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American Bank v. Wadsworth Golf Construction Co Clerk's Record v. 8 Dckt. 39415

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Vol 8 of 25

SUPREME COURT
OF THE
STATE OF IDAHO

AMERICAN BANK,

Plaintiffs-Cross Defendant-Appellant,

v.

WADSWORTH GOLF CONSTRUCTION COMPANY OF,
THE SOUTHWEST, etal.,

Defendant-Cross Defendant-Respondent-
Cross-Appellant,

and

TAYLOR ENGINEERING, INC., etal.,

Defendant-Third Party Plaintiff

and

BRN DEVELOPMENT, INC., etal,

Defendants-Cross-Defendants,

*Appealed from the District Court of the First Judicial District of
the State of Idaho, in and for the County of Kootenai.*

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho
corporation, BRN INVESTMENTS, LLC, an
Idaho limited liability company, LAKE VIEW
AG, a Liechtenstein company, BRN-LAKE
VIEW JOINT VENTURE, an Idaho general
partnership, ROBERT LEVIN, Trustee for the
ROLAND M. CASATI FAMILY TRUST,
dated June 5, 2008, RYKER YOUNG, Trustee

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 JUL 21 AM 11:16

CLERK DISTRICT COURT

Carol Anderson
DEPUTY

Case No. CV 09-2619

**AMERICAN BANK'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANT
WADSWORTH GOLF RE: LIEN
PRIORITY**

for the RYKER YOUNG REVOCABLE TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,


Defendants.

COMES NOW counterdefendant American Bank, by and through undersigned counsel of record, and pursuant to Idaho Rule of Civil Procedure 56 and other applicable law, hereby file its Motion for Partial Summary Judgment Against Defendant Wadsworth Golf Re: Lien Priority to establish that American Bank's Mortgage has priority over Wadsworth's and its subcontractors' lien claims.

In support of this motion, American Bank submits a memorandum of law and the Affidavit of Randall A. Peterman in Support of American Bank's Motion for Partial Summary Judgment Against Wadsworth Golf.

DATED this 20th day of July, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
For Tyler J. Anderson – Of the Firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of July, 2010, I caused a true and correct copy of the foregoing **AMERICAN BANK'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT WADSWORTH GOLF RE: LIEN PRIORITY** to be served by the method indicated below, and addressed to the following:

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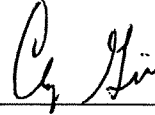
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho
corporation, BRN INVESTMENTS, LLC, an
Idaho limited liability company, LAKE VIEW
AG, a Liechtenstein company, BRN-LAKE
VIEW JOINT VENTURE, an Idaho general
partnership, ROBERT LEVIN, Trustee for the
ROLAND M. CASATI FAMILY TRUST,

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
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CLERK DISTRICT COURT

DEPUTY

Case No. CV 09-2619

**AMERICAN BANK'S MEMORANDUM
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANT
WADSWORTH GOLF RE: LIEN
PRIORITY**

**AMERICAN BANK'S MEMORANDUM IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT WADSWORTH
GOLF RE: LIEN PRIORITY**

Client:1703494.1

dated June 5, 2008, RYKER YOUNG, Trustee for the RYKER YOUNG REVOCABLE TRUST, MARSHALL CHESROWN a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

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COMES NOW counterdefendant American Bank, by and through its attorneys Moffatt, Thomas, Barrett, Rock & Fields, Chartered, and hereby files this Memorandum in Support of Motion for Summary Judgment Re: Wadsworth Golf's Lien Priority.

I. INTRODUCTION

Wadsworth Golf Construction Company of the Southwest ("Wadsworth") filed its counterclaim to establish priority of its lien claim, along with all of its subcontractors, over American Bank's Mortgage. Wadsworth bases its counterclaim almost exclusively on its contention that it began services to the property in question prior to the recording of American Bank's Mortgage. However, Wadsworth fails to disclose to this Court that it contractually agreed, on behalf of itself and all its subcontractors, to the subordination of its lien claims thereby giving priority to American Bank's Mortgage. Wadsworth further fails to disclose to this Court numerous post-mortgage lien waivers that it executed and its subcontractors executed. The plain terms of the lien waivers that Wadsworth and its subcontractors executed in favor of American Bank evidence that Wadsworth clearly and unambiguously intended to, and did in fact, waive and subordinate priority to American Bank's Mortgage. Accordingly, American Bank respectfully requests this Court to grant summary judgment in favor of American Bank establishing that American Bank's Mortgage has priority over Wadsworth's lien claims and its subcontractors' lien claims.

II. BACKGROUND

American Bank incorporates by reference its Statement of Undisputed Facts set forth in Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment Against Defendants BRN Development, Inc.; BRN Investments, LLC; BRN-Lake View Joint Venture; Roland M. Casati Family Trust, dated June 5, 2008; Ryker Young Revocable Trust; Thorco, Inc.;

Polin & Young Construction, Inc.; Taylor Engineering; and Marshall Chesrown filed July 16, 2010 (“Plaintiff’s SOF in Support of MSJ Against BRN”) at 5-14. American Bank further provides the following additional statement of undisputed facts that relate specifically to the priority of American Bank’s Mortgage over Wadsworth’s lien claims.

A. Wadsworth/BRN Relationship.

Wadsworth and BRN Development, Inc. (“BRN”) entered into a Contract Agreement for the construction of a golf course known as Black Rock North. *See* Affidavit of Randall A. Peterman in Support of American Bank’s Motion for Partial Summary Judgment Against Wadsworth Golf (“Peterman Aff.”), Ex. A (Ex. 11 to Deposition of Stephen Arnold Harrell (“Harrell Depo.”)); Ex. B (Harrell Depo. at 22:5-8). Wadsworth’s president, Stephen Harrell, signed the Contract Agreement on behalf of Wadsworth. *Id.*, Ex. B (Harrell Depo. at 8:1-6; 23:18-23). Harrell testified numerous times in his deposition that when he signs a document on behalf of Wadsworth that it is bound by the terms of the written agreement. *Id.*, Ex. B (Harrell Depo. at 18:19-23; 25:15-25; 40:4-11; 85:12-20; 91:12-15; 95:12 – 96:9; 99:4-10). Key provisions in the Contract Agreement include:

D. SCHEDULING

Subcontractor shall give Owner advance notice of the anticipated starting date for work. (*Id.*, Ex. A, Page 3 of 15).

* * *

F. PAYMENTS

Subcontractor [Wadsworth] shall submit the **original** payment applications to Owner [BRN] by the 25th of the month As a prerequisite for any payment, Subcontractor shall provide, in a form satisfactory to Owner, partial lien releases, claim waivers, and affidavits of payment from Subcontractor, and its subcontractors and suppliers of any tier, for the billed portion of

Subcontractor's work. (*Id.*, Ex. A, Page 4 of 15) (emphasis in original).

* * *

BB. SUBCONTRACTORS

Any subcontractor of Subcontractor [Wadsworth] shall be bound to Subcontractor to the same extent Subcontractor is bound to Owner. This form may be used for subcontracts and when so used, the term Owner shall mean Contractor and the term Subcontractor shall mean the Subcontractor's subcontractor. (*Id.*, Ex. A, Page 12 of 15).

* * *

CC. MODIFICATIONS

No modifications to, or waiver of any rights under this Contract shall be valid or binding on the parties to this Contract unless the same be in writing. Failure of Owner to insist upon strict performance of any term or condition of this Contract, or to exercise any option herein conferred on one or more instances, shall not be construed to be a waiver of such performance or portion, or of any other covenants or Contracts, on subsequent occasions, but the same shall be and remain in full force and effect. (*Id.*, Ex. A, Page 13 of 15).

In addition to the foregoing provisions, the Contract Agreement has several exhibits that constitute the contractually-approved documents to be executed by the parties in connection with periodic payments for work completed. Specifically, the Contract Agreement contains Exhibit "B," which is entitled Conditional Lien Waiver, Release and Subordination. *Id.*, Ex. A (Exhibit "B" to Contract Agreement). The contractually-approved lien release form provided in Exhibit B contains the following language:

Upon receipt of payment of the sum of \$ _____, the undersigned waives any and all right to any lien whatever and releases all rights to lien or claim any lien against the real property associated with the above Project by the undersigned in connection with any and all work or labor performed, materials, equipment,

goods, or things supplied or furnished, or any other claims or obligations owed through the date shown above, on the above-named Project.

This waiver and release does not cover rights or obligations that might accrue after the above date for additional work that may be performed. *In addition, upon receipt of the payment stated above, the undersigned agrees that any lien may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date.*

Id. (emphasis added).

In addition to the Contract Agreement governing the relationship between Wadsworth and BRN Wadsworth entered into other agreements with its subcontractors, including Precision Irrigation, Inc. *Id.*, Ex. D, AIA Document A401-1997 (Ex. 7 to Harrell Depo.). Notably, even with its own contractors, Wadsworth required lien releases to be submitted in the identical form as the contractually-approved lien releases in the Contract Agreement between BRN and Wadsworth. *Id.*, Ex. D, AIA Document A401-1997 at Exhibit "C" Condition Lien Waiver, Release and Subordination. In the AIA contract between Wadsworth and Precision Irrigation, Wadsworth required lien releases to be submitted that contained the following language:

This waiver and release does not cover rights or obligations that might accrue after the above date for additional work that may be performed. *In addition, upon receipt of the payment stated above, the undersigned agrees that any lien may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date.*

Id. (emphasis added).

B. Wadsworth's Claimed Priority.

Wadsworth alleges that it commenced work by October 28, 2006. *See* Wadsworth Answer and Counterclaim at ¶ 20. Wadsworth's president, Steve Harrell, contended in his deposition that Wadsworth commenced work in September 2006. *See* Anderson Aff., Ex. B, Harrell Depo. at 22:5-19. Under either date, at the time that Wadsworth claims it commenced work, it was not registered as a contractor under Idaho law and, as a result, any work performed while unregistered was illegal. *Id.*, Ex. E (Registry from Idaho Bureau of Occupational Licenses). Moreover, throughout the course of the project and after American Bank recorded its Mortgage, Wadsworth executed numerous contractually-approved lien releases reflected in Exhibit B to the Contract Agreement in connection with receiving payment for work performed. Before being paid hundreds of thousands of dollars for work performed, Wadsworth expressly acknowledged:

upon receipt of the payment stated above, the undersigned agrees that any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date.

Id., Ex. C (Exhibit 1-C and 63 to Harrell Depo.). *Id.*, Ex. I (Golden Releases produced by BRN) (hereinafter "Golden Releases"). Additionally, in connection with each Application and Certification for Payment, Wadsworth further certified that work covered under the application for payment was completed in accordance with the "Contract Documents" as required under the Contract Agreement. *Id.* Ex. F (Ex. 63 to Harrell Depo.).

Wadsworth also admits that it received the payments referenced in at least three of the Golden Releases, satisfying the conditions precedent referenced in the Golden Releases. *Id.*, Ex. B (Harrell Depo. at 102:20 – 103:20; 104:17 – 105:16).

Throughout the course of the project, numerous subcontractors, including Wadsworth's own subcontractors, also executed similar Golden Releases as required by the Contract Agreement. *Id.*, Exs. G and J.

On February 6, 2007, American Bank recorded its Mortgage securing its funds lent to BRN. *See* ¶ 2.1.6 of Plaintiff's SOF in Support of MSJ Against BRN.

On January 6, 2009, Wadsworth recorded its claim of lien against the same property that American Bank recorded its Mortgage. *See* Ex. K to Peterman Aff.

III. LEGAL STANDARD

A moving party is entitled to summary judgment under Idaho Rule of Civil Procedure 56(c) if the moving party shows that there is an absence of material facts with respect to a claim and the nonmoving party fails to show specific facts that would support the claim at trial. *Tuttle v. Sudenga Indus., Inc.*, 125 Idaho 145, 150, 868 P.2d 473, 478 (1994); *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994). The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho at 530-31, 887 P.2d at 1037-38 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)). "[A] mere scintilla of evidence or only slight doubt as to the facts' is not sufficient to create a genuine issue" *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 996 P.2d 303, 307 (2000) (quoting *Harpole v. State*, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998)). Where the nonmoving party fails to meet his burden of presenting sufficient evidence to create a triable issue of fact such that the court would grant a motion for a directed verdict if the case

were to go to trial, summary judgment is proper. *Jarman v. Hale*, 122 Idaho 952, 842 P.2d 288 (Ct. App. 1992), *abrogated on other grounds by Puckett v. Verska*, 144 Idaho 161, 158 P.3d 937 (2007).

A motion for summary judgment should not be regarded with disfavor. *Celotex*, 477 U.S. at 317. Rather, it should be viewed as an important part of the rules of civil procedure, which are designed “to secure the just, speedy and inexpensive determination of every action.” *Id.*; IDAHO R. CIV. P. 1(a).

IV. ARGUMENT

A. **Wadsworth’s Claim of Lien Is Void Because It Failed To Comply with Idaho Law Requiring That It Register as a Contractor at All Times During the Performance of Its Work.**

Idaho Code Section 54-5208 states, “[a] contractor who is not registered as set forth in this chapter, unless otherwise exempt, shall be denied and shall be deemed to have conclusively waived any right to place a lien upon real property as provided for in chapter 5, title 45, Idaho Code.” Wadsworth seeks to enforce its mechanic’s lien that it filed pursuant to chapter 5, title 45, Idaho Code. Wadsworth claims priority in its Answer and Counterclaim as of October 28, 2006. Fatal to Wadsworth’s lien claim is that it was not registered with the state of Idaho at the time it commenced work; to the contrary, Wadsworth did not take the basic steps to bring itself into compliance with Idaho law until January 9, 2007. As a result, Wadsworth’s claim of priority as of October 28, 2006—a time in which it was not a registered contract under the law of Idaho—lacks merit. *See* IDAHO CODE § 54-5208; *cf. ParkWest Homes, LLC v. Barnson*, No. 36246-2009, Slip Op. No. 68 at 8 (Idaho June 25, 2010) (holding that an unregistered contractor “is denied a lien for work or labor done or materials furnished in the

construction during the period that the contractor is not registered.”). Notably, Idaho Code Section 54-5217(2) provides:

No person engaged in the business or acting in the capacity of a contractor, unless otherwise exempt, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which registration is required by this chapter without alleging and proving that he was a duly registered contractor, or that he was otherwise exempt as provided for in this chapter, at all times during the performance of such act or contract.

(Emphasis added.) Because Wadsworth was not registered at all times during the performance of work during the time period covering its claim of lien, Wadsworth’s claim of lien is void and unenforceable.

B. Wadsworth’s Contractual Agreement To Subordinate Its Subcontractors’ and Its Own Lien Interests, Combined with Lien Releases and Surrounding Circumstances Demonstrate That Wadsworth Voluntarily Waived Lien Priority in Favor of American Bank’s Mortgage.

1. Legal principles of contract interpretation.

“[W]here a contract is clear and unambiguous, not involving any absurdities or contradictions, it is the best evidence of the intent of the parties and hence a determination of its meaning and its legal effect are a question of law.” *Madrid v. Roth*, 134 Idaho 802, 805, 10 P.3d 751, 754 (Ct. App. 2000). Put differently, “[q]uestions of contract interpretation and enforcement are normally the sole province of the courts.” *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204, 1214 (2000). Regarding waivers and releases, a “[w]aiver is foremost a question of intent” *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 520, 650 P.2d 657, 662 (1982) (citations omitted). Waiver is defined as a voluntary, intentional relinquishment of a known right or advantage. *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 739, 735 P.2d 1047, 1050 (1987) (citations omitted). Within the context of a mechanic’s lien “[t]he general

rule is that an express waiver of a mechanics lien must be supported by consideration in order to be effective and binding.” *Pierson v. Sewell*, 97 Idaho 38, 43, 539 P.2d 590, 595 (1975).

2. **Wadsworth clearly and unambiguously waived its subcontractors and its own lien priority rights as evidenced by the subordination language of the construction agreement and the custom and practice in the industry.**

The Golden Releases executed by Wadsworth and its subcontractors clearly and unambiguously show Wadsworth’s intent to waive its priority start date. The Golden Releases waive “all” lien rights — not just part or some rights — but unconditionally “all” rights that would include the priority right. The Golden Releases do not reserve or include an exception for priority. To the contrary, the Golden Releases expressly state that lien priority will be “subordinate to any liens or encumbrances attaching to the subject property” prior to the date referenced at the top of the waiver. The express language of each Golden Release states “all” rights are waived.



CONDITIONAL LIEN WAIVER, RELEASE AND SUBORDINATION

Payment Amount: \$1,000,000.00
For Work Through: October 31, 2007

TO: BRN DEVELOPMENT, INC., OWNER
P. O. Box 3070
Coeur d'Alene, ID 83816
- and -
ALL OTHER PARTIES IN INTEREST

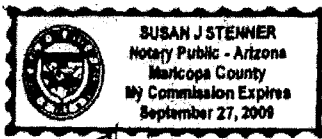
RE: PROJECT - BLACK ROCK NORTH and BLACK ROCK NORTH GOLF COURSE
COEUR D'ALENE, IDAHO

Upon receipt of payment of the sum of \$1,000,000.00, the undersigned waives any and all right to any lien whatever and releases all rights to lien or claim any lien against the real property associated with the above Project by the undersigned in connection with any and all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligations owed through the date shown above, on the above-named Project.

This waiver and release does not cover rights or obligations that might accrue after the above date for additional work that may be performed. In addition, upon receipt of the payment stated above, the undersigned agrees that any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to any liens or encumbrances attaching to the subject property prior to said date.

As an inducement to the above-named Owner to make the payment first described above, the undersigned further covenants and represents that it has performed the work and/or furnished the materials pursuant to and in accordance with the plans and specifications or work order in effect up through September 30, 2007. The undersigned further covenants and represents that either all obligations related to labor, equipment, supplies, materials, lower tier subcontractors at all levels and consultants through the date first stated above have been fully paid, or all such obligations will be paid first out of the funds to be received before any of said funds will be applied to any other purpose and the payment first described above will be sufficient to fully satisfy all such obligations.

If signed on behalf of a company, the undersigned certifies under penalty of perjury under the laws of the State of Idaho that he or she is authorized to execute the same on behalf of the company to be bound.



STATE OF ARIZONA

WADSWORTH GOLF CONSTRUCTION CO.

By: [Signature]
Its: [Signature]

(Acknowledgment omitted.)

Even the most cursory reading of the Golden Release quoted verbatim above evidences a clear intent by Wadsworth to subordinate its lien claim to any lien or encumbrance that attached to the subject property prior to October 31, 2007. The waiver language is express, it is clearly stated, and it is not subject to multiple interpretations. Wadsworth knew each and

every time that it executed the Golden Releases that it was waiving “all” rights associated with its lien claim and, more specifically, that its priority would be subordinate to any lien that attached before October 31, 2007, which would include American Bank’s Mortgage that was recorded against the property on February 6, 2007.

C. Idaho Law Expressly Allows Parties To Waive the Priority of Their Mechanic’s Liens.

Idaho and other jurisdictions recognize that parties can and have agreed to subordinate the priority of their lien through the use of a waiver and release.

A lien claimant’s priority is established by Idaho Code Section 45-506 which states:

§ 45-506. Liens preferred claims

The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens, without reference to the date of the filing of the lien claim or claims and are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished; also to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished.

In the case of *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (1997), the Idaho Supreme Court supported the proposition that the priority date of a lien can be modified by agreement. 129 Idaho at 896, 934 P.2d at 962 (distinguished but on other grounds). In *Baker*, the defendant hired plaintiff to remodel their home. The plaintiff executed a lien waiver stating that plaintiff had performed work on the residence that amounted to \$27,908.66 and had been paid in full. *Id.*

129 Idaho at 889, 934 P.2d at 955. The supreme court stated that although the “lien waiver unambiguously *released all of [Plaintiffs] rights* against the property and acknowledged payment in full. . . *as of June 17* [the] waiver does not release the [defendants] of any labor and material cost claims alleged by [plaintiff] *subsequent* to June 17.” 129 Idaho at 888-89, 934 P.2d at 954-55.

In an early case, the Idaho Supreme Court, in *Smith v. Faris-Kesl Construction Co. Ltd., et al.*, 27 Idaho 407, 429, 150 P. 25, 32 (1915), recognized the practice of a contractual lien waiver and release to waive priority. In *Smith*, the owner canal company and general contractor agreed in their contract to “waive and release on behalf of itself and its successors assigns, and subcontractors all lien or right of lien for work done” in a superior position to the mortgage so that the mortgage company’s security remained in a priority first position. *Id* at 428, 150 P. at 32. “[T]he parties [are] interested in having said mortgage constitute a first lien on said canal system, has and does *hereby waive and release . . . all lien or right of lien for work done. . .*” *Id*. The agreement between the general contractor and subcontractor consistently stated that the subcontractor “does hereby waive any lien on the property . . .” *Id*. The court held this agreement did not act as a total bar to the subcontractor’s right to a lien, but only changed the priority of the subcontractor’s lien in relationship to the mortgage. *Id*. The agreement made the lien “subsequent to the mortgage” and “**did by contract waive the priority of his** lien to the \$350,000 mortgage made by said Canyon Canal Company in favor of the American Trust & Savings Bank, as trustee.” *Id*. (emphasis added). Thus, the Idaho Supreme Court again recognized that via contractual agreement, a claimant can lose his priority over a mortgage, or any other lien.

The Idaho Supreme Court first interpreted the question of priority in 1905 in the case of *Pacific States Savings, Loan & Building Co. v. Dubois et al.*, 11 Idaho 319, 83 P. 513 (1905). At that time, the question was whether the priority of all mechanics' liens "relate back" to the same date when commencement construction of the building first began, or whether priority was established by each individual lienor on the specific date its materials were first delivered and/or labor first commenced. *Id.* The trial court ruled in favor of the lien claimants that all liens had the same beginning priority date and "related back to the time of the commencement of the building" and gained priority over the mortgagee irrespective of whether labor or materials were delivered prior or subsequent to the recording of the mortgage. *Id.* at 323, 83 P. at 513. On appeal, the supreme court agreed with the mortgage company, reversing the lower court's ruling and instead held that priority regarding mechanic's liens is established by the first date materials are proved to have actually been delivered or labor actually supplied. *Id.*, 11 Idaho at 325-26, 83 P. at 514.

