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HAILEY, BLAINE, IDAHO
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JOLYNN DRAGE Fee: 37.00
Ex-Officio Recorder Deputy
Index to: AGREEMENT/CORRECTION

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HIAWATHA CANAL/SUNBEAM SUBDIVISION CANAL MAINTENANCE AGREEMENT

THIS HIAWATHA CANAL/SUNBEAM SUBDIVISION CANAL MAINTENANCE AGREEMENT (this "**Agreement**") is made and entered into this 19 day of August, 2020, by and between the HIAWATHA CANAL WATER USERS ASSOCIATION OF LATERAL OR LATERALS, organized and operating pursuant to provisions of Title 42, Chapter 13 of the Idaho Code ("**Canal Company**"), and MARATHON PARTNERS, LLC, an Idaho limited liability company, ("**Marathon**").

RECITALS

A. The Canal Company owns, operates and maintains an irrigation canal known as the Hiawatha Canal ("**Canal**"), a portion of the which traverses along the westerly boundary of the Sunbeam Subdivision according to the plat thereof on file or to be filed in the records of the Office of the Blaine County Recorder, Hailey, Idaho (the "**Subdivision**"), which Subdivision is currently owned and being developed by Marathon, and is more particularly described as set forth on attached Exhibit A (the "**Real Property**"). The location of the Canal portion within the Subdivision ("**Canal Portion**" or "**Canal Easement**") is depicted on Exhibit B attached hereto.

B. The purpose of the Canal is to deliver surface water from the Big Wood River to its members through the diversion structures located along the entire length of the Canal . which includes the delivery of Water Right 37-21112 to Marathon.

C. Marathon and the Canal Company desire to have the Canal Portion be maintained by Marathon and upon its creation by a Homeowners Association of the Subdivision (collectively the "**Association**") so that said maintenance is done in a manner acceptable to said Association and the owners of the lots, blocks and parcels of land within the Subdivision.

D. The Canal Company is willing to have the Canal Portion maintained first by Marathon and subsequently by the Association in a manner consistent with the terms and conditions set forth in this Agreement.

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each party, Marathon and the Canal Company hereby covenant and agree as follows:

1. MAINTENANCE OF THE CANAL PORTION (A). Marathon, and after its creation, the Association, shall maintain the Canal Portion and shall keep it in good condition and repair at its sole expense, except as set forth herein. Said maintenance shall

include, but not be limited to (i) inspection and cleaning, (ii) keeping the Canal Portion free of debris, fallen trees, shrubs, branches, silt, obstructions, weeds, and grasses, (iii) keeping the embankments free of debris, trees, brush, and aquatic plants and grasses (iv) keeping the embankments in good condition and repair, all so that the water in the Canal flows, and does not flow out of said Canal (except at established points of diversion) onto the Real Property or any portion thereof, and to ensure delivery of the water in the Canal to the owners thereof is not materially obstructed due to lack of maintenance. Upon creation of the Association, Marathon shall automatically be released from any and all obligations hereunder. Until that release, all references in this Agreement to the Association shall include and refer to Marathon.

(B). The Association shall conduct an annual spring cleaning of the Canal Portion so that the maintenance required by the Association under this Agreement is done by April 1st of each year. If during the year the Canal Company becomes aware of additional maintenance which needs to be done on the Canal it will so notify the Association, however, this provision does not relieve the Association of its independent continuing obligation to inspect and maintain the Canal Portion as set forth in this Agreement. The Association shall have no obligation to maintain or repair any portion of the Canal not part of the Canal Portion depicted on Exhibit B.

(C) In order for the Canal Portion to function properly and safely the Association and the owners of property within the Subdivision shall not, without the express prior written consent of the Canal Company:

- (i) place any obstructions such as dams, foot bridges (other than those approved by the City of Hailey and the Canal Company), rocks, etc., in or over the Canal Portion;
- (ii) build or place any fence, deck, patio or other structure within the Canal Easement and the additional building setbacks as shown on the Subdivision Plat;
- (iii) dig into the embankment within the Canal Easement (this is to avoid damage to or weakening of the embankment to prevent flooding or seepage);
- (iv) plant any tree, shrubs or other vegetation within the Canal Easement;
- (v) plant or place cattail, reed, rush or similar aquatic vegetation in the Canal, along its embankments, or in any pond or waterway in the subdivision
- (vi) dump or store grass clippings, compost, firewood, dirt, construction materials or other items within the Canal Easement;
- (vii) restrict the flow of the water within the Canal Portion; and

(viii) divert or use any water from the Canal Portion, except for any Big Wood River water rights that may be delivered to and lawfully used in the Subdivision.

