub-agreements with other professionals for portions of the work included under the Agreement. Where such a sub-agreement would represent a major portion of the work, CMB shall receive approval of CLIENT for this sub agreement.

1.2.5 All documents including drawings and specifications, furnished by CMB pursuant to the Agreement, are the instruments of CMB's services in respect to the PROJECT. CMB grants

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to CLIENT a nonexclusive license for CLIENT's use of the documents on the PROJECT. They are not intended or represented to be suitable for reuse by CLIENT or others on extensions of the PROJECT or on any other project. Any reuse without the specific written verification or adaptation by CMB will be at CLIENT's sole risk and without liability or legal exposure to CMB from all claims, damages, losses and expenses, including attorneys fees, arising out of or resulting therefrom. Any such verification, adaptation or reuse will entitle CMB to further compensation to be agreed on by CLIENT and CMB.

1.2.6 Whenever CLIENT elects to enter into any contract or agreement with any person or entity other than CMB for the

performance of services on the PROJECT, CMB will not be responsible for the acts or omissions of said persons or entity at the site or otherwise performing such services. This includes those parties for whom CMB is providing coordination. Neither CMB's authority to act under the Contract Documents or under the Agreement nor any decision made by CMB in good faith either to exercise or not exercise such authority shall give rise to any duty or responsibility of CMB to the above, or any of their agents, or employees or any other person performing any services for CLIENT testing or observation of portions of the work of other parties on the PROJECT shall not relieve other parties from their responsibility for performing their work in

accordance with applicable plans, specifications, and safety requirements.

1.2.7 CMB has not been retained or compensated to provide design and construction review services relating to safety precautions or to means, methods, techniques, sequences, or procedures, all as may be required for any person or entity other than CMB to perform their work, including but not limited to shoring, scaffolding, underpinning, temporary retainment of excavations, any erection methods or temporary bracing methods, confined space entry, environmental sampling, soil boring, and rock drilling.

1.2.8 CMB in no way undertakes to be responsible for any personal injury or property damage

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occurring to any person or entity arising out of the construction or subsequent operation of this PROJECT by any person or entity unless same shall be found to be the result of a design error. In spite of this, if any claims shall be brought against CMB of that nature, CLIENT agrees to defend, indemnify and hold harmless CMB from all claims, damages and expenses including attorneys fees arising out of such claim, which claim, damages and expenses are the result or attributable to the acts or omissions in whole or in part of any person or entity other than CMB.

1.2.9 Original documents, notes, and the like, except those furnished to CMB by CLIENT, represent CMB's cumulative knowledge and are, and shall remain, the

property of CMB and shall not constitute the work product of the Agreement.

1.2.10 It is hereby acknowledged that CMB has procured a general liability insurance policy and an environmental impairment errors and omissions insurance policy to protect it from certain claims, as more fully described therein.

CLIENT shall indemnify CMB against and hold CMB harmless from all claims, damages and expenses, including attorney's fees arising out of or resulting from any claim not covered by CMB's general liability insurance policy or by CMB's environmental impairment errors and omissions insurance policy, including such claims, damages and expenses which arise out of the acts or omissions of CMB.

CLIENT shall also indemnify CMB against and hold CMB harmless from all claims, damages and expenses, including attorney's fees which are beyond the liability limits of CMB's general liability insurance policy or of CMB's environmental impairment errors and omissions insurance policy, including such claims, damages and expenses which arise out of the acts or omissions of CMB.

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**1.3 Pertaining to CLIENT**

1.3.1 CLIENT shall provide at CLIENT's expense (unless CMB has specifically included them in the Agreement) and in such a manner that CMB may rely upon them in the performance of CMB's services under the Agreement, all criteria, design, and construction standards including full information as to CLIENT's requirements for the PROJECT. Such information may include but not be limited to:

1.3.2 CLIENT shall designate a person authorized to act as CLIENT's representative. CLIENT or CLIENT's representative shall receive and examine documents submitted by CMB and shall be empowered to interpret and define CLIENT's

**1.3.1.1**

Laboratory tests, soils data, reports and inspections of samples, materials or other items, with appropriate professional interpretations.

**1.3.1.2 A**

complete survey of the PROJECT site which shall include but not be limited to easements, right-of-way, encroachments, zoning and deed restrictions, existing buildings and improvements.

**1.3.1.3** Legal, accounting, financial and policies and render decisions and authorizations in writing promptly to prevent unreasonable delay in the progress of CMB's services.

**1.3.3** CLIENT shall give prompt written notice to CMB whenever CLIENT observes or otherwise becomes aware of any

insurance counseling services necessary for the PROJECT including legal review of the Construction Contract Documents.