Though not interpreting a lien release in the priority dispute, the court in *Pacific States* emphasized a strong public policy statement supporting lenders. That policy should also apply to the present case. The supreme court stated:

Money is absolutely necessary for building anywhere, and, if security cannot be given until the building is completed and all liens cleared, it would in many cases be impossible to complete the work. We think the case at bar furnishes a good illustration of the evil effects of such a construction of our statute.

11 Idaho at 350, 83 P. at 524. Simply put, advancing the view that a lien waiver and release cannot change priority would undercut the above policy in that a lender could never be assured of its mortgage's priority until after the entire project was completed and all amounts paid to the

general contractor, which may have begun work prior the mortgage being recorded. If that were the law, no lender would ever extend credit on any project that has already begun.

In 1924, the Idaho Supreme Court addressed the concept of priority by agreement by relying on case law from New York, Iowa and Tennessee to conclude that changes in priority status of a mechanic's lien must be expressed and cannot be inferred. *Carlson-Lusk Hardware Co. v. Kammann*, 39 Idaho 654, 657, 229 P. 85, 86 (1924) (stating, “. . . [I]n the absence of express provision, a lien created by statute is subsequent to other liens which are prior in time.”). In 1936, the Idaho Supreme Court again addressed the question of priority by agreement in the context of the continued employment of mine worker. See *White v. Constitution Min. & Mill. Co. et al.*, 56 Idaho 403, 425, 55 P.2d 152, 162 (1936). In its analysis of the continuing nature of the employment, the court referred to and quoted the Utah case of *Fields v. Daisy Gold Mining Co.* for the rule that a presumption of priority as of commencement of the furnishing of materials arises with regards to a continuous contract unless rebutted by an express agreement. *Id.* at 422 P.2d at 161.

Other jurisdictions are in accord. See *First Union Nat'l Bank v. RPB 2, LLC*, 674 N.W. 2d 1, *4 and *5 (N.D. 2004) (stating “A party entitled to a mechanic's lien may waive that right by a signed writing. A party may also be estopped from asserting a mechanic's lien by conduct constituting estoppel.”) (also citing to Minnesota and Nevada case law, which upheld lien waivers supported by consideration.); accord, *Richard's Lumber & Supply Co. v. Nat'l Bank of Joliet*, 336 N.E. 2d 820, 837 (Ill. App. 3d 1975) (stating “The bank loaned money to Witbrod in reliance on the waivers, which had been completed and presented to the bank. Under the facts, the appellants would lose any priority they might otherwise have had as to the bank by

reason of their mechanic's liens."); *see also Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541, 545 (Mo. Ct. App. 1973) (stating "A claim of lien as well as the preference accorded the lien by statute may be waived, but the intention to do so must be clearly manifested.").

D. Wadsworth Did Not Perform Any Work Giving Rise to a Claim of Lien Until After American Bank Recorded Its Mortgage on February 6, 2007.

As noted above, Wadsworth did not register as a contractor until January 9, 2007. Assuming arguendo that Wadsworth's failure to have performed work as a registered contractor "at all times" under Idaho law as required by Idaho Code Section 54-5217(2) does not create an absolute bar to its claim of priority, Wadsworth bears the burden to at least establish that it performed lienable work between January 9, 2007 and the time that American Bank recorded its Mortgage, i.e., February 6, 2007. *See Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 821, 41 P.3d 242, 250 (2001); *see also Boone v. P & B Logging Co.*, 88 Idaho 111, 115, 397 P.2d 31, 33 (1964) (citing burden of proof standard for logger's liens); and *Wheatcroft v. Giffith*, 42 Idaho 231, 245 P. 71, 73 (1926) (citing burden of proof standard for farm labor lien). As it applies to a mechanic's lien, work is lienable where the lien claimant shows "that the labor or materials were incorporated into the land or building that is the subject of the claim." *Elec. Wholesale*, 136 Idaho at 821, 41 P.3d at 250. *See also Baker v. Boren*, 129 Idaho 885, 895, 934 P.2d 951, 961 (1997) ("The purpose of the mechanic's lien statutes is remedial in nature and seeks to provide protection to laborers and materialmen who have added directly to the value of the property of another by their materials or labor."). Conversely, "where the labor is not used or the materials are not incorporated into the building, structure or improvement, no lien on the land

or building results.” *Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 687, 587 P.2d 823, 829 (1978).

The work that took place between January 9, 2007 (the date Wadsworth registered as a contractor), and February 6, 2007 (the date American Bank recorded its Mortgage), associated with Wadsworth’s claim of lien for its construction of a golf course was to “monitor erosion control, inspect[] yard and equipment for vandalism, general outlook of job site.” *See Anderson Aff., Ex. H, Operations Reports (Ex. 71 to Harrell Depo.)*. This claimed “lienable work” took place in the dead of winter and did not add directly to the value of the property nor did such work incorporate labor or materials into the golf course improvement. *Elec. Wholesale*, 136 Idaho at 821, 41 P.3d at 250. Simply put, Wadsworth’s efforts to prevent vandalism or erosion control did nothing to add value to the land; to the contrary, such efforts at most ensured no diminution in value to the land. Under Idaho law, no “lienable work” exists until such time as that work was actually “incorporated into the land or building that is the subject of the claim.” Work does not, therefore, become “lienable work” until it actually improves the value of the land or structure by virtue of some associated construction activity.

Because Wadsworth cannot rely on preliminary non-lienable work to establish its alleged commencement date, the earliest possible date Wadsworth’s lien could have attached to the project at issue was *after* American Bank recorded its Mortgage on February 6, 2007. Accordingly, Wadsworth’s mechanic’s lien is clearly junior and subordinate American Bank’s Mortgage.

E. Alternatively, Wadsworth's Claims of Lien Must Be Subordinate to All Other Liens.

In the event that this Court finds that Wadsworth did not contractually agree to waive its lien priority when executed the contractually-required Golden Releases, then such lien claims should be subordinated and postponed to all other liens. Idaho Code Section 45-508 provides:

In every case in which one (1) claim is filed against two (2) or more . . . improvements, owned by the same person, the person filing such claim must, at the same time, designate the amount due him on each of said . . . improvement; **otherwise the lien of such claim is postponed to other liens.**

(Emphasis added.)

Wadsworth contracted with BRN to construct the golf course known as Black Rock North. *See Anderson Aff., Ex. B (Harrell Depo. at 22:5-8; 45:9-20).* In its Notice of Claim of Lien, Wadsworth claimed a lien against all of the real property associated with the Black Rock North development and did not limit its claim to the real property associated with the construction of the golf course. *Compare Answer and Counterclaim at Ex. B, with First Amended Complaint at Ex. A.* Accordingly, Wadsworth's claim of lien is filed against two or more improvements. However, Wadsworth did nothing to parse out or designate the amounts due as against each improvement as required by Idaho Code Section 45-508. Instead, Wadsworth made a general claim of lien for the full amount of \$2,329,439.72 together with interest. Because Wadsworth failed to properly designate the amount due for each improvement, Wadsworth failed to substantially comply with the statutory requirement set forth in Idaho Code Section 45-508 and its lien claims must be postponed and subordinated to all other liens on the property.

V. CONCLUSION

For the foregoing reasons, American Bank respectfully requests this Court to grant is motion for partial summary judgment and to determine that American Bank's Mortgage has priority over Wadsworth's claim of lien and its claim of lien on behalf of its subcontractors.

DATED this 20th day of July, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By  _____

For

Tyler J. Anderson – Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of July, 2010, I caused a true and correct copy of the foregoing **AMERICAN BANK'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT WADSWORTH GOLF RE: LIEN PRIORITY** to be served by the method indicated below, and addressed to the following:

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Robert Levin, Trustee For The Roland M.
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to

Tyler J. Anderson

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: *[Signature]*

SS

[Signature]
O'CLOCK
CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

In the Matter of the Petition of:

AMERICAN BANK for Release of
Mechanic's Lien of ACI Northwest, Inc. Upon
Posting of Surety Bond

Case No. CV 09-2619

**ORDER SETTING DATE AND TIME
FOR HEARING ON PETITION FOR
RELEASE OF MECHANIC'S LIEN**

Petitioner American Bank having petitioned the Court pursuant to Idaho Code Section 45-518 *et seq.*, for the release of the Notice of Claim of Lien described in the Petition upon the posting of a surety bond, notice is hereby given that a hearing on the Petition will be held on the 27th day of July, 2010, at 3:00 o'clock p.m., in the District Court of the State of Idaho in and for the First Judicial District, Kootenai County, 501 Government Way, Coeur d'Alene, Idaho.

If, on the hearing of the Petition, the Court finds that the proof required is evinced, the liens will be released of record as provided by Idaho Code Section 45-521.

The within and foregoing Order shall be served on the lien claimant described in the Petition in the same manner as provided by law for service of a summons at least two (2) days before the date set for the hearing.

IN WITNESS WHEREOF, the Court's seal has been affixed hereto as of this
21st day of July, 2010.

[Signature of John P. Luster]

The Honorable John P. Luster
District Judge

**ORDER SETTING DATE AND TIME FOR HEARING ON
PETITION FOR RELEASE OF MECHANIC'S LIEN**

1735

ORIGINAL

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of July, 2010, I caused a true and correct copy of the foregoing ORDER SETTING DATE AND TIME FOR HEARING ON PETITION FOR RELEASE OF MECHANIC'S LIEN to be served by the method indicated below, and addressed to the following:

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By: 
Deputy Clerk

#879

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED: 7/27/10
AT 400 O'CLOCK P.M
CLERK, DISTRICT COURT
Wanda Butler
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

In the Matter of the Petition of:

AMERICAN BANK for Release of
Mechanic's Liens of ACI Northwest, Inc.
Upon Posting of Surety Bond

Case No. CV 09-2619

ORDER RELEASING CLAIM OF LIEN

This matter came regularly before the Court at a hearing on July 27, 2010 at 3:00 p.m. This Court having determined that:

(a) ACI Northwest, Inc. have been duly served with the Court's order setting the time and place for hearing at least two (2) days prior to the hearing hereon;

(b) Petitioner American Bank having presented satisfactory proof as required by Idaho Code Section 45-521 that a bond complying with the form prescribed by Idaho Code Section 45-519 was procured and paid for with respect to the:

(i) Notice of Claim of Lien filed by ACI Northwest, Inc. on August 15, 2009, and recorded as Instrument No. 2216696000, in the records of the Kootenai County Recorder, a complete copy of which is attached hereto as **Exhibit A**; and

(ii) Endorsement to Claim of Lien for Payment on Account filed by ACI Northwest, Inc. on December 10, 2009 in the records of the Kootenai County Recorder, as Instrument No. 2244689000, a complete copy of which is attached hereto as **Exhibit B**; and

(c) the original bond in the amount of \$2,250,000.00 having been filed with the Court;

(d) ACI Northwest, Inc. having agreed to the form of this Order; and

(e) ACI Northwest, Inc. having agreed that the real property subject to the mortgage lien of American Bank ("Real Property") is described in Exhibit C attached hereto and incorporated herein by this reference;

IT IS HEREBY ORDERED, and this does order, that the:

(a) Notice of Claim of Lien filed by ACI Northwest, Inc. on August 15, 2009, and recorded as Instrument No. 2216696000, in the records of the Kootenai County Recorder, against and the Real Property; and

(b) Endorsement to Claim of Lien for Payment on Account filed by ACI Northwest, Inc. on December 10, 2009 in the records of the Kootenai County Recorder, as Instrument No. 2244689000, against the Real Property;

are hereby released of record for all purposes, to the same extent as if such liens had been released of record by ACI Northwest, Inc. and if such claims are asserted by motion pursuant to Idaho Code Section 45-523 or in an independent action pursuant to Idaho Code Section 45-522, the bond filed herein shall be subject to the claims that would otherwise constitute liens against the above-described property.

DATED this 27th day of July, 2010.



The Honorable John P. Luster
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of July, 2010, I caused a true and correct copy of the foregoing **ORDER RELEASING CLAIM OF LIEN** to be served by the method indicated below, and addressed to the following:

John R. Layman
LAYMAN, LAYMAN & ROBINSON, PLLP
601 S. Division St.
Spokane, WA 99202
Facsimile (509) 624-2902
*Attorney for Defendants BRN Development,
BRN Investments, BRN-Lake View Joint
Venture, Marshal Chesrown, Lake View AG,
Robert Levin, Trustee For The Roland M.
Casati Family Trust, Dated June 5, 2008 and
Ryker Young Revocable Trust*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Barry W. Davidson
DAVIDSON BACKMAN MEDEIROS PLLC
601 W. Riverside #1550
Spokane, WA 99201
Facsimile (509) 623-1660
*Co-Attorney for BRN Development, BRN
Investments, BRN-Lake View Joint Venture,
Marshal Chesrown, Lake View AG, Robert
Levin, Trustee For The Roland M. Casati
Family Trust, Dated June 5, 2008 and Ryker
Young Revocable Trust*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Ryker Young, Trustee
RYKER YOUNG REVOCABLE TRUST
2448 S. Manard Road
Fort Gibson, OK 74434
*Pro Se Defendant Ryker Young, Trustee For The
Ryker Young Revocable Trust*

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Charles B. Lempesis
ATTORNEY AT LAW
W. 201 Seventh Ave.
Post Falls, ID 83854
Facsimile (208) 773-1044
Attorney for Defendant Thorco, Inc.

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Robert J. Fasnacht
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Coeur d'Alene, ID 83814
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*Attorney for Defendant Interstate Concrete &
Asphalt Company*

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Edward J. Anson
WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.
608 Northwest Blvd. #300
Coeur d'Alene, ID 83814-2146
Facsimile (208) 667-8470
*Attorney for Defendants The Turf Corporation,
Wadsworth Golf Construction Company of the
Southwest and Precision Irrigation, Inc.*

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Richard D. Campbell
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7 S. Howard St. #416
Spokane, WA 99201
Facsimile (509) 455-7111
*Attorneys for Defendant Polin & Young
Construction*

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Attorney for Defendant Taylor Engineering, Inc.

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WETZEL WETZEL & HOLT, PLLC
618 N. 4th St., Suite 2
Coeur d'Alene, ID 83814-3021
Facsimile (208) 664-6741
Attorneys for Defendant ACI Northwest, Inc.

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 Overnight Mail
 Facsimile

Maggie Y. Lyons, Receiver
RESOLVE FINANCIAL GROUP
3731 N. Ramsey Rd., Suite 110B
Coeur d'Alene, ID 83815

Tyler Anderson
Randall A. Peterman, ISB No. 1944
C. Clayton Gill, ISB No. 4973
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
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Post Office Box 829
Boise, ID 83701
Facsimile (208) 385-5384
Attorneys for the Plaintiff

Nancy L. Isserlis, ISB No. 7331
Elizabeth A. Tellessen, ISB No. 7393
WINSTON & CASHATT
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Coeur d'Alene, Idaho 83814
Facsimile (509) 838-1416
Attorneys for Plaintiff

Terrance R. Harris
RAMSDEN & LYONS LLP
700 Northwest Blvd
PO Box 1336
Coeur D'Alene ID 83816-1336

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

U.S. Mail, Postage Prepaid
 Hand Delivered in court 7/27/10
 Overnight Mail
 Facsimile

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

U.S. Mail, Postage Prepaid
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 Overnight Mail
 Facsimile

By: Wanda Butler
Deputy Clerk

EXHIBIT A

ACI Northwest, Inc. Notice of Claim of Lien

DANIEL J. ENGLISH 15P I 2216696000
KOOTENAI CO. RECORDER Page 1 of 15
BBB Date 06/15/2009 Time 11:51:54
REC-REG OF ACI NORTHWEST INC
RECORDING FEE: 45.00
2216696000 XN 16

CLAIM OF LIEN

1. The name of the Claimant is ACI Northwest, Inc., an Idaho corporation, having its principal place of business at 6600 North Government Way, Coeur d'Alene, Idaho 83815.
2. The name of the owner of real property against which said lien is claimed is BRN Development, Inc., an Idaho corporation (hereinafter "Owner").
3. The Claimant hereby claims a lien against all properties described in the attached Exhibit "A".
4. This lien is claimed for monies due and owing to Claimant for various construction work, including but not limited to the construction of streets, golf cart paths, culverts, ditches, swales, wet and dry utilities, along with demolition, excavation, and piping.
5. The related labor and materials were performed and furnished at the request of BRN Development, Inc.
6. Performance of the related labor and furnishing of the related materials commenced on October 1, 2006 and ended on March 17, 2009.
7. The amount claimed due and owing to the Claimant for the labor and materials is \$1,499,327.63. *see attached Exhibit "B"*.
8. A lien is also claimed for interest due and owing at twelve percent (12%) per annum pursuant to Idaho Code Section 28-22-104(1), in the amount of \$32,466.08 as of May 31, 2009, plus \$493.09 per day every day thereafter, until paid. *see attached Exhibit "B"*.
9. In the event of litigation, a lien is also claimed for any costs and attorneys' fees awarded pursuant to Idaho Code Section 45-513.
10. All amounts claimed under this lien are fair, just and equitable for the materials that were supplied and/or the labor that was performed.

CLAIM OF LIEN

STATE OF IDAHO)
) :ss
County of Kootenai)

Ada Loper, being first duly sworn deposes and says:

I am the Secretary/Treasurer of ACI Northwest, Inc., the Claimant in the above-entitled Claim of Lien. I am competent to testify as to all matters contained in this Claim of Lien. I have read the foregoing Claim of Lien, I know the contents thereof, and I testify that the facts stated therein are true, correct and just based upon my personal knowledge.

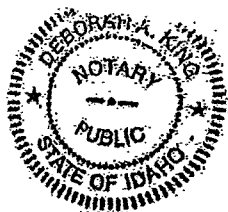
ACI Northwest, Inc.

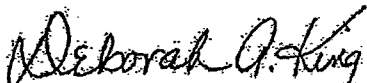

Ada Loper, Secretary/Treasurer

STATE OF IDAHO)
) :ss
County of Kootenai)

On this 15th day of June, 2009 before me the undersigned, a Notary Public in and for the State of Idaho, personally appeared Ada Loper, known to me to be the Secretary/Treasurer of ACI Northwest, Inc., who acknowledged to me that she executed the within instrument and acknowledged to me that she executed the same for and on behalf of ACI Northwest, Inc.

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




Notary for the State of Idaho
Commission Expires: 7/21/09

CLAIM OF LIEN

2

1746

EXHIBIT "A"
LEGAL DESCRIPTION

PARCEL 1:

THE FOLLOWING 4 TRACTS LABELLED A-D IN GOVERNMENT LOTS 7 AND 8 IN SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO:

TRACT A:

A TRACT OF LAND LOCATED IN GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 3 DEGREES 37'03" WEST ALONG THE WEST LINE OF SAID GOVERNMENT LOT, A DISTANCE OF 1111.1 FEET TO THE NORTH RIGHT OF WAY OF EXISTING LOFF'S BAY ROAD;

THENCE 55.69 SOUTHEASTERLY ALONG A CURVE TO THE RIGHT WITH A RADIUS OF 290.0 FEET ON A CHORD BEARING SOUTH 68 DEGREES 17'44" EAST, 55.60 FEET;

THENCE SOUTH 62 DEGREES 47'39" EAST ALONG SAID RIGHT OF WAY, 115.37 FEET TO THE TRUE POINT OF BEGINNING;

THENCE NORTH 3 DEGREES 37'03" EAST, 588.0 FEET;

THENCE SOUTH 86 DEGREES 54'39" EAST, 955.4 FEET TO THE INTERSECTION WITH THE NORTH RIGHT OF WAY OF EXISTING COUNTY ROAD;

THENCE SOUTH 42 DEGREES 34'10" WEST ALONG SAID RIGHT OF WAY 538.6 FEET;

THENCE ALONG SAID RIGHT OF WAY ON A CURVE TO THE RIGHT, 161.47 FEET WITH A RADIUS OF 690.0 FEET AND A CENTRAL ANGLE OF 13 DEGREES 24'29";

THENCE SOUTH 55 DEGREES 58'39" WEST ALONG SAID RIGHT OF WAY, 107.27 FEET;

THENCE ALONG SAID RIGHT OF WAY ON A CURVE TO THE RIGHT, 341.96 FEET WITH A RADIUS OF 320.0 FEET AND A CENTRAL ANGLE OF 61 DEGREES 13'42";

THENCE NORTH 62 DEGREES 47'39" WEST ALONG SAID RIGHT OF WAY, 100.0 FEET TO THE TRUE POINT OF BEGINNING.