(D) Marathon, the Association and its members and owners of the Real Property shall have the right to make use of the Real Property in any manner not expressly prohibited by this Agreement.

2. BREACH. If either party deems the other party to be in breach of any of its obligations or responsibilities with respect to the Canal Portion contained in this Agreement, the non-defaulting party shall give the defaulting party written notice of such breach which shall include a detailed description of such breach, and the defaulting party shall have thirty (30) days in which to cure the breach (unless due to an emergency immediate action is deemed necessary by the non-defaulting party), provided that if the nature of such breach is such that the same cannot with due diligence be cured within said period, the non-defaulting party shall not be deemed to be in default if it shall within said period, commence such curing and thereafter diligently prosecute the same to completion. If within said time the defaulting party does not cure the breach, the non-defaulting party may then undertake to cure the breach and the defaulting party shall pay the non-defaulting party for any and all expenses, which it may reasonably incur in doing so. In the case of an emergency (such as waters flooding out from the Canal due to an obstruction of the Canal or damage to its embankments, or reduction in the free flow of water due to an obstruction in the ditch during the irrigation season) where immediate action is reasonably deemed necessary by the Canal Company, the Canal Company may proceed without notice to the Association to take such actions as the Canal Company deems reasonably appropriate and the Association shall pay the Canal Company for any and all expenses which it may reasonably incur in doing so. The Association shall pay the Canal Company the expenses so incurred within thirty (30) days of billing by the Canal Company to the Association. In the event the Canal Company performs any maintenance of the Canal pursuant to this paragraph on the default of Marathon or the Association, such maintenance shall be done in a reasonable manner which includes without limitation the use of hand labor, chain saws, heavy construction equipment, burning, and herbicides along Canal and its embankments, and Marathon, the Association and each owner of lands within the Subdivision hereby irrevocably consents thereto. Any silt or debris removed by the Canal Company may be deposited within the easement premises, and the Canal Company is under no obligation to remove the debris or silt from the easement premises. However, such debris or silt may be removed from the easement premises by Marathon or the Association.

3. EASEMENT RIGHTS AND USE.

(A) This Agreement shall not affect in any way the Canal Company's rights to the Canal and its rights to use, access, maintain, repair or improve the Canal. Any debris and other material removed by the Canal Company may be deposited and remain within the easement premises. However, such debris or silt may be removed from the easement premises by Marathon or the Association.

(B) In the event that Marathon or the Association take delivery of water through and from the Canal for use in the Subdivision they shall be bound by the bylaws, rules and regulations of the Canal Company in the same manner as every other water user taking delivery of water through and from the Canal.

4. INDEMNIFICATION. The Association hereby agrees to indemnify, hold harmless and defend the Canal Company, its employees, agents, directors and officers from any and all injuries, damages, claims, causes of action and/or expenses for personal injury or death or damage to property, real or personal, arising out of or relating to any act or omission of the Association with regard to its obligations and responsibilities under this Agreement, any breach of any obligation or responsibility under this Agreement or of negligence with regard thereto. The Canal Company hereby agrees to indemnify, hold harmless and defend the Association and Marathon, their members, employees, agents, directors and officers from any and all injuries, damages, claims, causes of action and/or expenses for personal injury or death or damage to property, real or personal, arising out of or relating to any act or omission of the Canal Company with regard to its obligations and responsibilities under this Agreement or any applicable Idaho statute, rule or regulation, any breach of any obligation or responsibility under this Agreement or any applicable Idaho statute, rule or regulation or of negligence with regard thereto.

5. COVENANTS RUNNING WITH THE LAND. This Agreement shall be a covenant running with the land in perpetuity and shall inure to the benefit of and be binding upon the Canal Company and the Real Property and each and every portion thereof.

6. NOTICES. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Agreement or by law to be served on or given to either party hereto by the other party hereto shall be in writing and shall be deemed duly served and given when personally delivered to the party to whom it is directed, or in lieu of such personal service when deposited in the United States Mail, first-class postage prepaid, addressed as follows:

Canal Company:
Hiawatha Canal Water Users
Association
P.O. Box 1604
Hailey, ID 83333

With copy to:
James W. Phillips
P.O. Box 864
Hailey, Idaho 83333

Marathon: Marathon Partners, LLC.
POB 3118
Ketchum, ID 83340
Attn: Ed Dumke, Manager

With copies to:

LAWSON LASKI CLARK, PLLC
POB 3310
Ketchum, ID 83340
Attn: Edward A. Lawson

SPECK & AANESTAD, PLLC
POB 987
Ketchum, ID 83340
Attn: James P. Speck

or such other address as any party may hereafter in writing to the other designate.

