

Instrument # 411289

RIGBY, JEFFERSON, IDAHO

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CHRISTINE BOULTER

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Index to: STIPULATION

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 25-14379 IN THE NAME OF
M&B INVESTMENTS

STIPULATION FOR
WITHDRAWAL OF PROTESTS

THIS STIPULATION FOR WITHDRAWAL OF PROTESTS (this "Stipulation") is made and entered into as of the ___ day of April, 2014, by and between M&B Investments, LLC (hereinafter, "M&B"), the Sunbrook Estates Association, Inc. (hereinafter, the "the HOA"), and the A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company (hereinafter, collectively the "Protestants"). M&B, the HOA, and the Protestants are hereinafter collectively referred to as the "Parties."

RECITALS:

- A. Application for Permit No. 25-14379 seeks a water right from the Idaho Department of Water Resources ("IDWR") for .39 cfs of water for the outside use (e.g., irrigation) of 39 lots located within the Sunbrook Estates subdivision (simply, the "subdivision"), which is located in Jefferson County, Idaho. A copy of the final plat for the subdivision is attached hereto as Exhibit 1.
- B. On September 24, 2012, after Application for Permit No. 35-14379 was advertised pursuant to Idaho law, it was protested by the Protestants on numerous grounds.
- C. One of the bases for protest relates to an earlier *Stipulation to Resolve Protests* between M&B and the Protestants (dated April 5, 2005) which was submitted in conjunction with

a separate water right proceeding involving Application for Permit No. 25-14163. Based on the stipulation, Permit No. 25-14163 was eventually issued to M&B to be used in the subdivision for in-house domestic purposes only, and that "[i]rrigation water for lawns, gardens, landscaping, and common areas is provided by a separate surface water system with appurtenant canal shares of the Rigby Canal and Irrigating Company, Inc." Permit No. 25-14163, condition no. 6.

- D. Subsequent to issuance of Permit No. 25-14163, M&B determined that it was unable to deliver the surface water from the Rigby Canal and Irrigation Company, Inc. (hereinafter, "Rigby Canal"), to the subdivision.
- E. As a result, M&B filed the present Application for Permit, seeking to divert groundwater for the irrigation of lawns, gardens, landscaping and common areas and has proposed to mitigate for ground water use for irrigation within the subdivision by recharging with water allocated to 17 shares of Rigby Canal water.
- F. The HOA (Sunbrook Estates Association, Inc.) is the homeowner's association affiliated with the subdivision.
- G. Therefore, in lieu of participating in administrative hearings provided for under Idaho law, the Parties hereby agree as set forth below.

AGREEMENTS:

- 1. **Conveyance of Shares to HOA.** Within thirty (30) days of the execution of this Stipulation, M&B shall execute the necessary stock certificate and other associated documents required to assign and convey seventeen (17) shares of its stock in Rigby Canal to the HOA. M&B shall mail a copy of the newly-issued 17-share stock certificate to the Protestant's counsel within fourteen (14) days of its receipt.
- 2. **Covenant for HOA to Retain Shares and Pay Assessments.** The HOA, its successors or assigns, covenants that it will retain the above-described 17 shares for as long as water is diverted pursuant to 25-14163 and 25-14379, and shall pay assessments for such shares to Rigby Canal, its successors or assigns. After execution, this Agreement shall be recorded in the records of Jefferson County, Idaho, and the rights and obligations pertaining to this covenant shall run with the entirety of the ground encompassed by the Sunbrook Estates subdivision.
- 3. **Delivery of Water Allocated to 17 Shares.** The HOA shall instruct Rigby Canal to deliver water allocated to its 17 shares through the canal identified as Exhibit 2 attached hereto just as it would for delivery of irrigation water associated with the 17 shares where the canal will effectively serve as a recharge site. After review of historical delivery data and modeling with IDWR's Eastern Snake Plain Aquifer Model (ESPAM), the Parties agree that recharge of such water allocated to the 17 shares provides acceptable

mitigation for the impacts from ground water pumping under water right 25-14379 to various reaches of the Snake River because the water diverted for mitigation will be delivered to a pond where it will recharge the aquifer.