**1.3.1.4** Permits and approvals from any authorities having jurisdiction over the PROJECT.

defect in the PROJECT or other event which may substantially affect CMB's performance of services under the Agreement.

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## 1.4 Right of Entry

1.4.1 CLIENT will guarantee full and free access for CMB's personnel, and subcontractors and all necessary equipment, to enter upon all property required for the performance of CMB's services under the Agreement.

While CMB will take reasonable precautions to minimize damage to property, it is agreed that in the normal course of work, some damage will occur. CLIENT shall be responsible to repair or correct such damage.

## 1.5 PROJECT Site

1.5.1 In the prosecution of CMB's work, CMB will take reasonable precautions to avoid damage or injury to subterranean structures or utilities.

CLIENT agrees to hold CMB harmless for any damage to subterranean

structures or utilities which are not called to CMB's attention and correctly shown on plans furnished to CMB.

CMB shall backfill all borings or excavations on completion of CMB's work. Settlement of the backfill may occur and CLIENT shall be responsible for filling holes as required. CMB shall not be responsible for any such settlement.

1.5.2 CLIENT will make available to CMB all information readily available to CLIENT regarding existing and proposed conditions of the site which will aid CMB in the PROJECT. The information shall include, but not be limited to plot plans, topographic surveys, hydrologic data, subterranean structures and utilities, and previous soil data including borings, field or laboratory tests, and

written reports. Owner will immediately transmit to CMB any new information, which becomes available or any change in plans. CMB shall not be liable to CLIENT for any incorrect advice, judgment or decision based on any inaccurate information furnished by CLIENT, CLIENT's agents or CLIENT's other consultants, and CLIENT will indemnify CMB against claims, demands or liability to the extent arising out of or contributed to by such information. CMB shall be entitled to rely upon all such information without re-performing any of the environmental/geotechnical work reflected in any reports, data or information so furnished and CLIENT warrants the accuracy and suitability of same.

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1.5.3 CLIENT recognizes that commonly used exploration methods such as drilling bore holes and excavating trenches involve inherent risk of injury or damage which cannot be avoided. Exploration methods may penetrate through an aquifer of contaminated fluid that may result in contamination of groundwater systems and wells. While backfilling and grouting are intended to provide seals against ongoing contamination, it is recognized that such seals may be imperfect. In recognition of the inherent risks of injury and damage to persons and the environment, CLIENT agrees to hold harmless and indemnify CMB for any claim whatsoever by CLIENT or third parties arising out of drilling, trenching, or related activities,

including but not limited to attempts to backfill or grout trenches and borings.

## 1.6 Sample Handling and Retention

1.6.1 Generally, test samples or specimens are consumed or substantially altered during the conduct of tests and CMB, at CMB's sole discretion will dispose (subject to the following) of any remaining residue immediately upon completion of tests.

1.6.1.1 NON-HAZARDOUS SAMPLES. At Client's written request, CMB will maintain preservable test samples or the residue there from for 30 days after submission of CMB's report, free of storage charges. After the initial 30 days and upon written request, CMB will retain test specimens or samples

for a mutually acceptable storage charge and period of time. Owner agrees that it will not hold CMB responsible or liable for any loss of test specimens or samples retained in storage.

### 1.6.1.2

HAZARDOUS OR POTENTIALLY HAZARDOUS SAMPLES. In the event that samples contain substances or constituents hazardous or detrimental to health, safety or the environment as defined by federal, state or local statutes, regulations, or ordinances, CMB will, after completion of testing and at CLIENT's expense, return such samples to CLIENT, or, using a manifest signed by CLIENT as generator, CMB will have such samples transported to a location selected by CLIENT for final disposal. CLIENT

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agrees to pay all costs associated with the storage, transport, and disposal of samples. CLIENT recognizes and agrees that CMB is acting as a bailee and at no time assumes title to said waste.

**1.7 Hazardous Substances and Constituents**

1.7.1 CLIENT agrees to advise CMB, upon execution of the Agreement, of any hazardous substances or any condition existing in, on or near the site presenting a potential danger to human health, the environment, or equipment of which CLIENT has knowledge, information, or belief. CLIENT agrees to provide to CMB immediately and on a continuing basis any such information subsequently available to CLIENT. CMB does not assume control of or responsibility for the site or the person in charge of the site, or undertake responsibility for reporting to any federal, state or local public agencies any conditions at the site that may present a potential danger to public health, safety or the environment. CLIENT

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does hereby agree to assume such control and responsibility, and further agrees to notify the appropriate federal, state or local public agencies as required by law or otherwise to disclose, in a timely manner, any information that may be necessary to prevent any danger to health, safety or the environment. In connection with hazardous waste, CLIENT agrees to the maximum extent permitted by law to defend, hold harmless and indemnify CMB from and against any and all 1.7.1.5 CMB's discovery of, or failure to discover, hazardous substances or constituents on, in or under the site.