7. GENERAL PROVISIONS,

a. Severance and Validity. In the event any provision of this Agreement or any part thereof shall be determined by any court of competent jurisdiction to be invalid, void, or otherwise unenforceable, the remaining provisions hereunder, or part thereof, shall remain fully in force and effect, it being agreed that such remaining provision shall be construed in a manner most closely approximating the intention of the parties with respect to the invalid, void, or unenforceable provision or part thereof .

b. Attorney Fees. In the event of any suit or proceeding by either party herein against the other party, in any way arising out of this Agreement, or attempting to enforce any right herein granted, the no-prevailing party, in such suit or proceeding shall pay to the prevailing party such sum or sums as the court shall adjudge reasonable, in such suit or proceeding, for attorney's fees, including such fees on appeal, for such prevailing party.

c. Governing Law. The validity, meaning and effect of this Agreement shall be determined in accordance with the laws of the state of Idaho without reference to its conflicts of law.

d. Captions to Paragraphs. The captions to the paragraphs of this Agreement are for convenience only and shall not be deemed to enlarge, diminish, explain or in any manner affect the meaning of such paragraphs.

e. Binding Contract. This Agreement shall be binding upon and inure to the benefit of the heirs, personal representative, administrators, successors, and assigns of the parties hereto.

f. Entire Agreement and Amendment. This Agreement contains the entire agreement between the Parties respecting the matters herein set forth and supersedes all prior agreements that may exist between the Parties respecting the matters contained in this Agreement. This Agreement may not be amended except in writing executed by the Parties hereto.

g. Assignment. This Agreement shall not be assigned by either party without the prior written consent of the other party except the Canal Company may assign this Agreement to a statutory lateral Canal water users' association pursuant to Title 42, Chapter 13 of the Idaho Code or similar organization created by the Canal Company for the Canal.

h. Waiver. Failure of any party to exercise its rights upon a breach or default of the other party shall not be constructed as a waiver of the right to insist upon full performance of all of the terms and conditions of this Agreement.

i. Recordation. This Agreement shall be recorded in the records of Blaine County, Idaho by either party. The costs of recordation shall be borne by the party recording this Agreement.

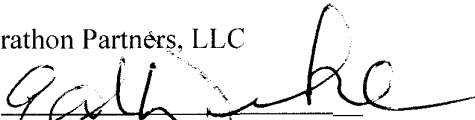
j. Recitals Incorporated. The recitals set forth in this Agreement are hereby incorporated herein by reference.

k. Exhibits Incorporated. Exhibit A and Exhibit B attached hereto are hereby incorporated herein by reference.

IN WITNESS WHEREOF the parties hereto have executed the foregoing Agreement on the date set forth above.

Marathon Partners, LLC

By



Ed Dumke, Manager

Hiawatha Canal Company

By



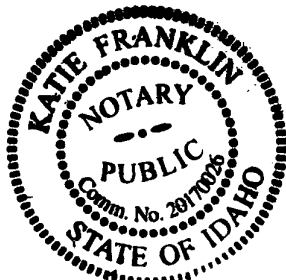
Title: Chairman

ACKNOWLEDGEMENTS

STATE OF IDAHO)
) ss.
County of Blaine)

On this 14th day of August, 2020, before me, the undersigned, a Notary Public in and for said County and State, personally appeared ED DUMKE, known or identified to be the Manager of Marathon Partners, LLC, an Idaho limited liability company, the limited liability company that executed the foregoing instrument or the person who executed the foregoing instrument on behalf of said corporation, and acknowledged to me that said limited liability company executed 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.

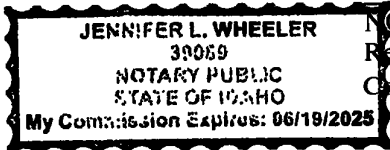


Katie Franklin
NOTARY PUBLIC FOR IDAHO
Residing at: Ketchum, ID
Commission expires: 7/3/23

STATE OF IDAHO)
) ss.
County of Blaine)

On this 2 day of September 2020 before me, the undersigned, a Notary Public in and for said County and State, personally appeared JAMES W. PHILLIPS, known or identified to be the Chairman of HIAWATHA CANAL WATER USERS ASSOCIATION OF LATERAL OR LATERALS, the statutory association that executed the foregoing instrument or the person who executed the foregoing instrument on behalf thereof, and acknowledged to me that said association executed 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.