TRACT B:

A PARCEL OF LAND LOCATED IN THE NORTH HALF OF SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST OF THE BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, SAID PARCEL BEING

EXHIBIT "A"
LEGAL DESCRIPTION

A PORTION OF GOVERNMENT LOT 7, SAID SECTION 8, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHEAST CORNER OF LOT 20, AS SHOWN ON THE RECORD OF SURVEY BY EUGENE H. WELBORN, R.L.S. #1020, FILED IN BOOK 4 AT PAGE 249, KOOTENAI COUNTY RECORDS, FROM WHICH THE CENTER OF SAID SECTION 8 BEARS SOUTH 3 DEGREES 28' 34" WEST A DISTANCE OF 1,759.89 FEET;

THENCE SOUTH 86 DEGREES 54' 39" EAST ALONG THE NORTH BOUNDARY LINE, SAID GOVERNMENT LOT 7, A DISTANCE OF 1329.84 FEET TO THE NORTHEAST CORNER OF LOT 7;

THENCE 3 DEGREES 37' 03" WEST ALONG THE EASTERLY BOUNDARY LINE, SAID LOT 7, A DISTANCE OF 766.02 FEET TO THE TRUE POINT OF BEGINNING FOR THIS DESCRIPTION;

THENCE SOUTH 3 DEGREES 37' 03" WEST CONTINUING ALONG SAID LINE A DISTANCE OF 345.08 FEET TO A POINT ON THE NORTHERLY RIGHT OF WAY LINE OF LOFF'S BAY ROAD, SAID POINT BEING THE BEGINNING OF A NON-TANGENT CURVE CONCAVE TO THE SOUTH, HAVING A RADIUS OF 290.00 FEET, THROUGH A CENTRAL ANGLE OF 50 DEGREES 52' 50" A DISTANCE ALONG THE ARC OF 257.53 FEET, THE CHORD BEARING OF SAID CURVE BEING SOUTH 80 DEGREES 44' 47" WEST;

THENCE SOUTH 55 DEGREES 18' 20" WEST CONTINUING ALONG SAID RIGHT OF WAY, A DISTANCE OF 297.82 FEET TO THE BEGINNING OF A CURVE CONCAVE TO THE SOUTHEAST, HAVING A RADIUS OF 1980.00 FEET, THROUGH A CENTRAL ANGLE OF 7 DEGREES 02' 34", A DISTANCE ALONG THE ARC OF 243.38 FEET;

THENCE SOUTH 48 DEGREES 15' 46" WEST CONTINUING ALONG SAID RIGHT OF WAY A DISTANCE OF 243.62 FEET TO THE BEGINNING OF A CURVE CONCAVE TO THE NORTHWEST, HAVING A RADIUS OF 670.00 FEET, THROUGH A CENTRAL ANGLE OF 11 DEGREES 00' 00" A DISTANCE ALONG THE ARC OF 128.63 FEET;

THENCE NORTH 3 DEGREES 51' 04" EAST LEAVING SAID RIGHT OF WAY, A DISTANCE OF 279.05 FEET;

THENCE NORTH 16 DEGREES 00' 00" EAST A DISTANCE OF 831.46 FEET;

THENCE SOUTH 86 DEGREES 54' 39" EAST A DISTANCE OF 84.09 FEET;

THENCE SOUTH 41 DEGREES 42' 23" EAST A DISTANCE OF 133.87 FEET;

THENCE SOUTH 86 DEGREES 54' 39" EAST A DISTANCE OF 568.90 FEET TO THE TRUE POINT OF BEGINNING.

TRACT C:

A PARCEL OF LAND LOCATED IN THE NORTH HALF OF SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, SAID PARCEL

EXHIBIT "A"
LEGAL DESCRIPTION

BEING A PORTION OF GOVERNMENT LOT 7, SAID SECTION 8, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHEAST CORNER, LOT 20, AS SHOWN ON THE RECORD OF SURVEY BY EUGENE H. WELBORN, R.L.S. #1020, FILED IN BOOK 4, AT PAGE 242, KOOTENAI COUNTY RECORDS, FROM WHICH THE CENTER OF SAID SECTION 8 BEARS SOUTH 3 DEGREES 28' 34" WEST, A DISTANCE OF 1759.89 FEET;

THENCE SOUTH 3 DEGREES 28' 34" WEST, ALONG THE EASTERLY BOUNDARY LINE OF LOT 20, AS SHOWN ON SAID RECORD OF SURVEY, A DISTANCE OF 671.01 FEET TO THE SOUTHEAST CORNER OF SAID LOT 20, SAID CORNER BEING THE TRUE POINT OF BEGINNING FOR THIS DESCRIPTION;

THENCE SOUTH 86 DEGREES 54' 39" EAST, A DISTANCE OF 580.00 FEET; THENCE SOUTH 16 DEGREES 00' 00" WEST, A DISTANCE OF 831.46 FEET;

THENCE SOUTH 3 DEGREES 51' 04" WEST, A DISTANCE OF 279.05 FEET TO A POINT ON THE NORTH RIGHT OF WAY LINE OF LOFF'S BAY ROAD;

THENCE NORTH 86 DEGREES 49' 26" WEST, LEAVING SAID RIGHT OF WAY, A DISTANCE OF 397.86 FEET TO THE SOUTHEAST CORNER OF LOT 21, AS SHOWN ON THE SAID RECORD OF SURVEY;

THENCE NORTH 3 DEGREES 28' 34" EAST, ALONG THE EASTERLY BOUNDARY LINE, SAID LOT 21, A DISTANCE OF 1088.88 FEET TO THE TRUE POINT OF BEGINNING.

TRACT D THE FOLLOWING 3 PARCELS:

TRACT 1:

THAT PORTION OF GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, LYING NORTH OF LOFF'S BAY COUNTY ROAD, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 86 DEGREES 54' 39" EAST, ALONG THE NORTH LINE THEREOF 225.00 FEET;

THENCE SOUTH 03 DEGREES 28' 34" WEST, 587.97 FEET;

THENCE NORTH 86 DEGREES 54' 39" WEST, 69.31 FEET;

THENCE SOUTH 03 DEGREES 28' 34" WEST, 588.00 FEET TO THE NORTH MARGIN OF SAID LOFF'S BAY ROAD;

THENCE NORTH 62 DEGREES 47' 39" WEST, ALONG SAID NORTH MARGIN 115.37 FEET TO THE BEGINNING OF A CURVE TO THE LEFT HAVING A RADIUS OF 290 FEET

EXHIBIT "A"
LEGAL DESCRIPTION

THROUGH A CENTRAL ANGLE OF 11 DEGREES 00' 10", AN ARC DISTANCE OF 55.69 FEET;

THENCE NORTH 03 DEGREES 37' 03" EAST, ALONG THE WEST LINE OF SAID GOVERNMENT LOT 8, 1111.10 FEET TO THE NORTH LINE THEREOF, AND THE TRUE POINT OF BEGINNING.

TRACT 2:

THAT PORTION OF GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, LYING NORTH OF LOFF'S BAY COUNTY ROAD DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 86 DEGREES 54' 39" EAST, ALONG THE NORTH LINE THEREOF, 225.00 FEET TO THE TRUE POINT OF BEGINNING;

THENCE CONTINUING SOUTH 86 DEGREES 54' 39" EAST, ALONG SAID NORTH LINE 757.32 FEET;

THENCE SOUTH 23 DEGREES 49' 53" WEST, 628.71 FEET;

THENCE NORTH 86 DEGREES 54' 39" WEST, 538.63 FEET;

THENCE NORTH 03 DEGREES 28' 34" EAST, 587.97 FEET TO SAID NORTH LINE AND THE TRUE POINT OF BEGINNING.

TRACT 3:

THAT PORTION OF GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, LYING NORTH OF LOFF'S BAY ROAD.

LESS AND EXCEPT A TRACT OF LAND LOCATED IN GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 3 DEGREES 37' 03" WEST ALONG THE WEST LINE OF SAID GOVERNMENT LOT, A DISTANCE OF 1111.1 FEET TO THE NORTH RIGHT OF WAY OF EXISTING LOFF'S BAY ROAD;

THENCE 55.69 SOUTHEASTERLY ALONG A CURVE TO THE RIGHT WITH A RADIUS OF 290.0 FEET ON A CHORD BEARING SOUTH 63 DEGREES 17' 44" EAST, 55.60 FEET;

THENCE SOUTH 62 DEGREES 47' 39" EAST ALONG SAID RIGHT OF WAY 115.37 FEET

EXHIBIT "A"
LEGAL DESCRIPTION

TO THE TRUE POINT OF BEGINNING;

THENCE NORTH 3 DEGREES 37' 03" EAST, 538.0 FEET;

THENCE SOUTH 86 DEGREES 54' 39" EAST, 955.4 FEET TO THE INTERSECTION WITH THE NORTH RIGHT OF WAY OF EXISTING COUNTY ROAD;

THENCE SOUTH 41 DEGREES 34' 10" WEST ALONG SAID RIGHT OF WAY 538.6 FEET;

THENCE ALONG SAID RIGHT OF WAY ON A CURVE TO THE RIGHT 161.47 FEET WITH A RADIUS OF 690.0 FEET AND A CENTRAL ANGLE OF 13 DEGREES 24' 29";

THENCE SOUTH 55 DEGREES 58' 39" WEST ALONG SAID RIGHT WAY 107.27 FEET;

THENCE ALONG SAID RIGHT OF WAY ON A CURVE TO THE RIGHT 341.96 FEET WITH A RADIUS OF 320.0 FEET AND A CENTRAL ANGLE OF 61 DEGREES 13' 42";

THENCE NORTH 62 DEGREES 47' 39" WEST ALONG SAID RIGHT OF WAY 100.0 FEET TO THE TRUE POINT OF BEGINNING.

ALSO EXCEPTING THEREFROM THAT PORTION OF GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, LYING NORTH OF LOFF'S BAY COUNTY ROAD, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 86 DEGREES 54' 39" EAST, ALONG THE NORTH LINE THEREOF 225.00 FEET;

THENCE SOUTH 03 DEGREES 28' 34" WEST, 587.97 FEET;

THENCE NORTH 86 DEGREES 54' 39" WEST, 69.31 FEET;

THENCE SOUTH 03 DEGREES 28' 34" WEST, 588.00 FEET TO THE NORTH MARGIN OF SAID LOFF'S BAY ROAD;

THENCE NORTH 62 DEGREES 47' 39" WEST, ALONG SAID NORTH MARGIN 115.37 FEET TO THE BEGINNING OF A CURVE TO THE LEFT HAVING A RADIUS OF 290 FEET THROUGH A CENTRAL ANGLE OF 11 DEGREES 00' 10", AN ARC DISTANCE OF 55.69 FEET;

THENCE NORTH 03 DEGREES 37' 03" EAST, ALONG THE WEST LINE OF SAID GOVERNMENT LOT 8, 1111.10 FEET TO THE NORTH LINE THEREOF, AND THE TRUE POINT OF BEGINNING.

ALSO EXCEPTING THEREFROM THAT PORTION OF GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, LYING NORTH OF LOFF'S BAY COUNTY ROAD DESCRIBED AS FOLLOWS:

EXHIBIT "A"
LEGAL DESCRIPTION

COMMENCING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 86 DEGREES 54' 39" EAST, ALONG THE NORTH LINE THEREOF, 225.00 FEET TO THE TRUE POINT OF BEGINNING;

THENCE CONTINUING SOUTH 86 DEGREES 54' 39" EAST, ALONG SAID NORTH LINE 757.32 FEET;

THENCE SOUTH 23 DEGREES 49' 53" WEST, 628.71 FEET;

THENCE NORTH 86 DEGREES 54' 39" WEST, 538.63 FEET;

THENCE NORTH 03 DEGREES 28' 34" EAST, 587.97 FEET TO SAID NORTH LINE AND THE TRUE POINT OF BEGINNING.

PARCEL 2:

THE NORTH HALF OF THE SOUTHEAST QUARTER, THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 5, AND GOVERNMENT LOTS 1 AND 2, SECTION 8, ALL IN TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO.

PARCEL 3:

THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 5, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO.

PARCEL 4:

THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER AND THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 5, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO.

PARCEL 5:

THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 5, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO,

AND

LOT 2, BLOCK 1, SCHORMAN-ATKINS SHORT PLAT, ACCORDING TO THE PLAT RECORDED IN BOOK "T" OF PLATS AT PAGES 253 AND 253A, RECORDS OF KOOTENAI COUNTY, IDAHO.

PARCEL 6:

EXHIBIT "A"
LEGAL DESCRIPTION

LOTS 1, 2 AND 3, THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER, THE
NORTHEAST QUARTER OF THE SOUTHWEST QUARTER, THE SOUTHWEST QUARTER OF THE
NORTHEAST QUARTER AND THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER OF
SECTION 5, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN.

AND

GOVERNMENT LOT 4, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE
MERIDIAN, KOOTENAI COUNTY, IDAHO.

EXCEPTING THEREFROM A PORTION OF THAT PROPERTY REFERRED TO IN EXHIBIT "E"
OF QUIET TITLE JUDGEMENT RECORDED UNDER INSTRUMENT NO. 1903262 IN SAID
COUNTY AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID GOVERNMENT LOT 4, SECTION 4;
THENCE

NORTH 00 DEGREES 45' 39" EAST ALONG THE EAST LINE OF SAID LOT 4 A
DISTANCE OF 135.30 FEET TO THE POINT OF BEGINNING; THENCE

SOUTH 87 DEGREES 21' 30" WEST 48.71 FEET; THENCE

NORTH 02 DEGREES 51' 12" WEST 32.07 FEET; THENCE

NORTH 03 DEGREES 13' 21" WEST 10.60 FEET; THENCE

NORTH 02 DEGREES 51' 19" WEST 23.11 FEET; THENCE

NORTH 03 DEGREES 43' 08" WEST 37.65 FEET; THENCE

NORTH 03 DEGREES 46' 01" WEST 51.50 FEET; THENCE

NORTH 03 DEGREES 11' 51" WEST 16.13 FEET; THENCE

NORTH 07 DEGREES 58' 23" WEST 24.73 FEET; THENCE

NORTH 05 DEGREES 22' 53" WEST 23.29 FEET; THENCE

NORTH 06 DEGREES 14' 48" WEST 58.80 FEET; THENCE

NORTH 05 DEGREES 01' 03" WEST 87.73 FEET; THENCE

NORTH 00 DEGREES 16' 11" WEST 39.22 FEET; THENCE

NORTH 18 DEGREES 20' 54" WEST 5.57 FEET; THENCE

NORTH 00 DEGREES 28' 20" WEST 116.01 FEET; THENCE

NORTH 04 DEGREES 23' 45" EAST 125.91 FEET; THENCE

Order No. 6001-17833.2

EXHIBIT "A"
LEGAL DESCRIPTION

NORTH 03 DEGREES 34' 02" EAST 185.71 FEET; THENCE

NORTH 02 DEGREES 44' 00" EAST 41.99 FEET; THENCE

SOUTH 80 DEGREES 57' 24" EAST 34.12 FEET; THENCE

SOUTH 73 DEGREES 27' 34" EAST 37.42 FEET TO A POINT ON THE EAST LINE OF SAID GOVERNMENT LOT 4; THENCE

SOUTH 00 DEGREES 45' 39" WEST A DISTANCE OF 880.68 FEET TO THE POINT OF BEGINNING.

AND EXCEPTING THEREFROM ALL OF THAT PORTION OF SAID GOVERNMENT LOT 4, SECTION 4, LYING NORTHEASTERLY OF THE EXISTING ROADWAY, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, FURTHER DESCRIBED AS FOLLOWS:

ALL OF THAT PORTION OF GOVERNMENT LOT 4, SECTION 4, LYING NORTHEASTERLY OF THE EXISTING ROADWAY, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, AND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING AT A FOUND 1/2 INCH IRON ROD AND PLS 3451 CAP MARKING THE NORTHEAST CORNER OF GOVERNMENT LOT 4, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO;

THENCE ALONG THE EAST LINE OF SAID GOVERNMENT LOT 4, SECTION 4, SOUTH 00 DEGREES 46' 41" WEST, A DISTANCE OF 137.94 FEET TO A SET IRON ROD AND PLS 4194 CAP ON THE NORTHEASTERLY RIGHT OF WAY OF COUNTY ROAD NO. 115 BELLGROVE-STINSON ROAD;

THENCE ALONG THE NORTHEASTERLY RIGHT OF WAY OF SAID ROAD THE FOLLOWING 2 COURSES, ALL MARKED BY IRON RODS AND PLS 4194 CAPS:

1) NORTH 50 DEGREES 44' 36" WEST, A DISTANCE OF 73.10 FEET;

2) THENCE NORTH 60 DEGREES 31' 30" WEST, A DISTANCE OF 210.09 FEET TO THE INTERSECTION WITH THE NORTH LINE OF THE AFOREMENTIONED GOVERNMENT LOT 4, SECTION 4;

THENCE ALONG SAID NORTH LINE OF GOVERNMENT LOT 4, SECTION 4, SOUTH 87 DEGREES 13' 28" EAST, A DISTANCE OF 241.66 FEET TO THE POINT OF BEGINNING.

PARCEL 7, THE FOLLOWING TRACTS:

TRACT A:

A PART OF THE SOUTHWEST QUARTER OF THE NORTHEAST QUARTER, AND GOVERNMENT LOT 2, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN,

COMPT. 12311.0

EXHIBIT "A"
LEGAL DESCRIPTION

KOOTENAI COUNTY, IDAHO, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID SOUTHWEST QUARTER OF THE
NORTHEAST QUARTER (CN 1/16 CORNER);

THENCE NORTH 1 DEGREES 08' 28" EAST, 159.98 FEET ALONG THE WEST BOUNDARY
OF SAID LOT 2 TO A POINT ON THE CENTERLINE OF LOFF'S BAY ROAD;

THENCE TRAVERSING SAID CENTERLINE AS FOLLOWS:

SOUTH 58 DEGREES 36' 55" EAST, 49.07 FEET;

THENCE 332.38 FEET ALONG THE ARC OF A 335.58 FOOT RADIUS CURVE RIGHT, SAID
CURVE HAVING A CHORD BEARING SOUTH 30 DEGREES 14' 24" EAST, 318.96 FEET;

THENCE SOUTH 1 DEGREE 51' 53" EAST, 328.02 FEET;

THENCE SOUTH 2 DEGREES 28' 04" WEST, 104.42 FEET;

THENCE SOUTH 12 DEGREES 40' 51" WEST, 42.73 FEET;

THENCE SOUTH 21 DEGREES 56' 11" WEST, 51.81 FEET;

THENCE SOUTH 31 DEGREES 00' 18" WEST, 99.74 FEET;

THENCE SOUTH 32 DEGREES 35' 22" WEST, 104.42 FEET;

THENCE SOUTH 36 DEGREES 33' 02" WEST, 100.94 FEET;

THENCE SOUTH 42 DEGREES 15' 53" WEST, 51.24 FEET;

THENCE NORTH 1 DEGREE 08' 28" EAST, AND LEAVING SAID CENTERLINE 955.75
FEET ALONG THE WEST BOUNDARY OF SAID SOUTHWEST QUARTER OF THE NORTHEAST
QUARTER TO THE POINT OF BEGINNING.

EXCEPT ANY PORTION LYING IN LOFF'S BAY ROAD.

TRACT B:

A PARCEL OF LAND IN GOVERNMENT LOT 3, SECTION 4, TOWNSHIP 48 NORTH, RANGE
4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, AND FURTHER DESCRIBED AS
FOLLOWS:

BEGINNING AT THE SOUTHWEST CORNER OF SAID GOVERNMENT LOT 3, SECTION 4;

THENCE NORTH 00 DEGREES 46' 05" EAST, ALONG THE WEST LINE OF SAID
GOVERNMENT LOT 3, A DISTANCE OF 135.57 FEET;

EXHIBIT "A"
LEGAL DESCRIPTION

THENCE NORTH 89 DEGREES 12' 07" EAST, A DISTANCE OF 312.12 FEET;

THENCE NORTH 89 DEGREES 47' 56" EAST, A DISTANCE OF 321.36 FEET;

THENCE NORTH 89 DEGREES 06' 35" EAST, A DISTANCE OF 325.48 FEET;

THENCE NORTH 82 DEGREES 25' 36" EAST, A DISTANCE OF 170.38 FEET;

THENCE SOUTH 84 DEGREES 22' 44" EAST, A DISTANCE OF 128.59 FEET;

THENCE NORTH 87 DEGREES 27' 56" EAST, A DISTANCE OF 78.74 FEET TO THE INTERSECTION WITH THE WEST LINE OF SAID GOVERNMENT LOT 2;

THENCE SOUTH 01 DEGREES 08' 46" WEST, A DISTANCE OF 260.57 FEET TO THE NORTH LINE OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN;

THENCE NORTH 85 DEGREES 39' 49" WEST, 1334.86 FEET TO THE POINT OF BEGINNING.

EXCEPT THAT PORTION OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTH ONE QUARTER CORNER OF SAID SECTION 4;

THENCE SOUTH 01 DEGREES 57' 14" WEST, ALONG THE EAST LINE OF THE NORTHWEST QUARTER OF SAID SECTION 4, 980.93 FEET TO THE POINT OF BEGINNING OF THIS DESCRIPTION;

THENCE CONTINUE SOUTH 01 DEGREES 57' 14" WEST, ALONG SAID EAST LINE, 65.86 FEET TO THE NORTHERLY RIGHT OF WAY LINE OF LOFTS BAY ROAD;

THENCE NORTH 57 DEGREES 48' 19" WEST, ALONG SAID NORTHERLY RIGHT OF WAY LINE 125.33 FEET;

THENCE SOUTH 83 DEGREES 34' 01" EAST, 29.69 FEET;

THENCE NORTH 88 DEGREES 16' 39" EAST, 78.83 FEET TO THE POINT OF BEGINNING.

ALL LYING SOUTH OF THE SOUTH LINE OF THE PLAT OF MCLEAN MEADOWS RECORDED IN BOOK "G" OF PLATS PAGE 493, KOOTENAI COUNTY, IDAHO.

TRACT C:

THE NORTH HALF OF THE SOUTHWEST QUARTER AND THE SOUTHWEST QUARTER OF THE SOUTHWEST QUARTER AND THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER AND

EXHIBIT "A"
LEGAL DESCRIPTION

THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER AND THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER, ALL IN SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO.

EXCEPTING THEREFROM A PORTION OF THE SOUTHEAST QUARTER OF SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF SAID SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, SAID POINT BEING A 1 INCH IRON PIPE AS SHOWN BY INSTRUMENT NO. 1941198, RECORDS OF KOOTENAI COUNTY, IDAHO;

THENCE NORTH 76 DEGREES 58'58" WEST ALONG THE SOUTH LINE OF SECTION 4, A DISTANCE OF 1106.63 FEET;

THENCE NORTH 29 DEGREES 07'51" EAST, A DISTANCE OF 370.78 FEET TO A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP, STAMPED P.L.S. 4346;

THENCE NORTH 71 DEGREES 05'20" EAST, A DISTANCE OF 402.07 FEET TO A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP STAMPED P.L.S. 4346;

THENCE NORTH 28 DEGREES 40'09" EAST, A DISTANCE OF 325.54 FEET TO A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP STAMPED P.L.S. 4346;

THENCE NORTH 14 DEGREES 25'38" EAST, A DISTANCE OF 225.75 FEET TO A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP STAMPED P.L.S. 4346;

THENCE NORTH 65 DEGREES 00'05" EAST, A DISTANCE OF 297.30 FEET BEING ON THE EAST-WEST 1/16TH LINE BETWEEN THE SE 1/16TH CORNER ON THE SOUTH 1/16TH CORNER OF SAID SECTION 4, SAID POINT ALSO BEING A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP STAMPED P.L.S. 4346;

THENCE SOUTH 78 DEGREES 57'20" EAST ALONG SAID EAST-WEST 1/16TH LINE A DISTANCE OF 46.31 FEET TO THE SOUTH 1/16TH CORNER OF SAID SECTION 4;

THENCE SOUTH 00 DEGREES 25'56" WEST ALONG THE EAST LINE OF SAID SECTION 4 A DISTANCE OF 1324.52 FEET TO THE SOUTHEAST CORNER OF SAID SECTION 4 AND THE POINT OF BEGINNING.