1.7.2 CMB shall have no liability to CLIENT for detecting or failing to detect the presence of hazardous substances

claims and liabilities resulting from:

1.7.1.1 CLIENT's violation of any federal, state or local statute, regulation or ordinance relating to the disposal of hazardous substances or constituents;

1.7.1.2 CLIENT's undertaking of or arrangement for the handling, removal, treatment, storage, transportation or disposal of hazardous substances or constituents found or identified at the site.

1.7.1.3 Changed conditions or hazardous or constituents on, in or under the site.

substances or constituents introduced at the site by CLIENT or third persons before, during or after the completion of services herein;

1.7.1.4 Allegations that CMB is a handler, generator, operator, treater or storer, transporter, or disposer under the Resource Conservation and Recovery Act (RCRA) of 1976 as amended, or any other similar Federal, state or local statute, ordinance, regulation or law;

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## 1.8 Contaminated Equipment

1.8.1 Costs related to decontamination of equipment will be charged to CLIENT in those instances where contact by substances encountered at the site requires decontamination efforts beyond that routinely provided by CMB or its subcontractors.

## 1.9 Unforeseen Occurrences

1.9.1 If, during the performance of services, any unforeseen hazardous substances or constituents or other unforeseen conditions or occurrences are encountered which, in CMB's sole judgment significantly affect or may affect the services, the risk involved in providing the services or the recommended Scope of Services, CMB will promptly notify CLIENT thereof. Subsequent to that notification, CMB may:

1.9.1.1 If practicable, in CMB's sole judgment, complete the Agreement's Scope of Services in accordance with the procedures originally intended.

1.9.1.2 Agree with CLIENT to modify the Scope of Services

and the estimate of charges to include study of the previously unforeseen conditions or occurrences, such revision to be in writing and signed by the parties and incorporated herein; or

### 1.9.1.3

Terminate the services immediately and/or effective on the date specified by CMB in writing.

1.9.2 CLIENT recognizes that the state of practice, particularly with respect to hazardous waste conditions, is changing and evolving. For example, the technology involved in the detection, removal and/or treatment of hazardous substances is constantly evolving and the interaction of soils and groundwater with hazardous substances is not fully understood at this time. CMB will be required to perform in

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reasonable accordance with the standards set forth in effect at the time its services are performed, but will not be held accountable to standards which later might be modified due to changes in the state of practice.

**1.10 Confidentiality**

1.10.1 CMB shall hold confidential all business or technical information obtained from CLIENT or its affiliates or generated in the performance of services under the Agreement. CMB shall not disclose such information without CLIENT's consent except to the extent required for (1) performance of services under the Agreement; (2) compliance with professional standards of conduct for preservation of public safety, health, and welfare; (3) compliance with any court order or other governmental directive; and/or (4) protection of CMB against claims or liabilities arising from performance of services under the Agreement. CMB's obligations hereunder shall not

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apply to information in the public domain or lawfully acquired on a non-confidential basis from others.

## 1.11 Limitations on Performance

1.11.1 Soil, water and other geologic conditions can vary significantly between borings, groundwater wells, test pits, and surface outcrops. CLIENT recognizes that environmental, geologic and geotechnical conditions can vary from those encountered at the times and locations where data are obtained by CMB, and that the limitation on available data results in some level of uncertainty with respect to the interpretation of these conditions, despite the use of due professional care.

1.11.2

Conditions revealed

by excavation or drilling may be at variance with preliminary findings. If this occurs, the changed conditions will be evaluated by CMB's PROJECT Manager. If necessary, will modify the Scope of Services through an Addendum to the Agreement.

1.11.3 Reports prepared under the Agreement will be prepared under constraints of cost, time, and scope and reflect a limited investigation and analysis rather than a full, total, complete, or extensive investigation and analysis. Such reports become invalid with the passage of time due to changes and conditions in the property which result from natural processes or the works of man on this or adjacent properties. Changing standards and expanded knowledge

may also cause reports to become invalid.

1.11.4 The findings of all reports may be invalidated wholly or partially by changes beyond CMB's control. Reports produced under the Agreement shall not be relied upon if there have been any changes in site conditions, regulations, or standards.

1.11.5 It is recognized that many desired or required results cannot be accomplished in an absolute sense, e.g., the detection and clean-up of all hazardous substances. Whenever a desired or required result cannot be accomplished in an absolute sense, in CMB's sole determination, CMB shall use due care in an attempt to accomplish the desired or required result but need not

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accomplish the result in an absolute sense.