4. **Failure to Delivery Water Allocated to 17 Shares.** M&B, the HOA, and any successors and assigns, agree that, in the event of any failure to deliver water allocated to the 17 shares to mitigate for 25-14379 pursuant to this stipulation, all diversions under water right 25-14379 shall immediately cease until M&B, the HOA and/or any successors and assigns can show that it is in compliance with the terms of this Stipulation. In addition, M&B, the HOA and any successors and assigns acknowledge that the failure to deliver water allocated to the 17 shares to mitigate for 25-14379 may also subject M&B and/or the HOA to a formal notice of violation pursuant to Idaho Code §§ 42-351 and 42-607, as well as an administrative enforcement action pursuant to Idaho Code § 42-1701B, the result of which could be injunctive action, fines, and/or requirements to obtain water supplies to mitigate for the unmitigated water usage as restitution.
5. **Amendment to *Stipulation to Resolve Protest* for Permit No. 25-14163** (dated April 5, 2005). This Stipulation amends the prior *Stipulation to Resolve Protest* for Permit No. 25-14163 between M&B and the Protestants insofar as that stipulation requires irrigation of lawn, garden, landscape, or other types of irrigation to be accomplished by the Rigby Canal water. Use of water for such irrigation may now be accomplished with the diversion and use of ground water, pursuant to the terms of this Stipulation. M&B may submit a copy of this Stipulation to IDWR in order to amend the current permit conditions accordingly, or include such conditions upon the issuance of the license for 25-14163.
6. **IDWR Conditions Upon Issuance of Permit No. 25-14379.** Regarding this Stipulation, IDWR shall add the following conditions, or conditions in substantially the same form, to the final order issuing Permit No. 25-14379:
 - i. The diversion and use of water described in this right may be subject to additional limitations agreed to by the protestant(s) and the right holder under separate agreement recorded as Instrument No. _____ in the records of Jefferson County, Idaho, to which the Department is not a party and which may be enforceable by a court of law.
 - ii. The holder of this water right shall submit copies of the annual diversion records demonstrating that shares of water from Rigby Canal and Irrigation Company, Inc. were delivered to the holder of this water right to mitigate impacts of diversions under this water right.
7. **Withdrawal of Protest.** Provided IDWR includes the above condition in its approval, and in exchange for the agreements herein, the Protestants hereby withdraw their protests. M&B may submit a copy of this Stipulation to IDWR and notify IDWR of such

withdrawal of protests.

8. **Reservation of Rights.** The Parties agree and acknowledge that this Stipulation only resolves the protest to Application for Permit No. 25-14379 and amends the *Stipulation to Resolve Protest* for Permit No. 25-14163, and that the Protestants reserve all rights to pursue protests to other applications for permit and/or transfers in the future filed by M&B or the HOA. The Parties shall not use this Stipulation in any other administrative or judicial proceedings for any purpose, other than an action to enforce its terms as provided in paragraph 12 below.
9. **Reliance Upon Statements/Integration and Merger.** The Parties hereto specifically acknowledge that they were represented by counsel in this matter, and agree that other than as is set forth herein, they have executed this Stipulation without relying upon any statements or representations written or oral, as to any statement of law or fact made by any other party or attorney. The Parties to this Stipulation have read and understand the Stipulation, and warrant and represent that this Agreement is executed voluntarily and without duress or undue influence on the part of or on behalf of any party. This Agreement represents the sole entire and integrated Stipulation by and between the parties hereto, and supersedes any and all prior understandings or agreements whether written or oral except as specifically provided herein.
10. **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of each Parties' officers, directors, shareholders, heirs, successors and assigns, and shall be specifically enforceable.
11. **Waiver and Modification.** No provision of this Agreement may be waived, modified, or amended except by written agreement executed by all of the Parties hereto.
12. **Enforcement and Interpretation.** This Stipulation is a valid and binding obligation of the parties, and their successors or assigns. It shall be admissible and enforceable according to its terms, and venue in any subsequent action shall rest within the State of Idaho. This Stipulation is subject to interpretation in accordance with the laws of the State of Idaho.
13. **Counterparts.** This Stipulation may be executed in counterparts, each of which is deemed an original but all of which constitute one and the same instrument. The signature pages may be detached from each counterpart and combined into one instrument.