AND

THE SOUTH HALF OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO.

EXCEPTING THEREFROM THAT PORTION CONVEYED TO BABBITT LOGGING, INC. BY WARRANTY DEED RECORDED JULY 1, 1997 AS INSTRUMENT NO. 1495927, DESCRIBED AS FOLLOWS:

EXHIBIT "A"
LEGAL DESCRIPTION

THAT PORTION OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, LYING EAST OF LOFF'S BAY COUNTY ROAD.

TOGETHER WITH THAT PORTION OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, LYING EAST OF LOFF'S BAY COUNTY ROAD.

PARCEL 8:

ALL OF THAT PORTION OF GOVERNMENT LOT 4, SECTION 4, LYING NORTHEASTERLY OF THE EXISTING ROADWAY, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, AND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING AT A FOUND 1/2 INCH IRON ROD AND PLS 3451 CAP MARKING THE NORTHEAST CORNER OF GOVERNMENT LOT 4, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO;

THENCE ALONG THE EAST LINE OF SAID GOVERNMENT LOT 4, SECTION 4, SOUTH 00 DEGREES 46'41" WEST, A DISTANCE OF 137.94 FEET TO A SET IRON ROD AND PLS 4194 CAP ON THE NORTHEASTERLY RIGHT OF WAY OF COUNTY ROAD NO. 115 BELLGROVE-STINSON ROAD;

THENCE ALONG THE NORTHEASTERLY RIGHT OF WAY OF SAID ROAD THE FOLLOWING 2 COURSES, ALL MARKED BY IRON RODS AND PLS 4194 CAPS:

- 1) NORTH 50 DEGREES 44'36" WEST, A DISTANCE OF 73.10 FEET;
- 2) THENCE NORTH 60 DEGREES 31'30" WEST, A DISTANCE OF 210.09 FEET TO THE INTERSECTION WITH THE NORTH LINE OF THE AFOREMENTIONED GOVERNMENT LOT 4, SECTION 4;

THENCE ALONG SAID NORTH LINE OF GOVERNMENT LOT 4, SECTION 4, SOUTH 87 DEGREES 13'25" EAST, A DISTANCE OF 241.66 FEET TO THE POINT OF BEGINNING.

ACI NORTHWEST, INC.
SCHEDULE OF CURRENT AMOUNTS DUE FROM BLACK ROCK ENTITIES

Due Date	Contract	Invoice	Amount	Interest at 12% Accrued to 05/31	
9/10/2008	8104	6169	52,155.00	4,509.62	Blackrock Offsite Sewer
10/10/2008	8101	6322	206,016.63	15,781.44	Panhandle Modifications
10/10/2008	8970	6312	7,135.36	546.59	Cart Path Work-Hole 586
10/10/2008	8187	6367	6,573.65	503.56	New Clubhouse Site 06-5040
10/10/2008	8186	6366	4,270.89	327.16	BRN Erosion Control 06-5035
11/10/2008	8101	6448	20,981.75	1,992.09	Panhandle Modifications
11/10/2008	8027	6452	19,570.00	1,299.66	BRN Winter Work
11/10/2008	8974	6448	1,462.73	97.14	Kootenai Camp 06-5038
11/10/2008	8187	6451	13,922.92	924.63	New Clubhouse Site 06-5040
11/10/2008	8964	6467	1,088.93	68.86	BRN Golf Course 06-5040
11/10/2008	8186	6450	14,568.30	967.49	BRN Erosion Control 06-5035
11/10/2008	8097	6435	837.09	55.65	BR Comfort Station-Retention
11/10/2008	8058	6436	2,312.00	153.54	BR House Demo-Retention
12/10/2008	8101	6608	18,355.89	1,037.98	Panhandle Modifications
12/10/2008	8101	6677	49,844.78	2,801.66	Panhandle Retention
12/10/2008	8964	6628	3,045.90	172.24	BRN Golf Course 06-5040
12/10/2008	8186	6652	3,742.46	211.63	BRN Erosion Control 08-5035
12/10/2008	8503	6646	4,240.00	239.76	BRN Conduit @ New Entrance
12/10/2008	8097	6661	1,178.95	66.67	BRN Comfort Stations
12/10/2008	8027	6675	18,110.84	911.02	BRN Winter work plus retention
12/10/2008	8104	6878	7,032.49	397.67	BRN Offsite sewer retention
				454,075.06	32,466.08
Bonus Per Contract for Cost Savings				1,045,752.57	
				1,499,827.63	32,466.08
Per Diem Interest				483.05	

Exhibit B

EXHIBIT B

ACI Northwest, Inc. Endorsement to Claim of Lien for Payment on Account

DANIEL J. ENGLISH AP I 2244689000
KOOTENAI CO. RECORDER Page 1 of 4
Date 12/10/2009 Time 12:48:38
REC-REQ OF ACI NORTHWEST INC
RECORDING FEE: 12.00
2244689000 XH 11

**ENDORSEMENT TO CLAIM OF LIEN
FOR PAYMENT ON ACCOUNT**

1. The name of the claimant is ACI Northwest, Inc., having its principal place of business at 6600 N. Government Way, Coeur d'Alene, Idaho 83815 (hereinafter "Claimant").
2. The name of the owner of the real property and improvements thereon against which the lien referred to herein is claimed (hereinafter "Property") is BRN Development, Inc., an Idaho corporation (hereinafter "Owner").
3. The Claimant previously recorded a Claim of Lien as Instrument No. 2216696000, Records of Kootenai County, Idaho, against the Property. A copy of said Claim of Lien is attached hereto as Exhibit "A".
4. The Claimant received a payment on account from Owner on December 9, 2009. Therefore, pursuant to Idaho Code Section 45-510, the binding effect of the Claim of Lien shall run for six (6) months after that date.
5. This Endorsement and the underlying payment on account shall not affect Owner's rights to challenge the validity of the Claim of Lien referred to herein.

STATE OF IDAHO)
) ss
County of Kootenai)

Ada Loper, being first duly sworn deposes and says:

I am the Secretary/Treasurer of ACI Northwest, Inc., the Claimant in the Claim of Lien referenced above. I am competent to testify as to all matters contained in this Endorsement to Claim of Lien for Payment on Account. I have read the foregoing Endorsement to Claim of Lien for Payment on Account, I know the contents thereof, and I testify that the facts stated therein are true, correct and just based upon my personal knowledge.

ACI Northwest, Inc.


Ada Loper, Secretary/Treasurer

**ENDORSEMENT TO
CLAIM OF LIEN FOR
PAYMENT ON ACCOUNT**

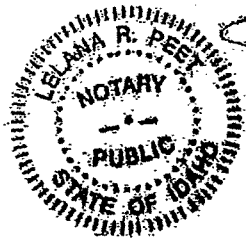


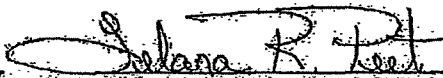
1761

STATE OF IDAHO)
) :ss
County of Kootenai)

On this 10th day of December, 2009 before me the undersigned, a Notary Public in and for the State of Idaho, personally appeared Ada Loper, known to me to be the Secretary/Treasurer of ACI Northwest, Inc., who acknowledged to me that she executed the within instrument and acknowledged to me that she executed the same for and on behalf of ACI Northwest, Inc.

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




Notary for the State of Idaho
Commission Expires: 4/5/10

ENDORSEMENT TO
CLAIM OF LIEN FOR
PAYMENT ON ACCOUNT

COPY

DANIEL J. ENGLISH 15P I 2216698000
KOOTENAI CO. RECORDER Page 1 of 15
BBB Date 08/15/2009 Time 11:51:54
REC-REQ OF ADI NORTHWEST INC
RECORDING FEE: 45.00
2216698000 XN 16

CLAIM OF LIEN

1. The name of the Claimant is ACI Northwest, Inc., an Idaho corporation, having its principal place of business at 6600 North Government Way, Coeur d'Alene, Idaho 83815.
2. The name of the owner of real property against which said lien is claimed is BRN Development, Inc., an Idaho corporation (hereinafter "Owner").
3. The Claimant hereby claims a lien against all properties described in the attached Exhibit "A".
4. This lien is claimed for monies due and owing to Claimant for various construction work, including but not limited to the construction of streets, golf cart paths, culverts, ditches, swales, wet and dry utilities, along with demolition, excavation, and piping.
5. The related labor and materials were performed and furnished at the request of BRN Development, Inc.
6. Performance of the related labor and furnishing of the related materials commenced on October 1, 2006 and ended on March 17, 2009.
7. The amount claimed due and owing to the Claimant for the labor and materials is \$1,499,827.63. *see attached Exhibit "B"*.
8. A lien is also claimed for interest due and owing at twelve percent (12%) per annum pursuant to Idaho Code Section 28-22-104(1), in the amount of \$32,466.08 as of May 31, 2009, plus \$493.09 per day every day thereafter, until paid. *see attached Exhibit "B"*.
9. In the event of litigation, a lien is also claimed for any costs and attorneys' fees awarded pursuant to Idaho Code Section 45-513.
10. All amounts claimed under this lien are fair, just and equitable for the materials that were supplied and/or the labor that was performed.

STATE OF IDAHO)
) :ss
County of Kootenai)

Ada Loper, being first duly sworn deposes and says:

I am the Secretary/Treasurer of ACI Northwest, Inc., the Claimant in the above-entitled Claim of Lien. I am competent to testify as to all matters contained in this Claim of Lien. I have read the foregoing Claim of Lien, I know the contents thereof, and I testify that the facts stated therein are true, correct and just based upon my personal knowledge.

ACI Northwest, Inc,


Ada Loper, Secretary/Treasurer

STATE OF IDAHO)
) :ss
County of Kootenai)

On this 15th day of June, 2009 before me the undersigned, a Notary Public in and for the State of Idaho, personally appeared Ada Loper, known to me to be the Secretary/Treasurer of ACI Northwest, Inc., who acknowledged to me that she executed the within instrument and acknowledged to me that she executed the same for and on behalf of ACI Northwest, Inc.

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



Notary for the State of Idaho
Commission Expires: 7/21/09



EXHIBIT C

Legal Description of the Real Property

EXHIBIT "A"
LEGAL DESCRIPTION

PARCEL 1:

THE FOLLOWING 4 TRACTS LABELLED A-D IN GOVERNMENT LOTS 7 AND 8 IN SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO:

TRACT A:

A TRACT OF LAND LOCATED IN GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 3 DEGREES 37'03" WEST ALONG THE WEST LINE OF SAID GOVERNMENT LOT, A DISTANCE OF 1111.1 FEET TO THE NORTH RIGHT OF WAY OF EXISTING LOFF'S BAY ROAD;

THENCE 55.69 SOUTHEASTERLY ALONG A CURVE TO THE RIGHT WITH A RADIUS OF 290.0 FEET ON A CHORD BEARING SOUTH 68 DEGREES 17'44" EAST, 55.60 FEET;

THENCE SOUTH 62 DEGREES 47'39" EAST ALONG SAID RIGHT OF WAY, 115.37 FEET TO THE TRUE POINT OF BEGINNING;

THENCE NORTH 3 DEGREES 37'03" EAST, 588.0 FEET;

THENCE SOUTH 86 DEGREES 54'39" EAST, 955.4 FEET TO THE INTERSECTION WITH THE NORTH RIGHT OF WAY OF EXISTING COUNTY ROAD;

THENCE SOUTH 42 DEGREES 34'10" WEST ALONG SAID RIGHT OF WAY 538.6 FEET;

THENCE ALONG SAID RIGHT OF WAY ON A CURVE TO THE RIGHT, 161.47 FEET WITH A RADIUS OF 690.0 FEET AND A CENTRAL ANGLE OF 13 DEGREES 24'29";

THENCE SOUTH 55 DEGREES 58'39" WEST ALONG SAID RIGHT OF WAY, 107.27 FEET;

THENCE ALONG SAID RIGHT OF WAY ON A CURVE TO THE RIGHT, 341.96 FEET WITH A RADIUS OF 320.0 FEET AND A CENTRAL ANGLE OF 61 DEGREES 13'42";

THENCE NORTH 62 DEGREES 47'39" WEST ALONG SAID RIGHT OF WAY, 100.0 FEET TO THE TRUE POINT OF BEGINNING.

TRACT B:

A PARCEL OF LAND LOCATED IN THE NORTH HALF OF SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST OF THE BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, SAID PARCEL BEING

Order No. 6001-17833.2

Version 3

UPDATE

EXHIBIT "A"
LEGAL DESCRIPTION

A PORTION OF GOVERNMENT LOT 7, SAID SECTION 8, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHEAST CORNER OF LOT 20, AS SHOWN ON THE RECORD OF SURVEY BY EUGENE H. WELBORN, R.L.S. #1020, FILED IN BOOK 4 AT PAGE 249, KOOTENAI COUNTY RECORDS, FROM WHICH THE CENTER OF SAID SECTION 8 BEARS SOUTH 3 DEGREES 28' 34" WEST A DISTANCE OF 1,759.89 FEET;

THENCE SOUTH 86 DEGREES 54' 39" EAST ALONG THE NORTH BOUNDARY LINE, SAID GOVERNMENT LOT 7, A DISTANCE OF 1329.84 FEET TO THE NORTHEAST CORNER OF LOT 7;

THENCE 3 DEGREES 37' 03" WEST ALONG THE EASTERLY BOUNDARY LINE, SAID LOT 7, A DISTANCE OF 766.02 FEET TO THE TRUE POINT OF BEGINNING FOR THIS DESCRIPTION;

THENCE SOUTH 3 DEGREES 37' 03" WEST CONTINUING ALONG SAID LINE A DISTANCE OF 345.08 FEET TO A POINT ON THE NORTHERLY RIGHT OF WAY LINE OF LOFF'S BAY ROAD, SAID POINT BEING THE BEGINNING OF A NON-TANGENT CURVE CONCAVE TO THE SOUTH, HAVING A RADIUS OF 290.00 FEET, THROUGH A CENTRAL ANGLE OF 50 DEGREES 52' 50" A DISTANCE ALONG THE ARC OF 257.53 FEET, THE CHORD BEARING OF SAID CURVE BEING SOUTH 80 DEGREES 44' 47" WEST;

THENCE SOUTH 55 DEGREES 18' 20" WEST CONTINUING ALONG SAID RIGHT OF WAY, A DISTANCE OF 297.82 FEET TO THE BEGINNING OF A CURVE CONCAVE TO THE SOUTHEAST, HAVING A RADIUS OF 1980.00 FEET, THROUGH A CENTRAL ANGLE OF 7 DEGREES 02' 34", A DISTANCE ALONG THE ARC OF 243.38 FEET;

THENCE SOUTH 48 DEGREES 15' 46" WEST CONTINUING ALONG SAID RIGHT OF WAY A DISTANCE OF 243.62 FEET TO THE BEGINNING OF A CURVE CONCAVE TO THE NORTHWEST, HAVING A RADIUS OF 670.00 FEET, THROUGH A CENTRAL ANGLE OF 11 DEGREES 00' 00" A DISTANCE ALONG THE ARC OF 128.63 FEET;

THENCE NORTH 3 DEGREES 51' 04" EAST LEAVING SAID RIGHT OF WAY, A DISTANCE OF 279.05 FEET;

THENCE NORTH 16 DEGREES 00' 00" EAST A DISTANCE OF 831.46 FEET;

THENCE SOUTH 86 DEGREES 54' 39" EAST A DISTANCE OF 84.09 FEET;

THENCE SOUTH 41 DEGREES 42' 23" EAST A DISTANCE OF 133.87 FEET;

THENCE SOUTH 86 DEGREES 54' 39" EAST A DISTANCE OF 568.90 FEET TO THE TRUE POINT OF BEGINNING.

TRACT C:

A PARCEL OF LAND LOCATED IN THE NORTH HALF OF SECTION 8, TOWNSHIP 43 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, SAID PARCEL

COUNTY.L2011.0

EXHIBIT "A"
LEGAL DESCRIPTION

BEING A PORTION OF GOVERNMENT LOT 7, SAID SECTION 8, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHEAST CORNER, LOT 20, AS SHOWN ON THE RECORD OF SURVEY BY EUGENE H. WELBORN, R.L.S. #1020, FILED IN BOOK 4, AT PAGE 249, KOOTENAI COUNTY RECORDS, FROM WHICH THE CENTER OF SAID SECTION 8 BEARS SOUTH 3 DEGREES 28' 34" WEST, A DISTANCE OF 1759.89 FEET;

THENCE SOUTH 3 DEGREES 28' 34" WEST, ALONG THE EASTERLY BOUNDARY LINE OF LOT 20, AS SHOWN ON SAID RECORD OF SURVEY, A DISTANCE OF 671.01 FEET TO THE SOUTHEAST CORNER OF SAID LOT 20, SAID CORNER BEING THE TRUE POINT OF BEGINNING FOR THIS DESCRIPTION;

THENCE SOUTH 86 DEGREES 54' 39" EAST, A DISTANCE OF 580.00 FEET; THENCE SOUTH 16 DEGREES 00' 00" WEST, A DISTANCE OF 831.46 FEET;

THENCE SOUTH 3 DEGREES 51' 04" WEST, A DISTANCE OF 279.05 FEET TO A POINT ON THE NORTH RIGHT OF WAY LINE OF LOFF'S BAY ROAD;

THENCE NORTH 86 DEGREES 49' 26" WEST, LEAVING SAID RIGHT OF WAY, A DISTANCE OF 397.86 FEET TO THE SOUTHEAST CORNER OF LOT 21, AS SHOWN ON THE SAID RECORD OF SURVEY;

THENCE NORTH 3 DEGREES 28' 34" EAST, ALONG THE EASTERLY BOUNDARY LINE, SAID LOT 21, A DISTANCE OF 1088.88 FEET TO THE TRUE POINT OF BEGINNING.

TRACT D THE FOLLOWING 3 PARCELS:

TRACT 1:

THAT PORTION OF GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, LYING NORTH OF LOFF'S BAY COUNTY ROAD, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 86 DEGREES 54' 39" EAST, ALONG THE NORTH LINE THEREOF 225.00 FEET;

THENCE SOUTH 03 DEGREES 28' 34" WEST, 587.97 FEET;

THENCE NORTH 86 DEGREES 54' 39" WEST, 69.31 FEET;

THENCE SOUTH 03 DEGREES 28' 34" WEST, 588.00 FEET TO THE NORTH MARGIN OF SAID LOFF'S BAY ROAD;

THENCE NORTH 62 DEGREES 47' 39" WEST, ALONG SAID NORTH MARGIN 115.37 FEET TO THE BEGINNING OF A CURVE TO THE LEFT HAVING A RADIUS OF 290 FEET

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EXHIBIT "A"
LEGAL DESCRIPTION

THROUGH A CENTRAL ANGLE OF 11 DEGREES 00' 10", AN ARC DISTANCE OF 55.69 FEET;

THENCE NORTH 03 DEGREES 37' 03" EAST, ALONG THE WEST LINE OF SAID GOVERNMENT LOT 8, 1111.10 FEET TO THE NORTH LINE THEREOF, AND THE TRUE POINT OF BEGINNING.

TRACT 2:

THAT PORTION OF GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, LYING NORTH OF LOFF'S BAY COUNTY ROAD DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 86 DEGREES 54' 39" EAST, ALONG THE NORTH LINE THEREOF, 225.00 FEET TO THE TRUE POINT OF BEGINNING;

THENCE CONTINUING SOUTH 86 DEGREES 54' 39" EAST, ALONG SAID NORTH LINE 757.32 FEET;

THENCE SOUTH 23 DEGREES 49' 53" WEST, 628.71 FEET;

THENCE NORTH 86 DEGREES 54' 39" WEST, 538.63 FEET;

THENCE NORTH 03 DEGREES 28' 34" EAST, 587.97 FEET TO SAID NORTH LINE AND THE TRUE POINT OF BEGINNING.

TRACT 3:

THAT PORTION OF GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, LYING NORTH OF LOFF'S BAY ROAD.

LESS AND EXCEPT A TRACT OF LAND LOCATED IN GOVERNMENT LOT 8, SECTION 8, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 3 DEGREES 37' 03" WEST ALONG THE WEST LINE OF SAID GOVERNMENT LOT, A DISTANCE OF 1111.1 FEET TO THE NORTH RIGHT OF WAY OF EXISTING LOFF'S BAY ROAD;

THENCE 55.69 SOUTHEASTERLY ALONG A CURVE TO THE RIGHT WITH A RADIUS OF 290.0 FEET ON A CHORD BEARING SOUTH 68 DEGREES 17' 44" EAST, 55.60 FEET;

THENCE SOUTH 62 DEGREES 47' 39" EAST ALONG SAID RIGHT OF WAY 115.37 FEET

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EXHIBIT "A"
LEGAL DESCRIPTION

TO THE TRUE POINT OF BEGINNING;

THENCE NORTH 3 DEGREES 37' 03" EAST, 588.0 FEET;

THENCE SOUTH 86 DEGREES 54' 39" EAST, 955.4 FEET TO THE INTERSECTION WITH
THE NORTH RIGHT OF WAY OF EXISTING COUNTY ROAD;

THENCE SOUTH 42 DEGREES 34' 10" WEST ALONG SAID RIGHT OF WAY 538.6 FEET;

THENCE ALONG SAID RIGHT OF WAY ON A CURVE TO THE RIGHT 161.47 FEET WITH A
RADIUS OF 690.0 FEET AND A CENTRAL ANGLE OF 13 DEGREES 24' 29";

THENCE SOUTH 55 DEGREES 58' 39" WEST ALONG SAID RIGHT WAY 107.27 FEET;

THENCE ALONG SAID RIGHT OF WAY ON A CURVE TO THE RIGHT 341.96 FEET WITH A
RADIUS OF 320.0 FEET AND A CENTRAL ANGLE OF 61 DEGREES 13' 42";

THENCE NORTH 62 DEGREES 47' 39" WEST ALONG SAID RIGHT OF WAY 100.0 FEET TO
THE TRUE POINT OF BEGINNING.