1.11.6 CLIENT recognizes that installations in connection with hazardous waste sites, and sanitary landfill sites, monitoring projects, and certain remedial action techniques and procedures may not perform in the field as anticipated by CLIENT, even if CMB's services are performed according to the level of care and skill ordinarily exercised by other professional consultants under similar circumstances.

## 2.0 - COMPENSATION FOR SERVICES

### 2.1 General

2.1.1 CLIENT shall compensate CMB for services rendered under the Agreement. The method of compensation for said services shall be as set forth in the Agreement.

2.1.2 Payments for Services are due when invoiced, unless another schedule of payments is agreed upon in the Agreement.

2.1.3 Where CLIENT disputes some portion of the charges contained in CMB's bill for services, CLIENT shall make payment of that portion of the bill which is undisputed and shall notify CMB in writing of

the reason for CLIENT's dispute. In no case may CLIENT elect to withhold payment to CMB of the entire amount due. This would constitute a failure to make payment.

2.1.4 If CLIENT fails to make any payment due CMB for services and expenses after receipt of CMB's bill therefor, the amounts due CMB shall include a charge at the rate set forth in the Agreement. In addition, CMB may, after giving ten (10) days written notice to CLIENT, suspend services under the Agreement until CMB has been paid in full all amounts due CMB under the Agreement.

## 3.0 - GENERAL PROVISIONS

### 3.1 General

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3.1.1 The Agreement is the result of final negotiations between CLIENT and CMB and represents the entire and integrated agreement between CLIENT and CMB for the PROJECT and supersedes all prior negotiations, representations or agreements, either written or oral. The Agreement may be amended only by written instrument signed by both CLIENT and CMB.

3.1.2 Neither party shall hold the other responsible for damages or delay in performance by acts of God, strikes, lockouts, accidents, or other events beyond the control of the other or the other's agents. However, when these delays require additional work to be performed by CMB, CMB shall be entitled to additional compensation at CMB's prevailing "Time and Materials Rates" or as

otherwise agreed to between CLIENT and CMB.

3.1.3 The Agreement may be terminated by either party if the other party substantially fails to fulfill its obligations under the Agreement through no fault of the terminating party. No such termination may be effected unless the other party is given not less than ten calendar days written notice of intent to terminate and an opportunity for correcting the default and for consultation with the terminating party before termination. In addition, CLIENT may terminate the Agreement, in whole or in part, for cause (such as for legal or financial reasons, or major changes in the work or program requirements), and CMB is given not less than ten (10) calendar days written notice and an opportunity for

consultation before termination. If CLIENT terminates as a result of CMB's default, any payment due CMB at the time of termination may be adjusted to the extent of any additional cost CLIENT incurs due to CMB's default. If CMB terminates as a result of CLIENT default or CLIENT terminates for cause, CMB shall be paid for services performed to the termination date including reimbursable expenses due. Upon receipt of the terminating action, CMB shall promptly discontinue all services unless the notice directs otherwise, and upon receipt of final compensation make available to CLIENT all appropriate documents prepared under the Agreement.

3.1.4 The parties to this agreement, acknowledging that each has a constitutional and

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statutory right to trial by jury, hereby waive this right in any action or proceeding of any kind or nature in any court to which they may both be parties arising out of the Agreement or the transaction associated with the Agreement regardless of the nature of the causes of action alleged.

3.1.5 Unless otherwise specified within the Agreement, the Agreement shall be governed by the laws of the State of Wisconsin.

3.1.6 In the event any provisions of the Agreement shall be held to be invalid and unenforceable, the remaining provisions shall be valid and binding upon the parties.

One or more waivers by either party of any provision, term, condition or covenant shall not be construed by the other party as a waiver of a subsequent breach of

the same by the other party.

3.1.7 CLIENT may not assign or transfer CLIENT's duties or interest in the Agreement without CMB's written consent.

3.1.8 The Agreement shall inure to the benefit of and be binding upon the successors and permitted assigns of CLIENT.

3.1.9 The PROJECT shall not include asbestos sampling and analysis by CMB. If asbestos sampling and analysis is required as part of this site assessment, CLIENT shall contract directly with an entity to complete the asbestos sampling and analysis.

3.1.10 CLIENT shall provide all legal services necessary for the PROJECT including, but not limited to necessary counseling regarding compliance

with federal and state environmental regulations.

3.1.11 CLIENT agrees that any claims made by CLIENT, its heirs, successors, or assignees, or other affected parties which requires or results in the performance of additional site investigation work or remedial work compensated by CMB's errors and omissions or professional liability insurance coverage will be completed solely by CMB, or under the direction of CMB, unless CMB declines in writing to perform the services.