[SIGNATURES ON NEXT PAGE]

M&B INVESTMENTS, LLC

Dean M. Mortimer

By: Comfort Construction, Inc.

Its: Member

By: Dean M. Mortimer

Its: President

STATE OF IDAHO)

)ss,

County of Bonneville)

On the 10 day of April, 2014, before me the undersigned, a notary public in and for said State, personally appeared Dean M. Mortimer, known or identified to me to be the President of Comfort Construction Inc., which corporation is one of the members of M&B Investments, LLC, and the member or one of the members who subscribed said limited liability company name to the foregoing instrument, and acknowledged to me that such member executed the same in said limited liability company name.

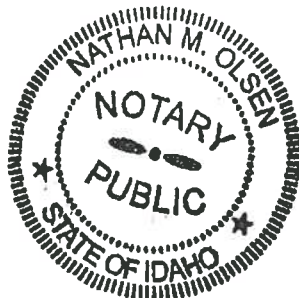
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(seal)

Nathan M. Olsen
Notary Public for Idaho

Residing at Idaho Falls, Idaho

My commission expires: 1/16/2019



SUNBROOK ESTATES ASSOCIATION, INC.

Dean M. Mortimer

By: Dean M. Mortimer

Its: Director

STATE OF IDAHO)

)ss.

County of Bonneville)

On the 10 day of April, 2014, before me, the undersigned, a notary public in and for said State, personally appeared Dean M. Mortimer, known or identified to me to be a director of the association that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such association executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

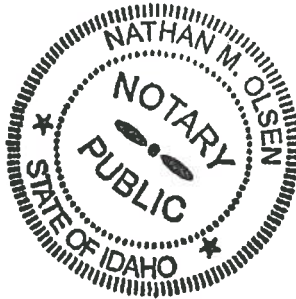
Nathan M. Olsen

(seal)

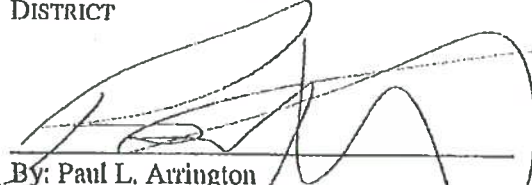
Notary Public for Idaho

Residing at Idaho Falls, Idaho

My commission expires: 1/16/2019



A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, AND MILNER IRRIGATION DISTRICT

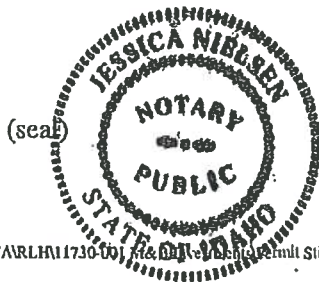


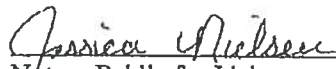
By: Paul L. Arrington
of the firm Barkel, Rosholt & Simpson, LLP
Attorneys for A&B Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company, and Milner Irrigation District

STATE OF IDAHO)
)ss.
County of Twin Falls)

On the 3rd day of April, 2014, before me, the undersigned, a notary public in and for said State, personally appeared Paul L. Arrington, known or identified to me to be the attorney of the entities that executed the instrument or the person who executed the instrument on behalf of said entities, and acknowledged to me that such entities executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.




Notary Public for Idaho
Residing at Twin Falls, Idaho
My commission expires: 4/3/18

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inbrook Estates to end.