ALSO EXCEPTING THEREFROM THAT PORTION OF GOVERNMENT LOT 8, SECTION 8,
TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO,
LYING NORTH OF LOFF'S BAY COUNTY ROAD, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 86 DEGREES 54' 39" EAST, ALONG THE NORTH LINE THEREOF 225.00
FEET;

THENCE SOUTH 03 DEGREES 28' 34" WEST, 587.97 FEET;

THENCE NORTH 86 DEGREES 54' 39" WEST, 69.31 FEET;

THENCE SOUTH 03 DEGREES 28' 34" WEST, 588.00 FEET TO THE NORTH MARGIN OF
SAID LOFF'S BAY ROAD;

THENCE NORTH 62 DEGREES 47' 39" WEST, ALONG SAID NORTH MARGIN 115.37 FEET
TO THE BEGINNING OF A CURVE TO THE LEFT HAVING A RADIUS OF 290 FEET
THROUGH A CENTRAL ANGLE OF 11 DEGREES 00' 10", AN ARC DISTANCE OF 55.69
FEET;

THENCE NORTH 03 DEGREES 37' 03" EAST, ALONG THE WEST LINE OF SAID
GOVERNMENT LOT 8, 1111.10 FEET TO THE NORTH LINE THEREOF, AND THE TRUE
POINT OF BEGINNING.

ALSO EXCEPTING THEREFROM THAT PORTION OF GOVERNMENT LOT 8, SECTION 8,
TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO,
LYING NORTH OF LOFF'S BAY COUNTY ROAD DESCRIBED AS FOLLOWS:

COMMIT.LLEGAL.0

EXHIBIT "A"
LEGAL DESCRIPTION

COMMENCING AT THE NORTHWEST CORNER OF SAID GOVERNMENT LOT 8;

THENCE SOUTH 86 DEGREES 54' 39" EAST, ALONG THE NORTH LINE THEREOF, 225.00 FEET TO THE TRUE POINT OF BEGINNING;

THENCE CONTINUING SOUTH 86 DEGREES 54' 39" EAST, ALONG SAID NORTH LINE 757.32 FEET;

THENCE SOUTH 23 DEGREES 49' 53" WEST, 628.71 FEET;

THENCE NORTH 86 DEGREES 54' 39" WEST, 538.63 FEET;

THENCE NORTH 03 DEGREES 28' 34" EAST, 587.97 FEET TO SAID NORTH LINE AND THE TRUE POINT OF BEGINNING.

PARCEL 2:

THE NORTH HALF OF THE SOUTHEAST QUARTER, THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 5, AND GOVERNMENT LOTS 1 AND 2, SECTION 8, ALL IN TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO.

PARCEL 3:

THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 5, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO.

PARCEL 4:

THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER AND THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 5, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO.

PARCEL 5:

THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 5, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO,

AND

LOT 2, BLOCK 1, SCHORZMAN-ATKINS SHORT PLAT, ACCORDING TO THE PLAT RECORDED IN BOOK "I" OF PLATS AT PAGES 253 AND 253A, RECORDS OF KOOTENAI COUNTY, IDAHO.

PARCEL 6:

EXHIBIT "A"
LEGAL DESCRIPTION

LOTS 1, 2 AND 3, THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER, THE
NORTHEAST QUARTER OF THE SOUTHWEST QUARTER, THE SOUTHWEST QUARTER OF THE
NORTHEAST QUARTER AND THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER OF
SECTION 5, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN.

AND

GOVERNMENT LOT 4, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE
MERIDIAN, KOOTENAI COUNTY, IDAHO.

EXCEPTING THEREFROM A PORTION OF THAT PROPERTY REFERRED TO IN EXHIBIT "B"
OF QUIET TITLE JUDGEMENT RECORDED UNDER INSTRUMENT NO. 1906262 IN SAID
COUNTY AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID GOVERNMENT LOT 4, SECTION 4;
THENCE

NORTH 00 DEGREES 45' 39" EAST ALONG THE EAST LINE OF SAID LOT 4 A
DISTANCE OF 135.30 FEET TO THE POINT OF BEGINNING; THENCE

SOUTH 87 DEGREES 21' 30" WEST 48.71 FEET; THENCE

NORTH 02 DEGREES 51' 12" WEST 32.07 FEET; THENCE

NORTH 03 DEGREES 13' 21" WEST 10.60 FEET; THENCE

NORTH 02 DEGREES 51' 19" WEST 23.11 FEET; THENCE

NORTH 03 DEGREES 43' 08" WEST 37.65 FEET; THENCE

NORTH 03 DEGREES 46' 01" WEST 51.50 FEET; THENCE

NORTH 03 DEGREES 11' 51" WEST 16.13 FEET; THENCE

NORTH 07 DEGREES 58' 23" WEST 24.73 FEET; THENCE

NORTH 05 DEGREES 22' 53" WEST 23.29 FEET; THENCE

NORTH 06 DEGREES 14' 48" WEST 58.80 FEET; THENCE

NORTH 05 DEGREES 01' 03" WEST 87.73 FEET; THENCE

NORTH 00 DEGREES 16' 11" WEST 39.22 FEET; THENCE

NORTH 18 DEGREES 20' 54" WEST 5.57 FEET; THENCE

NORTH 00 DEGREES 28' 20" WEST 116.01 FEET; THENCE

NORTH 04 DEGREES 23' 45" EAST 125.91 FEET; THENCE

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EXHIBIT "A"
LEGAL DESCRIPTION

NORTH 03 DEGREES 34' 02" EAST 185.71 FEET; THENCE

NORTH 02 DEGREES 44' 00" EAST 41.99 FEET; THENCE

SOUTH 80 DEGREES 57' 24" EAST 34.12 FEET; THENCE

SOUTH 73 DEGREES 27' 34" EAST 37.42 FEET TO A POINT ON THE EAST LINE OF SAID GOVERNMENT LOT 4; THENCE

SOUTH 00 DEGREES 45' 39" WEST A DISTANCE OF 880.68 FEET TO THE POINT OF BEGINNING.

AND EXCEPTING THEREFROM ALL OF THAT PORTION OF SAID GOVERNMENT LOT 4, SECTION 4, LYING NORTHEASTERLY OF THE EXISTING ROADWAY, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, FURTHER DESCRIBED AS FOLLOWS:

ALL OF THAT PORTION OF GOVERNMENT LOT 4, SECTION 4, LYING NORTHEASTERLY OF THE EXISTING ROADWAY, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, AND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING AT A FOUND 1/2 INCH IRON ROD AND PLS 3451 CAP MARKING THE NORTHEAST CORNER OF GOVERNMENT LOT 4, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO;

THENCE ALONG THE EAST LINE OF SAID GOVERNMENT LOT 4, SECTION 4, SOUTH 00 DEGREES 46' 41" WEST, A DISTANCE OF 137.94 FEET TO A SET IRON ROD AND PLS 4194 CAP ON THE NORTHEASTERLY RIGHT OF WAY OF COUNTY ROAD NO. 115 BELLGROVE-STINSON ROAD;

THENCE ALONG THE NORTHEASTERLY RIGHT OF WAY OF SAID ROAD THE FOLLOWING 2 COURSES, ALL MARKED BY IRON RODS AND PLS 4194 CAPS:

1) NORTH 50 DEGREES 44' 36" WEST, A DISTANCE OF 73.10 FEET;

2) THENCE NORTH 60 DEGREES 31' 30" WEST, A DISTANCE OF 210.09 FEET TO THE INTERSECTION WITH THE NORTH LINE OF THE AFOREMENTIONED GOVERNMENT LOT 4, SECTION 4;

THENCE ALONG SAID NORTH LINE OF GOVERNMENT LOT 4, SECTION 4, SOUTH 87 DEGREES 13' 28" EAST, A DISTANCE OF 241.66 FEET TO THE POINT OF BEGINNING.

PARCEL 7, THE FOLLOWING TRACTS:

TRACT A:

A PART OF THE SOUTHWEST QUARTER OF THE NORTHEAST QUARTER, AND GOVERNMENT LOT 2, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN,

COMMIT.LLEGAL.O

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EXHIBIT "A"
LEGAL DESCRIPTION

KOOTENAI COUNTY, IDAHO, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID SOUTHWEST QUARTER OF THE
NORTHEAST QUARTER (CN 1/16 CORNER);

THENCE NORTH 1 DEGREES 08' 28" EAST, 159.98 FEET ALONG THE WEST BOUNDARY
OF SAID LOT 2 TO A POINT ON THE CENTERLINE OF LOFFS BAY ROAD;

THENCE TRAVERSING SAID CENTERLINE AS FOLLOWS:

SOUTH 58 DEGREES 36' 55" EAST, 49.07 FEET;

THENCE 332.38 FEET ALONG THE ARC OF A 335.58 FOOT RADIUS CURVE RIGHT, SAID
CURVE HAVING A CHORD BEARING SOUTH 30 DEGREES 14' 24" EAST, 318.96 FEET;

THENCE SOUTH 1 DEGREES 51' 53" EAST, 328.02 FEET;

THENCE SOUTH 2 DEGREES 28' 04" WEST, 104.42 FEET;

THENCE SOUTH 12 DEGREES 40' 51" WEST, 42.73 FEET;

THENCE SOUTH 21 DEGREES 56' 11" WEST, 51.81 FEET;

THENCE SOUTH 31 DEGREES 00' 18" WEST, 99.74 FEET;

THENCE SOUTH 32 DEGREES 35' 22" WEST, 104.42 FEET;

THENCE SOUTH 36 DEGREES 33' 02" WEST, 100.94 FEET;

THENCE SOUTH 42 DEGREES 15' 53" WEST, 51.24 FEET;

THENCE NORTH 1 DEGREES 08' 28" EAST, AND LEAVING SAID CENTERLINE 955.75
FEET ALONG THE WEST BOUNDARY OF SAID SOUTHWEST QUARTER OF THE NORTHEAST
QUARTER TO THE POINT OF BEGINNING.

EXCEPT ANY PORTION LYING IN LOFF'S BAY ROAD.

TRACT B:

A PARCEL OF LAND IN GOVERNMENT LOT 3, SECTION 4, TOWNSHIP 48 NORTH, RANGE
4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, AND FURTHER DESCRIBED AS
FOLLOWS:

BEGINNING AT THE SOUTHWEST CORNER OF SAID GOVERNMENT LOT 3, SECTION 4;

THENCE NORTH 00 DEGREES 46' 05" EAST, ALONG THE WEST LINE OF SAID
GOVERNMENT LOT 3, A DISTANCE OF 135.57 FEET;

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EXHIBIT "A"
LEGAL DESCRIPTION

THENCE NORTH 89 DEGREES 12' 07" EAST, A DISTANCE OF 312.12 FEET;

THENCE NORTH 89 DEGREES 47' 56" EAST, A DISTANCE OF 321.36 FEET;

THENCE NORTH 89 DEGREES 06' 35" EAST, A DISTANCE OF 325.48 FEET;

THENCE NORTH 82 DEGREES 25' 36" EAST, A DISTANCE OF 170.38 FEET;

THENCE SOUTH 84 DEGREES 22' 44" EAST, A DISTANCE OF 128.59 FEET;

THENCE NORTH 87 DEGREES 27' 56" EAST, A DISTANCE OF 78.74 FEET TO THE
INTERSECTION WITH THE WEST LINE OF SAID GOVERNMENT LOT 2;

THENCE SOUTH 01 DEGREES 08' 46" WEST, A DISTANCE OF 260.57 FEET TO THE
NORTH LINE OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 4,
TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN;

THENCE NORTH 85 DEGREES 39' 49" WEST, 1334.86 FEET TO THE POINT OF
BEGINNING.

EXCEPT THAT PORTION OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 48
NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, DESCRIBED AS
FOLLOWS:

COMMENCING AT THE NORTH ONE QUARTER CORNER OF SAID SECTION 4;

THENCE SOUTH 01 DEGREES 57' 14" WEST, ALONG THE EAST LINE OF THE
NORTHWEST QUARTER OF SAID SECTION 4, 980.93 FEET TO THE POINT OF
BEGINNING OF THIS DESCRIPTION;

THENCE CONTINUE SOUTH 01 DEGREES 57' 14" WEST, ALONG SAID EAST LINE,
65.86 FEET TO THE NORTHERLY RIGHT OF WAY LINE OF LOFFS BAY ROAD;

THENCE NORTH 57 DEGREES 48' 19" WEST, ALONG SAID NORTHERLY RIGHT OF WAY
LINE 125.33 FEET;

THENCE SOUTH 83 DEGREES 34' 01" EAST, 29.69 FEET;

THENCE NORTH 88 DEGREES 16' 39" EAST, 78.83 FEET TO THE POINT OF
BEGINNING.

ALL LYING SOUTH OF THE SOUTH LINE OF THE FLAT OF MCLEAN MEADOWS RECORDED
IN BOOK "G" OF PLATS PAGE 493, KOOTENAI COUNTY, IDAHO.

TRACT C:

THE NORTH HALF OF THE SOUTHWEST QUARTER AND THE SOUTHWEST QUARTER OF THE
SOUTHWEST QUARTER AND THE SOUTHWEST QUARTER AND THE SOUTHWEST QUARTER AND

COUNTY, LEGAL, 0

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EXHIBIT "A"
LEGAL DESCRIPTION

THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER AND THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER, ALL IN SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO.

EXCEPTING THEREFROM A PORTION OF THE SOUTHEAST QUARTER OF SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF SAID SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, SAID POINT BEING A 1 INCH IRON PIPE AS SHOWN BY INSTRUMENT NO. 1341198, RECORDS OF KOOTENAI COUNTY, IDAHO;

THENCE NORTH 76 DEGREES 58'58" WEST ALONG THE SOUTH LINE OF SECTION 4, A DISTANCE OF 1106.63 FEET;

THENCE NORTH 29 DEGREES 07'51" EAST, A DISTANCE OF 370.78 FEET TO A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP, STAMPED P.L.S. 4346;

THENCE NORTH 71 DEGREES 05'20" EAST, A DISTANCE OF 402.07 FEET TO A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP STAMPED P.L.S. 4346;

THENCE NORTH 28 DEGREES 40'09" EAST, A DISTANCE OF 325.54 FEET TO A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP STAMPED P.L.S. 4346;

THENCE NORTH 14 DEGREES 25'38" EAST, A DISTANCE OF 225.75 FEET TO A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP STAMPED P.L.S. 4346;

THENCE NORTH 65 DEGREES 00'05" EAST, A DISTANCE OF 297.30 FEET BEING ON THE EAST-WEST 1/16TH LINE BETWEEN THE SC 1/16TH CORNER ON THE SOUTH 1/16TH CORNER OF SAID SECTION 4, SAID POINT ALSO BEING A 5/8 INCH REBAR WITH A ORANGE PLASTIC CAP STAMPED P.L.S. 4346;

THENCE SOUTH 78 DEGREES 57'20" EAST ALONG SAID EAST-WEST 1/16TH LINE A DISTANCE OF 46.31 FEET TO THE SOUTH 1/16TH CORNER OF SAID SECTION 4;

THENCE SOUTH 00 DEGREES 25'56" WEST ALONG THE EAST LINE OF SAID SECTION 4 A DISTANCE OF 1324.52 FEET TO THE SOUTHEAST CORNER OF SAID SECTION 4 AND THE POINT OF BEGINNING.

AND

THE SOUTH HALF OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO.

EXCEPTING THEREFROM THAT PORTION CONVEYED TO BABBITT LOGGING, INC. BY WARRANTY DEED RECORDED JULY 1, 1997 AS INSTRUMENT NO. 1495927, DESCRIBED AS FOLLOWS:

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EXHIBIT "A"
LEGAL DESCRIPTION

THAT PORTION OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, LYING EAST OF LOFF'S BAY COUNTY ROAD.

TOGETHER WITH THAT PORTION OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, LYING EAST OF LOFF'S BAY COUNTY ROAD.

PARCEL 3:

ALL OF THAT PORTION OF GOVERNMENT LOT 4, SECTION 4, LYING NORTHEASTERLY OF THE EXISTING ROADWAY, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, AND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING AT A FOUND 1/2 INCH IRON ROD AND PLS 3451 CAP MARKING THE NORTHEAST CORNER OF GOVERNMENT LOT 4, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO;

THENCE ALONG THE EAST LINE OF SAID GOVERNMENT LOT 4, SECTION 4, SOUTH 00 DEGREES 46'41" WEST, A DISTANCE OF 137.94 FEET TO A SET IRON ROD AND PLS 4194 CAP ON THE NORTHEASTERLY RIGHT OF WAY OF COUNTY ROAD NO. 115 BELLGROVE-STINSON ROAD;

THENCE ALONG THE NORTHEASTERLY RIGHT OF WAY OF SAID ROAD THE FOLLOWING 2 COURSES, ALL MARKED BY IRON RODS AND PLS 4194 CAPS:

- 1) NORTH 50 DEGREES 44'36" WEST, A DISTANCE OF 73.10 FEET;
- 2) THENCE NORTH 60 DEGREES 31'30" WEST, A DISTANCE OF 210.09 FEET TO THE INTERSECTION WITH THE NORTH LINE OF THE AFOREMENTIONED GOVERNMENT LOT 4, SECTION 4;

THENCE ALONG SAID NORTH LINE OF GOVERNMENT LOT 4, SECTION 4, SOUTH 87 DEGREES 13'28" EAST, A DISTANCE OF 241.66 FEET TO THE POINT OF BEGINNING.

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EXHIBIT "A"
LEGAL DESCRIPTION

THAT PORTION OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, LYING EAST OF LOFF'S BAY COUNTY ROAD.

TOGETHER WITH THAT PORTION OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, STATE OF IDAHO, LYING EAST OF LOFF'S BAY COUNTY ROAD.

PARCEL 8:

ALL OF THAT PORTION OF GOVERNMENT LOT 4, SECTION 4, LYING NORTHEASTERLY OF THE EXISTING ROADWAY, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, AND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING AT A FOUND 1/2 INCH IRON ROD AND PLS 3451 CAP MARKING THE NORTHEAST CORNER OF GOVERNMENT LOT 4, SECTION 4, TOWNSHIP 48 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO;

THENCE ALONG THE EAST LINE OF SAID GOVERNMENT LOT 4, SECTION 4, SOUTH 00 DEGREES 46'41" WEST, A DISTANCE OF 137.94 FEET TO A SET IRON ROD AND PLS 4194 CAP ON THE NORTHEASTERLY RIGHT OF WAY OF COUNTY ROAD NO. 115 BELLGROVE-STINSON ROAD;

THENCE ALONG THE NORTHEASTERLY RIGHT OF WAY OF SAID ROAD THE FOLLOWING 2 COURSES, ALL MARKED BY IRON RODS AND PLS 4194 CAPS:

- 1) NORTH 50 DEGREES 44'36" WEST, A DISTANCE OF 73.10 FEET;
- 2) THENCE NORTH 60 DEGREES 31'30" WEST, A DISTANCE OF 210.09 FEET TO THE INTERSECTION WITH THE NORTH LINE OF THE AFOREMENTIONED GOVERNMENT LOT 4, SECTION 4;

THENCE ALONG SAID NORTH LINE OF GOVERNMENT LOT 4, SECTION 4, SOUTH 37 DEGREES 13'28" EAST, A DISTANCE OF 241.66 FEET TO THE POINT OF BEGINNING.

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STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: *[Signature]*
APR 25 10 50 AM '10
CLERK, DISTRICT COURT
DEPUTY

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Attorneys for BRN Development, Inc., BRN Investments, LLC,
Lake View AG, BRN-Lake View Joint Venture, the Roland M.
Casati Family Trust, dated June 5, 2008, the Ryker Young
Revocable Trust and Marshall Chesrown

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Attorney for Marshall Chesrown

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho
corporation, BRN INVESTMENTS, LLC,
an Idaho limited liability company, LAKE
VIEW AG, a Liechtenstein company,
BRN-LAKE VIEW JOINT VENTURE,
an Idaho general partnership, ROBERT
LEVIN, Trustee for the ROLAND M.

Case No. CV09-2619

[PROPOSED] ORDER ON
DEFENDANTS BRN
DEVELOPMENT, INC., BRN
INVESTMENTS, LLC, LAKE VIEW
AG, BRN-LAKE VIEW JOINT
VENTURE, ROLAND M. CASATI
FAMILY TRUST, RYKER YOUNG
REVOCABLE TRUST, AND
MARSHALL CHESROWN'S
MOTION FOR CONTINUANCE OF
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

CASATI FAMILY TRUST, dated June 5, 2008, RYKER YOUNG, Trustee for the RYKER YOUNG REVOCABLE TRUST, MARSHALL CHESROWN, a single man, IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company, THORCO, INC., an Idaho corporation, CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

AND

MOTION TO SHORTEN TIME

THIS MATTER having come on for hearing on Defendants, BRN Development, Inc., BRN Investments, LLC, Lake View AG, BRN-Lake View Joint Venture, Roland M. Casati Family Trust, Ryker Young Revocable Trust, and Marshall Chesrown's Motion for Continuance of Plaintiff's Motion for Partial Summary Judgment and Motion to Shorten Time, the Court having reviewed all material pertinent hereto and for good cause appearing,

NOW, THEREFORE, it is hereby


ORDERED, ADJUDGED AND DECREED that the aforesaid motions be and the same are hereby GRANTED. Plaintiff's Motion for Partial Summary Judgment previously scheduled for August 18, 2010 is continued until November 16, 2010.