Jennifer L. Wheeler
NOTARY PUBLIC FOR IDAHO
Residing at: Blaine County, ID
Commission expires: 6/19/25

EXHIBIT A
Sunbeam Subdivision Legal Description

TOWNSHIP 2 NORTH, RANGE 18 EAST, BOISE MERIDIAN, BLAINE COUNTY, IDAHO

SECTIONS 9 & 10: A parcel of land lying within the NE¹/₄NE¹/₄ of Section 9 and the NW¹/₄ of Section 10 being more particularly described as follows:

BEGINNING at the brass cap set by Bruce T. Butler, marking the Section Corner common to Sections 3, 4, 9 and 10, Township 2 North, Range 18 East, Boise Meridian, being the TRUE POINT OF BEGINNING;
Thence North 89°57'19" East, 1264.10 feet along the North boundary of Section 10 to a 5/8 inch bar;
Thence South 0°10'03" West, 689.85 feet to a 5/8 inch bar;
Thence South 89°53'37" East, 56.08 feet to a ½ inch mark marking the Southwest corner of Lot 1, Block 1, Marvin Gardens No. 1 Subdivision;
Thence South 0°06'23" West 1297.70 feet along the West boundary of said Marvin Gardens No. 1 Subdivision to a 5/8 inch bar marking the Southwest corner of said Subdivision;
Thence South 75°43'07" West, 684.58 feet along the South side of Quigley Gulch Road to a 5/8 inch bar;
Thence North 28°44'48" West, 401.16 feet along the East boundary of the original Hailey City Limits to a 5/8 inch bar;
thence South 73°36'04" East, 70.71 feet along Rathke Subdivision to a 5/8 inch bar;
Thence South 28°44'48" East, 307.29 feet along Rathke Subdivision to a 5/8 inch bar;
Thence North 75°43'07" East, 195.28 feet along Rathke Subdivision to a 5/8 inch bar;
Thence leaving said road North 22°39'16" West, 909.27 feet to a 5/8 inch bar at a fence corner;
Thence South 63°54'58" West, 413.85 feet to the approximate center line of the Hiawatha Canal;
Thence North 22°41'12" West, 183.40 feet to the South side of Carbonate Street;
Thence North 61°13'30" West, 57.97 feet to Hailey City Limits;
Thence North 28°45'58" West 80.00 feet to the North side of Carbonate Street (20 feet being vacated);
Thence South 61°13'30" West 49.45 feet to the centerline of the Hiawatha Canal;
Thence North 22°41'12" West, 466.90 feet to the intersection with the Hailey City Limits;
Thence continuing North 22°53'07" West, 779.28 feet along said canal to the North boundary of Section 9;
Thence South 89°25'28" East, 442.36 feet to the brass cap marking the TRUE POINT OF BEGINNING.

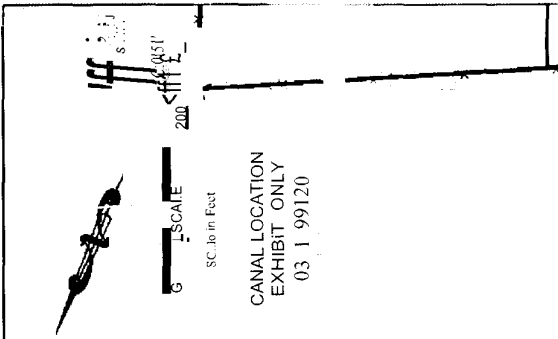
EXCEPTING THEREFROM: A parcel of land located in Section 10, Township 2 North, Range 18 East, Boise Meridian, Blaine County, Idaho, more particularly described as follows:

BEGINNING at the S¹/₄ corner of Section 10; thence North 31°55'42" West, 4031.29 feet to the POINT OF BEGINNING;
Thence North 74°00' West, 70.71 feet;
Thence South 29°00' East, 401.14 feet;
Thence North 19°45'06" East, 66.52 feet;
Thence North 29°00' West, 307.28 feet to the POINT OF BEGINNING.

This property being also known as Quigley Road lying adjacent between the original City limits of Hailey and Rathke Subdivision. As conveyed by Quitclaim Deed recorded October 31, 1979 as Instrument No. 198320, records of Blaine County, Idaho.

EXHIBIT B
Survey of Canal location

The Canal Portion, and the Canal Easement referred to in the Agreement are comprised of that area lying westerly of the “Existing Fence” depicted on this Exhibit.



CANAL LOCATION
EXHIBIT ONLY
03 1 99120

CANAL CENTERLINE
EXISTING FENCE