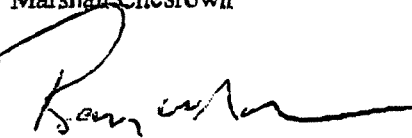
DONE IN OPEN COURT this 29 day of July, 2010.


JUDGE JOHN P. LUSTER

Presented by:

LAYMAN, LAYMAN & ROBINSON, PLLP


JOHN P. LAYMAN, ISB #6825
Attorneys for BRN Development, Inc., BRN Investments, LLC, Lake View AG, BRN-Lake View Joint Venture, the Roland M. Casati Family Trust, the Ryker Young Revocable Trust and Marshall Chesrown


Barry Davidson, Pro Hac Vice
Attorney for Marshall Chesrown

CERTIFICATE OF SERVICE

I hereby certify that on the ²⁷27th day of July, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

John Layman 509-624-2902

- Nancy L. Isserlis Hand-delivered
- Elizabeth A. Tellessen Regular mail
- Winston & Cashatt Certified mail
- 601 W. Riverside, Suite 1900 Overnight mail
- Spokane, WA 99201 Facsimile 765-2121
- Interoffice Mail
- Barry Davidson Hand-delivered
- Davidson, Backman, Medeiros Regular mail
- 601 West Riverside #1550 Certified mail
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- Overnight mail
- Facsimile 773-1044
- Interoffice Mail
- Edward J. Anson Hand-delivered
- Witherspoon, Kelley, Davenport & Toole Regular mail
- 608 Northwest Blvd, Suite 300 Certified mail
- Coeur d'Alene, ID 83814 Overnight mail
- Facsimile 607-8470
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#003

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- Overnight mail
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208-344-8542 (call on Fax fail)

1003

BY:

Wendy Johnson

JOHN R. LAYMAN, ISB #6825
PATTI JO FOSTER, ISB #7665
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STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 9/7/10
AT 2:08 O'CLOCK P.M.
CLERK, DISTRICT COURT
DEPUTY

Please Fax and Mail To:
LAYMAN, LAYMAN & ROBINSON, PLLP
601 S. Division Street
Spokane, Washington 99202
(509) 455-8883
(509) 624-2902 (fax)

Attorneys for BRN Development, Inc., BRN Investments, LLC,
Lake View AG, BRN-Lake View Joint Venture, the Roland M.
Casati Family Trust, dated June 5, 2008, the Ryker Young
Revocable Trust and Marshall Chesrown

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking
corporation,

Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho
corporation, BRN INVESTMENTS, LLC,
an Idaho limited liability company, LAKE
VIEW AG, a Liechtenstein company,
BRN-LAKE VIEW JOINT VENTURE,
an Idaho general partnership, ROBERT
LEVIN, Trustee for the ROLAND M.
CASATI FAMILY TRUST, dated June 5,
2008, RYKER YOUNG, Trustee for the
RYKER YOUNG REVOCABLE
TRUST, MARSHALL CHESROWN, a
single man, IDAHO ROOFING
SPECIALIST, LLC, an Idaho limited
liability company, THORCO, INC., an
Idaho corporation, CONSOLIDATED
SUPPLY COMPANY, an Oregon

Case No. CV09-2619

AMENDED ORDER FOR
CONTINUANCE OF HEARINGS ON
PLAINTIFF'S MOTIONS FOR
PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANTS BRN
DEVELOPMENT, INC.; BRN
INVESTMENTS, LLC; LAKE VIEW
AG; BRN-LAKE VIEW JOINT
VENTURE; ROLAND M. CASATI
FAMILY TRUST; RYKER YOUNG
REVOCABLE TRUST; THORCO,
INC.; POLIN & YOUNG
CONSTRUCTION, INC.; TAYLOR
ENGINEERING, INC.; AND
MARSHALL CHESROWN;

AND

WADSWORTH GOLF

corporation, INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation, CONCRETE FINISHING, INC., an Arizona corporation, THE TURF CORPORATION, an Idaho corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation, POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation, PRECISION IRRIGATION, INC., an Arizona corporation and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

THIS MATTER having come on for hearing on July 27, 2010 on Defendants, BRN Development, Inc.; BRN Investments, LLC; Lake View AG; BRN-Lake View Joint Venture; Roland M. Casati Family Trust; Ryker Young Revocable Trust; Thorco, Inc.; Polin & Young Construction, Inc.; Taylor Engineering, Inc.; Marshall Chesrown; and Wadsworth Golf's Motions for Continuance of Hearings on Plaintiff's Motions for Partial Summary Judgment, the Court having reviewed all material pertinent hereto and for good cause appearing,

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED that the aforesaid motions be and the same are hereby GRANTED. Plaintiff's hearings on its Motions for Partial Summary Judgment previously scheduled for August 18, 2010 are hereby continued until November 2, 2010 at 3:00 p.m.

////

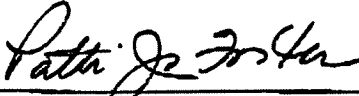
DATED this 7th day of September, 2010.



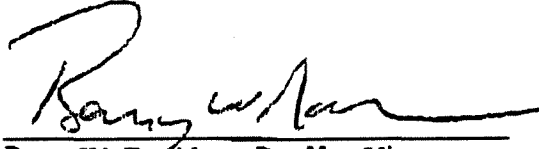
JUDGE JOHN P. LUSTER

Presented by:

LAYMAN, LAYMAN & ROBINSON, PLLP




JOHN R. LAYMAN, ISB #6825
PATTI JO FOSTER, ISB #7665
Attorneys for BRN Development, Inc., BRN
Investments, LLC, Lake View AG, BRN-Lake
View Joint Venture, the Roland M. Casati Family
Trust, the Ryker Young Revocable Trust and
Marshall Chesrown



Barry W. Davidson, Pro Hac Vice
Co-Counsel for Marshall Chesrown

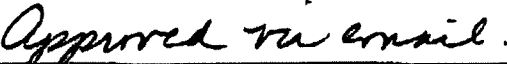
Approved as to Form; Notice of Presentment Waived:

CHARLES B. LEMPESIS, CHTD



CHARLES B. LEMPESIS, ISB# 2550
Attorney for Thorco, Inc.

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S



EDWARD J. ANSON, ISB# 2074
Attorneys for Wadsworth Golf Construction
Company of the Southwest, The Turf Corporation,
and Precision Irrigation, Inc.

CAMPBELL, BISSELL & KIRBY, PLLC

Approved via email.

RICHARD CAMPBELL, ISB# 5177
Attorneys for Polin & Young Construction, Inc.

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S

Approved via email.

TIMOTHY M. LAWLOR, ISB# 8160
GREG EMBREY, ISB# 6045
Attorneys for Taylor Engineering, Inc.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

Approved via email.

RANDALL A. PETERMAN, ISB# 1944
C. CLAYTON GILL, ISB#4973
Co-Attorneys for American Bank

WINSTON & CASHATT

Approved via email.

NANCY L. ISSERLIS, ISB# 7331
ELIZABETH A. TELLESSEN, ISB# 7393
Attorneys for American Bank

WETZEL, WETZEL & HOLT

Approved via email.

STEVEN WETZEL, ISB# 2988
KEVIN P. HOLT, ISB#7196
Attorneys for ACI Northwest, Inc.

Approved via email.

COREY J. RIPPEE, ISB#6803
Attorney for Sundance Investments, LLP

ROBERT J. FASNACHT, PC

Approved via email.
ROBERT J. FASNACHT, ISB# 3500
Attorney for Interstate Concrete & Asphalt Company

CERTIFICATE OF SERVICE

#124

I hereby certify that on the 7th day of September 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

- | | | |
|--|-------------------------------------|------------------------|
| Nancy L. Isserlis | <input type="checkbox"/> | Hand-delivered |
| Elizabeth A. Tellesen | <input type="checkbox"/> | Regular mail |
| Winston & Cashatt | <input type="checkbox"/> | Certified mail |
| 601 W. Riverside, Suite 1900 | <input type="checkbox"/> | Overnight mail |
| Spokane, WA 99201 | <input checked="" type="checkbox"/> | Facsimile 509-838-1416 |
| | <input type="checkbox"/> | Interoffice Mail |
| Barry Davidson | <input type="checkbox"/> | Hand-delivered |
| Davidson, Backman, Medeiros | <input type="checkbox"/> | Regular mail |
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| | <input type="checkbox"/> | Interoffice Mail |
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| West 201 Seventh Avenue | <input type="checkbox"/> | Regular mail |
| Post Falls, ID 83854 | <input type="checkbox"/> | Certified mail |
| | <input type="checkbox"/> | Overnight mail |
| | <input checked="" type="checkbox"/> | Facsimile 773-1044 |
| | <input type="checkbox"/> | Interoffice Mail |
| Edward J. Anson | <input type="checkbox"/> | Hand-delivered |
| Witherspoon, Kelley, Davenport & Toole | <input type="checkbox"/> | Regular mail |
| 608 Northwest Blvd, Suite 300 | <input type="checkbox"/> | Certified mail |
| Coeur d'Alene, ID 83814 | <input type="checkbox"/> | Overnight mail |
| | <input checked="" type="checkbox"/> | Facsimile 667-8470 |
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Randall A. Peterman
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- Certified mail
- Overnight mail
- Facsimile *664-5884*
- Interoffice mail

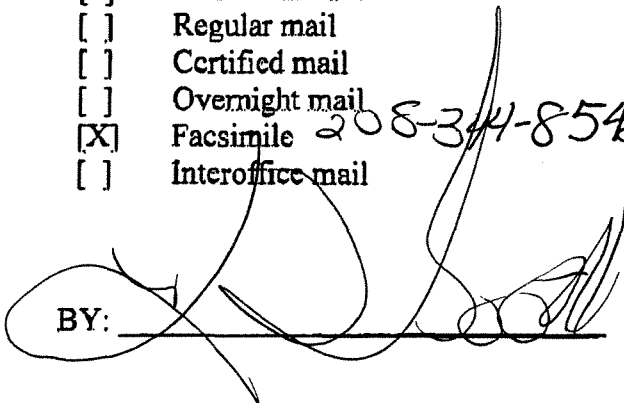
Robert Fasnacht
850 W. Ironwood Drive, Suite 101
Coeur d'Alene, ID 83814

- Hand-delivered
- Regular mail
- Certified mail
- Overnight mail
- Facsimile *664-4789*
- Interoffice Mail

Corey J. Rippee
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McKlveen
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Boise, ID 83701

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- Certified mail
- Overnight mail
- Facsimile *208-344-8542*
- Interoffice mail

John Layman
Fax 509-624-2902

BY: 

1 NANCY L. ISSERLIS, ISB #7331
ELIZABETH A. TELLESSEN, ISB #7393
2 WINSTON & CASHATT
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3 Coeur d'Alene, Idaho 83814
4 Telephone: (208) 667-2103
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STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 2/27/09 10:00 AM
AT SPOKANE, DISTRICT COURT
DEPUTY

6
7 RANDALL A. PETERMAN, ISB #1944
C. CLAYTON GILL, ISB # 4973
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& FIELDS, CHARTERED
9 101 South Capital Blvd., 10th Floor
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10 Boise, Idaho 83701
11 Telephone: (208) 345-2000
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12 rap@moffatt.com & ccg@moffatt.com

13 Attorneys for Plaintiff

14 **IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE**
15 **OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

16 AMERICAN BANK, a Montana banking
17 corporation,
18 Plaintiff,

19 vs.

20 BRN DEVELOPMENT, INC., an Idaho
corporation, BRN INVESTMENTS, LLC, an
Idaho limited liability company, LAKE VIEW
21 AG, a Liechtenstein company, BRN-LAKE
VIEW JOINT VENTURE, an Idaho general
22 partnership, ROBERT LEVIN, Trustee for the
23 ROLAND M. CASATI FAMILY TRUST, dated
June 5, 2008, E. RYKER YOUNG, Trustee for
24 the E. RYKER YOUNG REVOCABLE TRUST,
MARSHALL CHESROWN a single man,
25 IDAHO ROOFING SPECIALIST, LLC, an Idaho

Case No. CV 09-2619

**STIPULATION AND ORDER AMENDING
ORDER GRANTING CONTINUANCE OF
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ENTERED ON
JULY 29, 2010**

26 STIPULATION AND ORDER AMENDING ORDER
GRANTING CONTINUANCE OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

1 limited liability company, THORCO, INC., an
2 Idaho corporation, CONSOLIDATED SUPPLY
3 COMPANY, an Oregon corporation,
4 INTERSTATE CONCRETE & ASPHALT
5 COMPANY, an Idaho corporation, CONCRETE
6 FINISHING , INC., an Arizona corporation, THE
7 TURF CORPORATION, an Idaho corporation,
8 WADSWORTH GOLF CONSTRUCTION
9 COMPANY OF THE SOUTHWEST, a Delaware
10 corporation, POLIN & YOUNG
11 CONSTRUCTION, INC., an Idaho corporation,
12 TAYLOR ENGINEERING, INC., a Washington
13 corporation, PRECISION IRRIGATION, INC.,
14 an Arizona corporation and SPOKANE
15 WILBERT VAULT CO., a Washington
16 corporation, d/b/a WILBERT PRECAST,

Defendants.

11 And

12 TAYLOR ENGINEERING, INC., a Washington
13 corporation,

14 Third-Party Plaintiff,

15 v.

16 ACI NORTHWEST, INC., an Idaho corporation;
17 STRATA, INC., an Idaho corporation; and
18 SUNDANCE INVESTMENTS, LLP, a limited
19 liability partnership,

20 Third-Party Defendants.

21 And

22 ACI NORTHWEST, INC., an Idaho corporation,

23 Cross-Claimant,

24 v.

25 AMERICAN BANK, a Montana banking

26 STIPULATION AND ORDER AMENDING ORDER
GRANTING CONTINUANCE OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT - 2

1 corporation, BRN DEVELOPMENT, INC., an
2 Idaho corporation, BRN INVESTMENTS, LLC,
3 an Idaho limited liability company, LAKE VIEW
4 AG, a Liechtenstein company, BRN-LAKE
5 VIEW JOINT VENTURE, an Idaho general
6 partnership, ROBERT LEVIN, Trustee for the
7 ROLAND M. CASATI FAMILY TRUST, dated
8 June 5, 2008, E. RYKER YOUNG, Trustee for
9 the E. RYKER YOUNG REVOCABLE TRUST,
10 MARSHALL CHESROWN a single man,
11 THORCO, INC., an Idaho corporation,
12 CONSOLIDATED SUPPLY COMPANY, an
13 Oregon corporation, THE TURF
14 CORPORATION, an Idaho corporation,
15 WADSWORTH GOLF CONSTRUCTION
16 COMPANY OF THE SOUTHWEST, a Delaware
17 corporation, POLIN & YOUNG
18 CONSTRUCTION, INC., an Idaho corporation,
19 TAYLOR ENGINEERING, INC., a Washington
20 corporation and PRECISION IRRIGATION,
21 INC., an Arizona corporation,

Cross Claim Defendants.


STIPULATION

Plaintiff American Bank, by and through its attorneys of record, Nancy L. Isserlis and Elizabeth A. Tellessen of Winston & Cashatt and Randall A. Peterman and C. Clayton Gill of Moffatt, Thomas Barrett, Rock & Fields, Chartered; and Defendants, BRN Development, Inc., BRN Investments, LLC, Lake View AG., BRN-Lake View Joint Venture, Roland M. Casati Family Trust, Dated June 5, 2008, E. Ryker Young Revocable Trust and Marshall R. Chesrown, by and through their attorneys of record John R. Layman of Layman, Layman & Robinson and Barry W. Davidson of Davidson Backman Medeiros; Defendant Thorco, Inc., by and through its attorney of record Charles Lempeis; Defendants The Turf Corporation, Wadsworth Golf Construction Company of the Southwest, and Precision Irrigation, Inc., by

STIPULATION AND ORDER AMENDING ORDER
GRANTING CONTINUANCE OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT - 3

1 and through their attorney of record Edward Anson of Witherspoon, Kelley, Davenport & Toole;
2 Defendant Polin & Young Construction, Inc., by and through its attorney of record Richard Campbell of
3 Campbell & Bissell; Defendant/Third Party-Plaintiff Taylor Engineering, Inc., by and through its
4 attorney of record Timothy L. Lawlor of Witherspoon, Kelley, Davenport & Toole; Third-Party
5 Defendant/Cross-Claimant ACI Northwest, Inc., by and through its attorney of record Steven C. Wetzel
6 of Wetzel, Wetzel & Holt; and Third-Party Defendant Sundance Investments, LLP., by and through its
7 attorney of record Corey Rippee of Eberle, Berlin, Kading, Turnbow, McKlveene & Jones, hereby
8 stipulate and agree that the summary judgment hearings previously scheduled for November 2, 2010,
9 pursuant to the Court's Order on Defendants, BRN Development, Inc., BRN Investments, LLC, Lake
10 View AG, BRN-Lake View Joint Venture, Roland E. Casati Family Trust, E. Ryker Young Revocable
11 Trust, and Marshall Chesrown's Motion for Continuance of Plaintiff's Motion for Partial Summary
12 Judgment entered July 29, 2010, should be moved to December 15, 2010 at 3:00 p.m. to accommodate
13 Defendants' need for additional time for discovery. The hearing is scheduled before the Honorable John
14 P. Luster at the Kootenai County Courthouse, 324 West Garden Avenue, Coeur d'Alene, Idaho 83814.
15
16

17 DATED this 11 day of October, 2010.

18
19 
20 NANCY L. ISSERLIS, ISB # 7331
21 ELIZABETH A. TELLESSEN, ISB # 7393
22 WINSTON & CASHATT
23 Attorneys for Plaintiff

Approved via e-mail - 10/5/10
24 RANDALL A. PETERMAN, ISB #1944
25 C. CLAYTON GILL, ISB # 4973
26 MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS, CHARTERED
Attorneys for Plaintiff

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Approved via e-mail - 10/5/10
John R. Layman, ISB # 6825
Layman, Layman & Robinson, PLLP
Attorney for Defendants BRN Development, BRN
Investments, BRN-Lake View Joint Venture,
Marshal Chesrown, Lake View AG, and Robert
Levin, Trustee For The Roland M. Casati Family
Trust, Dated June 5, 2008 and E. Ryker Young,
Trustee of the E. Ryker Young Revocable Trust

Approved via e-mail - 10/5/10
Barry Davidson, *Pro Hac Vice*
Davidson Backman Medeiros
Attorney for Defendants BRN Development, BRN
Investments, BRN-Lake View Joint Venture,
Marshal Chesrown, Lake View AG, and Robert
Levin, Trustee For The Roland M. Casati Family
Trust, Dated June 5, 2008 and E. Ryker Young,
Trustee of the E. Ryker Young Revocable Trust

Telephonically approved 10/12/10
Charles B. Lempesis, ISB # 2550
Attorney for Defendant Thorco

Approved via e-mail - 10/5/10
Edward Anson, ISB # 2074
Witherspoon, Kelley, Davenport & Toole, P.S.
Attorney for Defendants Wadsworth Golf
Construction Company of the Southwest, The Turf
Corporation and Precision Irrigation Inc.

Approved via e-mail - 10/5/10
Richard Campbell, ISB # 5177
Campbell & Bissell
Attorney for Defendant Polin & Young

Approved via voicemail - 10/8/10
M. GREGORY Embrey, ISB #6045
Witherspoon, Kelley, Davenport & Toole
Attorney for Defendant Taylor Engineering

Approved via e-mail - 10/5/10
Steven C. Wetzel, ISB # 2988
Wetzel Wetzel & Holt, P.L.L.C.
Attorneys for Third Party Defendant ACI

Approved via e-mail - 10/8/10
Corey J. Rippee, ISB #6803
Eberle, Berlin, Kading, Turnbow, McKlveen
Attorney for Third-Party Defendant Sundance

ORDER

It is hereby, ORDERED, ADJUDGED, and DECREED that the hearing on Plaintiff's motions
for partial summary judgment will be continued until December 15, 2010 at 3:00 p.m.

DATED this 19th day of October, 2010.


HONORABLE JOHN P. LUSTER

CLERK'S CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Idaho that on 11 day of October, 2010, the foregoing was caused to be served on the following persons in the manner indicated:

John R. Layman
Layman, Layman & Robinson, PLLP
601 South Division Street
Spokane, WA 99202

VIA REGULAR MAIL
VIA CERTIFIED MAIL
HAND DELIVERED
BY FACSIMILE 509-624-2902
VIA FEDERAL EXPRESS

Attorney for Defendants BRN Development, BRN Investments, BRN-Lake View Joint Venture, Marshal Chesrown, Lake View AG, and Robert Levin, Trustee For The Roland M. Casati Family Trust, Dated June 5, 2008 and E. Ryker Young, Trustee of the E. Ryker Young Revocable Trust

Barry Davidson
Davidson Backman Medeiros
601 West Riverside #1550
Spokane, WA 99201

VIA REGULAR MAIL
VIA CERTIFIED MAIL
HAND DELIVERED
BY FACSIMILE 509-623-1660
VIA FEDERAL EXPRESS

Co-Attorney for Defendants BRN Development, BRN Investments, BRN-Lake View Joint Venture, Marshal Chesrown, Lake View AG, and Robert Levin, Trustee For The Roland M. Casati Family Trust, Dated June 5, 2008 and E. Ryker Young, Trustee of the E. Ryker Young Revocable Trust

Charles B. Lempeis
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STIPULATION AND ORDER AMENDING ORDER GRANTING CONTINUANCE OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT - 6

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STIPULATION AND ORDER AMENDING ORDER
GRANTING CONTINUANCE OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT - 7

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 NOV 12 PM 2:36

CLERK DISTRICT COURT

DEPUTY *Patty [Signature]*

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10 *Attorneys for Defendant Wadsworth Golf*
11 *Construction Company of the Southwest,*
12 *The Turf Corporation, and Precision Irrigation, Inc.*

13 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

14 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

15 AMERICAN BANK, a Montana banking
16 corporation,

17 Plaintiff and Counterdefendant,

18 vs.

19 BRN DEVELOPMENT, INC., an Idaho
20 corporation, BRN INVESTMENTS, LLC, an
21 Idaho limited liability company, LAKE VIEW
22 AG, a Liechtenstein company, BRN-LAKE
23 VIEW JOINT VENTURE, an Idaho general
24 partnership, ROBERT LEVIN, Trustee for the
25 ROLAND M. CASATI FAMILY TRUST,
26 dated June 5, 2008, RYKER YOUNG, Trustee
27 for the RYKER YOUNG REVOCABLE
28 TRUST, MARSHALL CHESROWN a single
man, IDAHO ROOFING SPECIALIST, LLC,
an Idaho limited liability company, THORCO,
INC., an Idaho corporation, CONSOLIDATED
SUPPLY COMPANY, an Oregon corporation,
INTERSTATE CONCRETE & ASPHALT
COMPANY, an Idaho corporation,
CONCRETE FINISHING, INC., an Arizona
corporation, WADSWORTH GOLF
CONSTRUCTION COMPANY OF THE
SOUTHWEST, a Delaware corporation, THE

NO. CV-09-2619

WADSWORTH'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AGAINST AMERICAN BANK

AND

NOTICE OF HEARING

Date: December 15, 2010
Time: 3:00 p.m.
Judge: Luster

WADSWORTH'S MOTION FOR PARTIAL SUMMARY
JUDGMENT AGAINST AMERICAN BANK AND
NOTICE OF HEARING - Page 1

1798



WITHERSPOON • KELLEY
Attorneys & Counselors

1 TURF CORPORATION, an Idaho corporation,
2 POLIN & YOUNG CONSTRUCTION, INC.,
3 an Idaho corporation, TAYLOR
4 ENGINEERING, INC., a Washington
5 corporation, PRECISION IRRIGATION, INC.,
6 an Arizona corporation and SPOKANE
7 WILBERT VAULT CO., a Washington
8 corporation, d/b/a WILBERT PRECAST,

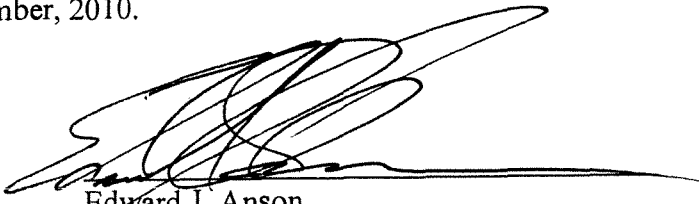
9 Defendants, Counterclaimants,
10 Crossclaimants and Crossdefendants.

11 COMES NOW, Wadsworth Golf Construction Company of the Southwest, by and
12 through its undersigned counsel of record, and pursuant to I.R.C.P. 56 and other applicable law,
13 hereby moves for partial summary judgment against American Bank seeking the relief and for
14 the reasons set forth in Wadsworth's Memorandum in re Summary Judgment Motions filed and
15 served herewith. This motion is supported by that memorandum, by the affidavits of Edward J.
16 Anson and Stephen Harrell, and by Wadsworth's Statement of Uncontested Material Facts.
17 Notice is given that Wadsworth intends to present oral argument upon the hearing on this
18 motion.

19 NOTICE OF HEARING

20 YOU ARE HEREBY NOTIFIED that a hearing on Defendant Wadsworth Golf
21 Construction Company of the Southwest's Motion for Partial Summary Judgment against
22 American Bank will be held at the Kootenai County Court House, Coeur d'Alene, Idaho, on the
23 15th day of December, 2010, at the hour of 3:00 p.m. before the Honorable John P. Luster at the
24 Kootenai County Courthouse located at 324 W. Garden Avenue, Coeur d'Alene, Idaho, or as
25 soon thereafter as counsel may be heard at which time said motion will be considered.
26
27
28

DATED this 12th day of November, 2010.



Edward J. Anson
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Boulevard, Suite 300
Coeur d'Alene, Idaho 83814-2146

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CERTIFICATE OF SERVICE

I certify that on this 12th day of November, 2010, I caused a true and correct copy of WADSWORTH'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST AMERICAN BANK AND NOTICE OF HEARING to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

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9 *Ryker Young, Trustee of the Ryker Young*
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Tina Marie Bell

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

2010 NOV 12 PM 2: 36

CLERK DISTRICT COURT

Patty Bayley
DEPUTY

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9 *Construction Company of the Southwest,*
10 *The Turf Corporation, and Precision Irrigation, Inc.*

11 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

12 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

13 AMERICAN BANK, a Montana banking
14 corporation,

15 Plaintiff and Counterdefendant,

16 vs.

17 BRN DEVELOPMENT, INC., an Idaho
18 corporation, BRN INVESTMENTS, LLC, an
19 Idaho limited liability company, LAKE VIEW
20 AG, a Liechtenstein company, BRN-LAKE
21 VIEW JOINT VENTURE, an Idaho general
22 partnership, ROBERT LEVIN, Trustee for the
23 ROLAND M. CASATI FAMILY TRUST,
24 dated June 5, 2008, RYKER YOUNG, Trustee
25 for the RYKER YOUNG REVOCABLE
26 TRUST, MARSHALL CHESROWN a single
27 man, IDAHO ROOFING SPECIALIST, LLC,
28 an Idaho limited liability company, THORCO,
INC., an Idaho corporation, CONSOLIDATED
SUPPLY COMPANY, an Oregon corporation,
INTERSTATE CONCRETE & ASPHALT
COMPANY, an Idaho corporation,
CONCRETE FINISHING, INC., an Arizona
corporation, WADSWORTH GOLF
CONSTRUCTION COMPANY OF THE
SOUTHWEST, a Delaware corporation, THE

NO. CV-09-2619

WADSWORTH'S MEMORANDUM IN
RE SUMMARY JUDGMENT MOTIONS

1 TURF CORPORATION, an Idaho corporation,
2 POLIN & YOUNG CONSTRUCTION, INC.,
3 an Idaho corporation, TAYLOR
4 ENGINEERING, INC., a Washington
5 corporation, PRECISION IRRIGATION, INC.,
6 an Arizona corporation and SPOKANE
7 WILBERT VAULT CO., a Washington
8 corporation, d/b/a WILBERT PRECAST,

Defendants, Counterclaimants,
Crossclaimants and Crossdefendants.

9 INTRODUCTION

10 Wadsworth Golf Construction Company of the Southwest (hence "Wadsworth")
11 submits this memorandum in support of its motion for summary judgment as against American
12 Bank, and in opposition to American Bank's motion for summary judgment against Wadsworth.
13

14 Wadsworth seeks a ruling on its motion for summary judgment on two alternative grounds:

15 1. By the filing of a bond to obtain an order from this Court releasing the
16 Wadsworth lien from all real property described in the American Bank foreclosure suit,
17 American Bank has removed all issues of lien priority from this case. With the bond having
18 been filed, the only issue is whether or not the Wadsworth lien was valid. Wadsworth contends
19 that its lien was valid, and whether or not it was in a first or last priority position is irrelevant.
20 A lien is still valid even if the foreclosure sale may have extinguished the lien claimant's rights
21 but for the right of redemption.
22

23 2. Alternatively, if this Court finds that lien priority remains an issue, Wadsworth
24 submits that its lien has priority over the lien of American Bank.
25

26 When two parties adverse to each other each move for summary judgment often there
27 are no issues of material fact and the parties present to the Court solely questions of law. That
28 is not true in this case. For example, the parties do not appear to disagree that Wadsworth

1 commenced lienable work during October, 2006. American Bank, however, contends that for
2 various reasons the starting date for lienable work should be January 9, 2007, instead of
3 October, 2006, and that Wadsworth did not provide lienable work from January 9, 2007 until
4 sometime subsequent to February 6, 2007. Wadsworth responds by first arguing that the
5 starting date for lienable work is October 17, 2006, but if the Court were to rule that the starting
6 date was January 9, 2007, then there are contested issues of material fact as to whether the
7 work performed during the month beginning January 9, 2007 was or was not lienable work.
8 Thus, while Wadsworth submits that there are no contested issues of material fact that would
9 preclude this Court from entering summary judgment in its favor, there are, alternatively,
10 contested issues of material fact that should properly preclude this Court from entering
11 summary judgment in American Bank's favor. The key for this Court in deciding this apparent
12 paradoxical situation is in defining what facts are, or are not, material.
13
14

15 STATEMENT OF FACTS

16
17 Wadsworth incorporates by reference herein its separately filed Statement of
18 Uncontested Material Facts. The most pertinent facts are that Wadsworth commenced
19 construction of the golf course on the subject real property prior to American Bank making its
20 loan to BRN Development, Inc. (BRN). At the time that American Bank made its loan, it knew
21 that construction had commenced on the golf course project. American Bank never reviewed,
22 received, or relied upon any of the lien waivers at issue in this action.
23

24 While it appears that the legal effect of the form of the BRN prepared lien waiver and
25 the form of the Wadsworth prepared lien waiver may differ, at the time neither Wadsworth nor
26 BRN understood that there may be a difference. BRN was satisfied with using the form of the
27 Wadsworth prepared lien waiver.
28

1 Wadsworth substantially completed the golf course on October 20, 2008 with final
2 completion occurring on November 21, 2008. Wadsworth was not paid the full balance of its
3 contract with BRN and on January 6, 2009 timely recorded its Notice of Claim of Lien
4 claiming the principal sum of \$2,329,439.72. BRN does not dispute that this is the principal
5 sum owing and that the only reason that Wadsworth has not been paid is that BRN does not
6 have the funds to do so.
7

8 The golf course benefits the entire BRN Development project. The golf course was
9 never intended to make money, but rather was designed and planned to enhance the value of
10 the adjoining property.
11

12 ARGUMENT

13 **1. The Priority Between the American Bank Mortgage and the Wadsworth Claim of** 14 **Lien is Not Relevant.**

15 The April 27, 2010 Order Releasing Claim of Lien states that the lien claims of
16 Wadsworth, Turf Corporation, and Precision Irrigation "are hereby released of record for all
17 purposes, only as to the real property described in Exhibit D, to the same extent as if such liens
18 had been released of record by Wadsworth, Turf Corporation, and Precision, respectively, and
19 if such claims are asserted by motion pursuant to Idaho Code § 45-523 or in an independent
20 action pursuant to Idaho Code § 45-522, the bond filed herein shall be subject to the claims that
21 would otherwise constitute liens against the above-described property."
22

23 The release of Mechanic's Lien Bond filed in this action states that American Bank and
24 International Fidelity Insurance Company do obligate themselves to Wadsworth in the sum of
25 \$3,494,159.58, "from which sum they will pay the claimant [Wadsworth] such amount as a
26 Court of competent jurisdiction may adjudge to have been secured by his lien, with interest,
27 costs and attorney's fees."
28

1 The language set forth in the bond is the statutorily prescribed language set forth in
2 Idaho Code § 45-519. The language in the Order is similar to the language contained in Idaho
3 Code § 45-522 which in relevant parts states:

- 4
- 5 (1) The lien claimant is entitled to bring an action against the lien claimant's
6 debtor and to join therein the surety on the bond. The rights of the lien
7 claimant include and the court may award to him in that action:
- 8 (a) The amount found due to the lien claimant by the court;
 - 9 (b) The cost of preparing and filing the lien claim, including attorney's
10 fees, if any;
 - 11 (c) The costs of the proceedings;
 - 12 (d) Attorney's fees for representation of the lien claimant in the
13 proceedings; and
 - 14 (e) Interest at the rate of seven percent (7%) per annum on the amount
15 found due to the lien claimant and from the date found by the court
16 that the sum was due and payable.

17 When a lien is discharged by the filing of a bond, the property is discharged from the
18 lien and the lien is shifted to the bond. *T.O. IX v. Superior Court*, 80 Cal.Rptr.3d 602 (2008);
19 *Washington International Insurance Company v. Hughes Supply, Inc.*, 271 Ga.App. 50, 609
20 S.E.2d 99 (2005); *Martirano Construction Corp. v. Briar Contracting Corporation*, 481
21 N.Y.S.2d 105 (1984). In such cases, the action although in essence is one to foreclose the lien,
22 actually becomes one to test the validity of the lien had it not been discharged. If the lien is
23 found to be valid a judgment is obtained against the bond rather than a judgment of foreclosure
24 against the property. *Lindt & Sprungli USA, Inc. v. PR Painting Corp.*, 740 N.Y.S.2d 369
25 (2002); *Brunet v. Justice*, 264 So.2d 743 (La.App., 1972); *FEW v. Capitol Materials, Inc.*, 274
26 Ga. 784, 559 S.E.2d 429 (2002); and *DBM Consulting Engineers, Inc. v. United States Fidelity
27 and Guaranty Company*, 142 Wash.App. 35, 170 P.3d 592 (2007).

28

1 In a series of decisions issued by Judge Scholl of the Superior Court of Connecticut on
2 April 7, 2009, the issue before the Court is whether the priority of the lien claimant's lien in
3 relation to other encumbrances on the property to which the lien attached, and therefore, the
4 existence of any equity to satisfy the lien, is the proper consideration by the Court in
5 determining the lien's validity when the lien on the real property has been discharged by the
6 filing of a bond. In all of the decisions the Court found that the issue of priority in relation to
7 other encumbrances has no place in the Court's consideration of whether the lien itself was
8 otherwise valid. In *Dalene Hardwood Flooring Company, Inc. v. Ashforth Properties*
9 *Construction, Inc.*, 2009 WL 1175516 (Conn.Super. 2009) the Court explained:
10
11

12 The issue before the court is whether the priority of the Plaintiff's mechanic's
13 lien in relation to other encumbrances on the property to which the lien attached,
14 and therefore, the existence of any equity to satisfy the lien, is a proper
15 consideration by the court in determining the lien's "validity."
16

17 ...
18 As a result, the lienor's action on the bond is an action to recover what is owed
19 the lienor for its work on the lien property, the payment of which was sought
20 to be secured by the lien. In *A. Petrucci Construction Co. v. Alaimo Excavators*
21 *& Blasters, Inc.*, Superior Court, Judicial District of Ansonia-Milford at Milfor,
22 Docket No. CV90032322S (July 9, 1990, Fuller, J.) (2 Conn. L. Rptr 106),
23 where the plaintiff substituted a bond for a mechanic's lien filed by the
24 defendant after claiming that it was not fully paid by the plaintiff for work
25 performed, the court found that: "[T]he action is no longer an action involving
26 land or foreclosure of a lien on real property. The action is a conventional civil
27 action ... The underlying action is now on a bond, which is a contract
28 obligating a third party to respond in damages if the principal does not do."
Similarly, in *NY Conn Corporation v. Southbury Diagnostic Imaging Center*,
Superior Court of Connecticut, Docket No. 990337528S (April 4, 2000,
Moraghan, J.) (27 Conn. L. Rptr. 42), where the plaintiff and defendant agreed
to substitute a bond for the plaintiff's mechanic's lien, the court found that "the
[action on the bond] is no longer an action in which the plaintiff is seeking
foreclosure of the mechanic's lien. The present action is essentially contractual
because the bond was substituted for the plaintiff's lien." As a result, the effect
of a bond substituted for a mechanic's lien is to release the property from the
mechanic's lien while providing the lienor security for payment from the parties
who undertook the bond agreement. The bond, therefore, is not substituted for
the land in the sense that equity may proceed against the bond as it could against

1 the land, but the bond becomes a contract between the parties that is enforceable
2 at common law.

3 ...
4 The Defendants argue that the Plaintiff's bond is invalid because a construction
5 mortgage on the lien property had priority over the Plaintiff's mechanic's lien,
6 and, as a result, there was no equity in the property to which the Plaintiff's
7 mechanic's lien attached. The Plaintiff argues that priority is not a basis to
8 contest validity pursuant to General Statutes § 49-37(b)(3) because validity is
9 not dependent on priority, but rather upon compliance with the statutory filing
10 requirements. The court agrees.

11 ...
12 There is nothing in General Statutes § 49-34 indicating that in order to be
13 "valid" a mechanic's lien must attach to sufficient equity in the property to
14 satisfy the amount of the lien.

15 ...
16 A mechanic's lien may be valid as a matter of law even if it is "worthless as a
17 matter of fact."

18 ...
19 Only after the bond has been posted do the principal and surety have an
20 opportunity to test the validity or amount of the liens. Even then, there is no
21 authority for reducing the amount of the lien solely based on priority. *citations*
22 *deleted in part.*

23 Likewise, in *Ashforth Properties Construction, Inc. v. Bank of Scotland*, 2009 WL
24 1175538 (Conn.Super. 2009) Judge Scholl again noted that a lien may be valid as a matter of
25 law even if it is worthless as a matter of fact. Judge Scholl wrote:

26 In this case, if the Defendants had not sought to substitute the Plaintiff's
27 mechanic's lien with a bond, the priority of that lien in relation to the
28 Defendants' mortgage would have had to be determined in the foreclosure
action, and, if the Plaintiff's lien was found to be junior to the Defendant's
mortgage the judgment of strict foreclosure would have terminated the Plaintiff's
interest in the property unless it was able to redeem. When the debt of a prior
mortgage exceeds that of a later encumbrance, the latter is worthless because the
property contains no equity to satisfy the later encumbrance. *citations and*
quotations deleted.

29 However, Judge Scholl found that when a bond is posted the effect is to shift the lien
30 from the real property to the bond and that the underlying action is now upon the bond, which
31 is a contract obligating a third party to respond in damages if the principal does not do so. As
32 such, the issue of the priority of the Plaintiff's lien in relation to other encumbrances on the lien

1 property has no place in the Court's consideration on the issue of whether or not the lien was
2 valid even if, as a practical matter, worthless. If the lien is valid the bond becomes a contract
3 between the parties that is enforceable regardless of the value of the lien.
4

5 On the same day Judge Scholl reached identical results in *Thyssenkrupp Elevator*
6 *Corporation v. Bank of Scotland*, 2009 WL 1143143 (Conn.Super. 2009) and *Shepard Steel*
7 *Co., Inc. v. Bank of Scotland*, 2009 WL 1175527 (Conn.Super. 2009) in each case finding that
8 the priority of a lien claimants lien in relation to other encumbrances on the property had no
9 place in determining whether the lien was valid. Each case further found that there was no
10 authority for the Court to reduce the lien on the basis that there was insufficient equity in the
11 property.
12

13 In *Gelder & Associates, Inc. v. St. Paul Fire and Marine Insurance Company*, 34
14 N.C.App. 731, 239 S.E.2d 604 (1977) the bond statute and the bond itself were extremely
15 similar to the bond and statute in this case. The bond statute provided for the posting of a bond
16 to discharge the lien from the real property with the bond to be used to pay the amount found
17 due upon the lien. Like the bond in this case, the bond in *Gelder* was an unconditional
18 obligation to pay to the claimant the amount found due by the Court. The Defendant contended
19 that the lien would have been foreclosed and therefore no payment should be made under the
20 bond. The Court disagreed, stating:
21
22

23 Defendant contends that the bond was intended solely to secure whatever rights
24 plaintiff had by virtue of the lien on the land, that it was not intended to give
25 plaintiff any greater security than it originally had by virtue of the lien and that,
26 since the foreclosure of the property would have extinguished plaintiff's lien had
27 not the bond been executed, the foreclosure cancelled defendant's obligations
28 under the bond. Defendant's argument ignores the plain wording of the bond. The bond unconditionally obligates defendant to pay any sum that the courts finally determine to be due plaintiff by the principal, Airpark, up to the amount of \$23,583.79, plus court costs and interest. That amount has now been determined. There is nothing in the contract to limit defendant's obligations to

1 what plaintiff might have collected had the lien not been discharged. Defendant
2 guaranteed payment of all that its principal owed plaintiff, not what plaintiff
3 might have been able to collect.

4 *At 239 S.E. 2d 605.*

5 A similar result was reached in *Gesco, Inc. v. Edward L. Nezelek, Inc.*, 414 So.2d 535
6 (Fla.App. 1982). There the contractor brought suit to foreclose its lien. Chase Manhattan
7 Bank, as the construction lender, obtained a bond that released the lien from the real property.
8 As under Idaho Law, the bond operated as a substitution of security pending a judicial
9 determination as to the validity of the claim. The posting of the bond did not relieve the lien
10 claimant from proving all of the conditions precedent to perfection and enforcement of a lien
11 against the property. However, proof of priority over the construction mortgage is not such a
12 condition precedent. The Court stated:

13
14 The language of the bond clearly established an unconditional obligation for
15 payment of the sum that the court determined was due the contractor. The bond
16 did not limit the surety's obligation to that which the contractor might have
17 collected absent execution of the bond. The trial court, therefore, did not err in
18 allowing full recovery on the bond, notwithstanding that foreclosure of the
19 mortgage might have extinguished the mechanic's lien had the bond not been
20 executed.

21 *At 414 So. 2d 540 citations deleted.*

22 The Court in *Hatch Companies Contracting, Inc. v. Arizona Bank*, 170 Ariz. 553, 826
23 P.2d 1179 (1991) reached an identical result holding that when the lien discharge bond has
24 been obtained the lien is shifted from the property to the bond and the claimant is only required
25 to prove that it would have been entitled to judgment against the property, not that it could have
26 satisfied judgment through foreclosure sale of the property. *At 826 P.2 1184.*

27 A result consistent with the cases discussed above is *George W. Kane, Inc. v. NuScope,*
28 *Inc.*, 243 Va. 503, 416 S.E.2d 701 (1992). There the owner of real property, Buckingham,

1 acquired a construction loan secured by a deed of trust. After the recording of the deed of trust
2 Buckingham entered into a construction contract with Kane, its general contractor. Later
3 NuScope, a subcontractor, recorded three liens against the property. Kane obtained bonds
4 causing the release of the liens. Thereafter the subcontractor brought suit against Kane and the
5 surety on the bonds seeking enforcement of its claims against the bonds.
6

7 The Chancellor entered full judgment against the bonds and the issue on appeal was
8 whether Buckingham and the construction lender were necessary parties to determine the
9 amount of the liens that would have been enforceable against the property. On appeal the
10 Chancellor was affirmed, with the Court stating:
11

12 Once Kane posted the bond, NuScope's security for the claim underlying its
13 mechanic's lien became the bond and not the real estate. When NuScope filed its
14 suit demanding payment on the bond, Kane, NuScope's debtor and principal on
15 the bond, acquired "an immediate interest in resisting the demand". *Id.* The same
16 was true of Hartford Accident, the surety on the bond. Both were necessary
17 parties to that suit.

18 But once the encumbrance on Buckingham's property was released and replaced
19 by a substitute security, the owner no longer had an interest in its property "likely
20 either to be defeated or diminished" by NuScope's suit on the bond. While, as in
21 Mendenhall and Walt Robbins, the beneficiary and the trustee of the construction
22 deed of trust would have acquired such an immediate interest if NuScope had
23 sued to enforce its mechanic's lien by a judicial sale of the property encumbered
24 by that deed of trust, neither had such an interest once the mechanic's lien was
25 released and NuScope sued to enforce its claim against the substitute security.

26 *At 416 S.E. 2d 705.*

27 The result reached in Kane is that the relative priority between a lien and a deed of trust
28 becomes irrelevant when the lien is released by the filing of a bond.

Undersigned counsel has only been able to locate one decision in which priority was
relevant when a bond had been filed to discharge the lien, being *York Federal Sav. & Loan
Ass'n v. William A. Hazel, Inc.*, 256 Va. 598, 506 S.E. 2d 315 (1998). The Virginia statutory

1 scheme regarding liens and the bonding off of liens is substantially different than the Idaho
2 statute and those jurisdictions having laws similar to Idaho. Virginia Code § 43-70 states in
3 relevant part:

4
5 In any suit brought under the provisions of § 43-22, the owner of the building
6 and premises to which the lien, or liens, sought to be enforced shall have
7 attached, the general contractor for such building or other parties in interest
8 may, after five days' notice to the lienor, or lienors, apply to the court in which
9 such suit shall be pending, or to the judge thereof in vacation, for permission to
10 pay into court an amount of money sufficient to discharge such lien, or liens,
11 and the costs of the suit or for permission to file a bond in the penalty of double
12 the amount of such lien, or liens, and costs, with surety to be approved by the
13 court, or judge, **conditioned for the payment of such judgment adjudicating
the lien or liens to be valid and determining the amount for which the same
would have been enforceable against the real estate as may be rendered by
the court upon the hearing of the case on its merits**, which permission shall
be granted by the court, or judge, in either such case, unless good cause be
shown against the same by some party in interest. *emphasis added*.

14 Virginia Code § 43-21 provides for the priority of mechanic's liens and other
15 encumbrances. When, as in *York*, there is a deed of trust given and recorded prior to the
16 commencement of any work being performed by the mechanic, the prior deed of trust holder
17 has priority, but only to the extent of the value of the land as determined by the Court excluding
18 the value of buildings or structures located thereon. Under Virginia law, unlike Idaho law,
19 when a bond has been filed the lien claimant must prove two facts:

- 21 1. that the lien was valid; and
- 22 2. the amount which the lien would have been enforceable against the real estate
23 after giving the prior deed of trust holder priority as to the extent only of the
24 value of the land exclusive of all improvements.
25

26 In this case Wadsworth only needs to establish that its lien was valid but it does not need to
27 establish what amount of money, if any, Wadsworth might collect upon foreclosure of its lien.

28 The Wadsworth lien secured the entire indebtedness owing to Wadsworth. It is mere

1 speculation as to what amount of money Wadsworth might receive upon foreclosure of its lien
2 regardless whether Wadsworth had a first or last priority. The bond filed in this action replaced
3 the real property as the security for the indebtedness owing to Wadsworth and the bond itself
4 states that it shall be used to pay to Wadsworth such amount as this Court adjudges to have
5 been secured by the Wadsworth lien. As the Wadsworth lien secured the entire indebtedness
6 owing to Wadsworth, the bond should be used to satisfy that indebtedness in full.
7

8 Wadsworth had assumed that the reason American Bank obtained the bond was to
9 facilitate a transaction where a majority interest in the BRN obligation owing to the bank was
10 sold by the bank to Fidelity National Timber Resources, Inc. The deposition of Leon Royer of
11 the bank established that the sale to Fidelity National Timber Resources occurred some eight
12 months prior to the bond. It therefore appears that the bond was acquired either to facilitate
13 some other transaction or through negligence. If so, the case of *Groom v. W.H. Ward Lumber*
14 *Co., Inc.*, 432 So. 2d 984 (La.App. 1983) is on point. In *Groom*, the material man filed a lien
15 against the subject property. Thereafter the material man commenced the foreclosure action
16 and was awarded default judgment. After judgment was entered, the property owner bonded
17 around the claim of lien. The Court enforced the claim against the bond of Union Pacific
18 Insurance Company. The Court stated:
19
20

21 The bond was entered into on April 1, 1980. The judgment of default by Ward
22 Lumber Company against Axis was obtained earlier, having been dated
23 February 25, 1980. This prior judgment had had the effect of establishing, to
24 use the language of the bond for release, "the legality of said claim", that is the
25 claim of Ward Lumber Company against Axis. Therefore, the bond ab initio
26 was instituted "in full force and effect to protect the interest of ... claimant ..."
27 (Ward Lumber Company). Although the stipulated facts are silent, we feel that
28 it was clearly through negligence that Pacific entered into the bond and release
contract with Axis when the public records indicated a judgment by default had
been obtained against Axis. The only other alternative is that Pacific entered
into the bond and release in full knowledge of the default judgment, an
improbable analysis of the facts that even further weakens Pacific's position. In

1 either case, the stipulation of facts does not indicate that fraud or coercion was
2 practiced against Pacific. Pacific entered into the contract freely and
3 voluntarily and took the facts as it found them. Contracts have the effect of
4 laws upon those who have formed them, and must be performed in good faith.
5 It is not the province of the courts to relieve a party of a bad bargain. We,
6 therefore, find the bond for release to be fully enforceable. *At 432 So. 2d 986*
7 *citations deleted.*

8 American Bank had two choices. It could have chosen to litigate lien priority in the
9 foreclosure action. Instead, generally to effectuate a transaction involving the property,
10 American Bank or BRN could obtain the release of the Wadsworth lien by the filing of the
11 bond. The trade off for being able to deal with the property free and clear of the Wadsworth
12 lien is that the issue of lien priority is removed and the only issue as to enforcement against the
13 bond is whether or not the lien was valid. For whatever reason, American Bank chose to file
14 the bond. The decision has been made, and lien priority is no longer an issue.

15 **2. To the Extent That Lien Priority Remains an Issue, the Wadsworth Lien Is Valid,
16 Enforceable, and Has Priority over the Mortgage of American Bank.**

17 **A. The Idaho Contractor Registration Act Does Not Render the Wadsworth
18 Lien Void.**

19 American Bank argues that because Wadsworth did not register as a contractor under
20 the Idaho Contractor Registration Act until January 9, 2007, the Wadsworth lien is void.
21 Wadsworth received a Class AAA Idaho Public Works Contractor License on December 26,
22 2000, which had an expiration date of January 31, 2007. To meet the construction schedule of
23 BRN, Wadsworth commenced work on the golf course project prior to the execution of final
24 contract documents during October 2006, under the terms of a Conditional Letter of Intent.
25 During the negotiation of the final contract documents, it came to Wadsworth's attention that it
26 may need to register under the Idaho Contractor Registration Act, and it thus did so on
27 January 9, 2007. The final contract consists of a number of documents bearing different dates
28

1 of execution but it appears that all of the documents constituting the final contract were
2 completely signed by both parties by January 27, 2007. The American Bank mortgage was
3 recorded on February 6, 2007.

4
5 The purpose of the Idaho Contractor Registration Act is set forth in I.C. §54-5202,
6 which states:

7 The legislature finds and declares that the practice of construction in the state of
8 Idaho affects the public health, safety and welfare of its citizens. The legislature
9 further finds that it is in the public interest to provide a mechanism to remove from
10 practice incompetent, dishonest, or unprincipled practitioners of construction. To
aid in fulfilling these purposes, this chapter provides for the registration of
construction contractors within the state of Idaho.

11 The Idaho Contractor Registration Act became effective January 1, 2006. Prior to that
12 time, Idaho had no registration for private work contracting, although since 1941, Idaho did and
13 does license public works contractors. The purpose of the Public Works Contractor Licensing
14 Act is set forth in I.C. §54-1901(1), which states:

15
16 The legislature finds that it is in the best interest of the people of the state of Idaho
17 to establish a process for licensure of public works contractors to be administered
18 through the public works contractors license board. To assure that experienced
19 and qualified contractors provide services to public entities in Idaho, the board is
20 charged with licensing as provided in this chapter. Effective licensing procedures
21 should assure that contractors of integrity provide work for which they have
22 specific experience and expertise and that public facilities are constructed and
rebuilt by efficient and cost-effective means. Licensing should also protect the
public health and safety through judicious exercise of investigative, disciplinary
and enforcement activities.

23 Clearly being licensed under the Idaho Public Works Contractor Licensing Act meets
24 the purposes of being registered under the Idaho Contractor Registration Act. The Idaho
25 Contractor Registration Act, in fact, has an exemption from registration found at I.C. §54-
26 5205(1), which states as follows:

27
28 Nothing in this chapter shall be construed to restrict any person licensed,
registered, or other wise regulated by the state of Idaho from engaging in the

1 profession or practice for which they are licensed, registered or otherwise
2 regulated by the state of Idaho including, but not limited to, persons licensed
3 pursuant to chapters 3, 10, 12, 19, 26, 45 and 50, title 54, Idaho Code, nor shall
4 this chapter require such persons otherwise licensed, registered or regulated to
5 obtain such registration as required by this chapter, so long as such person is not
6 acting with the intent to evade this chapter. No such person exempt hereunder
7 may hold himself out as a registered contractor.

8 The above cited provision is somewhat ambiguous. The first phrase of the statute
9 appears to provide that a licensed public works contractor is not required to register under the
10 Idaho Contractor Registration Act when the public works contractor is engaged in public works
11 contracting. The last phrase of the statute can be read as meaning that a licensed public works
12 contractor is not required to register when engaged in private contracting so long as the
13 contractor is not acting with the intent to evade the act. This in essence, provides for an
14 innocent party exception from registration and would be applicable in this case. When
15 Wadsworth commenced construction under the conditional letter of intent during October,
16 2006, Wadsworth was not aware of the new Idaho Contractor Registration Act. As soon as
17 Wadsworth became aware of the Act it registered. Under this interpretation Wadsworth was
18 exempt from registration when it commenced work.

19 **B. Even Assuming that Wadsworth Was Not Exempt From Registration**
20 **Under the Idaho Contractor Registration Act, the Wadsworth Lien is Valid.**

21 The Idaho Contractor Registration Act was recently analyzed in *ParkWest Homes, LLC*
22 *v. Barnson*, 149 Idaho 603, 238 P.3d 203 (2010). The Court first noted that "The Mechanics'
23 Lien Statutes are liberally construed in favor of those to whom the lien is granted, and to create
24 a valid lien the claimant must substantially comply with the statutory requirements." At 238
25 P.3d 205. The Court found that a contractor is denied a lien for work or labor done in the
26 construction during the period the contractor is not registered under the act. However, work
27 done after the contractor has registered is certainly legal and the contractor is thus entitled to a
28

1 lien for work or labor it provided during the time that it was duly registered. The Court noted
2 that "to hold otherwise would mean that a contractor who violated the Act would be forever
3 barred from obtaining a mechanic's lien." *At* 238 P.3d 208.

4
5 Idaho Code § 45-501 grants mechanic's lien for work or labor done or materials
6 furnished. Idaho Code § 45-506 gives priority to mechanic's liens for labor commenced prior
7 to the date or recording of the mortgage notwithstanding the fact that the mortgage is recorded
8 prior to the recording of a Notice of Claim of Lien. *See also, Ultrawall, Inc. v. Washington*
9 *Mutual Bank*, 135 Idaho 832, 25 P.3d 855 (2001); *Metropolitan Life Insurance Company v.*
10 *First Security Bank of Idaho*, 94 Idaho 489, 491 P.2d 1261 (1972). Under *ParkWest Homes,*
11 *supra*, mechanic's lien statutes are liberally construed in favor of the lien claimant. In accord,
12 *Metropolitan Life Insurance Company v. First Security Bank of Idaho*, 94 Idaho 489, 491 P.2d
13 1261 (1971). Likewise under *ParkWest Homes* a claimant is precluded from filing a lien when
14 it is unregistered and not exempt from registration under the Idaho Contractor Registration Act.
15 However, upon registration the lien claimant is entitled to a lien for work or labor it provided
16 during the time it was registered. There is nothing in the Idaho Contractor Registration Act
17 which effects or changes the lien priority of Idaho Code § 45-506. Wadsworth commenced its
18 work on October 17, 2006. Wadsworth was paid for its work up to October, 2008.
19 Wadsworth's lien was recorded on January 6, 2009. Prior to October 30, 2008 Wadsworth
20 could not have recorded a claim of lien as it had been paid. Payment for work performed prior
21 to the recording of the American Bank mortgage is irrelevant as to the priority of Wadsworth
22 over the bank pursuant to Idaho Code § 45-506. The lien relates back to when the work was
23 first performed.
24
25
26
27
28

1 **C. American Bank Ignores the Substantial Work Performed by Wadsworth**
2 **Commencing on October 17, 2006.**

3 Wadsworth has argued that it was exempt from registration under the Idaho Contractor
4 Registration Act and therefore its lien has an October 17, 2006 priority over American Bank's
5 February 6, 2007 mortgage. Alternatively, Wadsworth argues that under *ParkWest Homes,*
6 *supre*, Wadsworth was entitled to a lien for its unpaid work and that there is nothing in the
7 Idaho Contractor Registration Act that effects or changes the priority of that lien.
8

9 American Bank is arguing that the priority of the Wadsworth lien can be no earlier than
10 the date Wadsworth registered under the Idaho Contractor Registration Act and that from the
11 date of registration, January 9, 2007 to the date of the recording of the American Bank
12 mortgage, February 6, 2007, the Wadsworth work on the project was limited to erosion control
13 and general maintenance and preservation of the previously performed work.
14

15 From October 17, 2006 to December 31, 2006 Wadsworth performed \$159,747.00
16 worth of work on the golf course project. During October, November, and December of 2006
17 Wadsworth worked on the layout of various tees, fairways, greens, and a lake. Wadsworth
18 additionally did shaping work on holes six and seven including supervising earth moving for
19 holes four, five, six, seven, and related erosion control. From mid December, 2006 through
20 February 6, 2007 Wadsworth maintained the jobsite and performed the sensitive erosion
21 controls that were necessary both to preserve the work performed to that time as well as to
22 remain compliant with the various environmental requirements. Erosion controls included
23 installing, maintaining, and repairing silt fences, erosion fabric, straw mulch, straw wattle rolls,
24 and straw bails to control water flow on the slopes of the golf holes to prevent sediment from
25 getting into the water that was running off the site. If erosion controls were not properly
26 maintained and an event occurred which caused sedimentation of off-site water ways and water
27
28

1 sheds, such an occurrence would have had the affect of shutting down the project until
2 remedial action had taken place. This remedial action would take months and even perhaps a
3 year during which time no work could be performed on the project. The Environmental Storm
4 Water Prevention and Pollution Control Plan would be required to be reviewed and a new plan
5 could be required for submission and approval. *Harrell Aff'd.*

7 Even if American Bank is correct in its contention that lienable work was required to be
8 performed by Wadsworth between January 9, 2007 and February 6, 2007 there is at least a
9 contested issue of material fact as to whether the work performed by Wadsworth during that
10 period constitutes lienable work.

12 **D. American Bank's Argument That the Wadsworth Lien Should Be**
13 **Subordinated by Reason of Idaho Code § 45-508 Lacks Merit.**

14 Idaho Code § 45-508 provides:

15 **Claims against two buildings.** – In every case in which one (1) claim is filed
16 against two (2) or more buildings, mines, mining claims, or other improvements,
17 owned by the same person, the person filing such claim must, at the same time,
18 designate the amount due him on each of said buildings, mines, mining claims,
or other improvement; otherwise the lien of such claim is postponed to other
liens.

19 BRN Development, Inc. (henceforth "BRN") intended to develop Black Rock North
20 as a high end residential golf course community. The project consisted of approximately one
21 thousand acres located to the north and east of the original Club at Black Rock development.
22 The one thousand acres were designed for the development of three hundred twenty-five
23 (325) residential units segmented into a total of one hundred ninety-eight (198) single family
24 detached lots ranging in size from 0.9 acres to 11 acres and one hundred twenty-seven (127)
25 residential units designed for cluster housing, town homes, and condominiums. The golf
26 course traverses throughout the entire project and consists of approximately two hundred
27
28

1 (200) acres. *Anson Aff'd. Exs. 1, 2, and 3 [Capps Depo. at 13-14, Harrell Depo. Ex. 1, BRN*
2 *Development Depo. Ex. 181].*

3
4 Marshall Chesrown, the president of BRN, described the purpose of building the golf
5 course was to increase the value of the adjoining properties. Marshall Chesrown described
6 the business plan as follows:

7 So the plan always was for repayment to the bank, and everything
8 was always structured around the 325 residential units. That was the only
9 opportunity to create revenue, the only opportunity to pay off debt, all those
10 kinds of things. Because golf courses lose money. I mean, none of them
11 make money.

12 So – but that again, what it did is you take lots that – let's say just –
13 not in this case, but I'll just use round numbers. If, you know, a normal lot in
14 your market sells for 50,000 and it costs 25,000 to build them, you got 25,000
15 in margin, of course. In this world, you just take that same lot, and all of a
16 sudden it costs the same to build typically, all right, but now you take the cost
17 of that golf course and amortize it over those lots. And so now your lot cost
18 goes from 25 to 100, but your value goes from 100 to 400. So now you have
19 300,000 of margin to play with. So that's how the business model was built.

20 *Anson Aff'd. Exs. 4 and 5 [BRN Development Depo. at 11, Chesrown Depo., Vol. 2, at 77-*
21 *78].*

22 Wadsworth submits that Idaho Code § 45-508 is inapplicable because there is only one
23 project and the golf course was designed to benefit the entire project. For illustrative purposes
24 the Black Rock North Conceptual Master Plan is attached as Exhibit 58 to the Affidavit of
25 Edward J. Anson.

26 In *Weber v. Eastern Idaho Packing Corporation*, 94 Idaho 694, 496 P.2d 693 (1972) a
27 contractor was hired to remove rock and level earth on three adjoining parcels of real property
28 totaling approximately two hundred acres. The contractor did so, and when not paid, filed a
lien against all three parcels. The property owners contended that the extent of the lien was too
broad in that it did not specify what portions of the land in question had been benefited. The
Court found that the work performed benefited the entire two-hundred acres as a farming unit.

1 In this case the golf course had no independent value and was constructed to benefit the entire
2 one-thousand acre project.

3 **3. The Lien Releases Given By Wadsworth To BRN Do Not Affect the Wadsworth**
4 **Lien Priority.**

5 The final contract between Wadsworth and BRN provided that "as a prerequisite for
6 any payment, subcontractor shall provide, in a form satisfactory to owner, partial lien releases,
7 claim waivers, and affidavits of payment from subcontractor, and its subcontractors and
8 suppliers of any tier, for the build portion of subcontract's work." *at Harrell Depo, Ex. 6, Page*

9
10 4. In the final contract Wadsworth is identified as the subcontractor.

11 The contract itself contained as exhibits a Pay Request form and a Conditional Lien
12 Waiver, Release and Subordination form. During the course of this project Wadsworth never
13 utilized the Pay Request form as set forth in the exhibit to the contract. Instead, in the twenty-
14 five Applications for Payment made by Wadsworth to BRN during the course of this project
15 from the first application dated October 31, 2006 to the last application dated November 30,
16 2008, Wadsworth utilized an industry standard AIA prepared Application and Certification for
17 Payment together with continuation statements and various supporting documents. This form
18 provided more detailed information than the Pay Request form attached as an exhibit to the
19 contract and it was accepted by BRN. *Harrell Aff'd.*

20
21
22 Wadsworth was familiar with its conditional waiver and release on progress payment
23 form which it used in its ordinary course of business. The form was prepared pursuant to
24 Arizona Revised Statute § 33-1008 and that conditioned upon bank clearance of a check in the
25 sum of the application, Wadsworth was acknowledging payment in full for work performed to
26 the date set forth in the form, excluding retention, pending modifications, and changes or items
27 furnished after the date used. It was Wadsworth's understanding that the lien release form
28

1 prepared pursuant to the Arizona statute does not affect lien priority in the event that a lien is
2 recorded subsequent to the date of the document, and that further, under Arizona law no waiver
3 of lien priority is effective unless given for consideration other than mere payment then due
4 and owing under the contract. *Harrell Aff'd.*

5
6 In the first two applications for payment Wadsworth used its conditional waiver and
7 release on progress payment form. All the Wadsworth forms were identical except for the date
8 and the amount. The first Wadsworth conditional waiver and release on progress payment
9 form stated the following:

10
11 **CONDITIONAL WAIVER AND RELEASE ON PROGRESS**
12 **(Pursuant to A.R.S. § 33-1008)**

13 Project: Black Rock Development, Inc.
14 Job No: 317-01

15 On receipt by the undersigned of a check from Black Rock Development, Inc. in
16 the sum of \$38,250.00 payable to Wadsworth Golf Construction Company and
17 when the check has been properly endorsed and has been paid by the bank on
18 which it was drawn, this document becomes effective to release any mechanics'
19 lien, any state or federal statutory bond right, and private bond right, any claim
20 for payment and any rights under any similar ordinance, rule or statute related to
21 claim or payment rights for personals in the undersigned's position that the
22 undersigned has on the job of Black Rock North Golf Course located at Black
23 Rock North Golf Course in Coeur d'Alene, ID to the following extent. This
24 release covers a progress payment for all labor, services, equipment or materials
25 furnished to the jobsite or to Back Rock North Golf Course through October 31,
26 2006 only and does not cover any retention, pending modifications and changes
27 or items furnished after that date. Before any recipient of this document relies on
28 it, that person should verify evidence of payment to the undersigned.

1 The undersigned warrants that he either has already paid or will use the monies he
2 receives from this progress payment to promptly pay in full all of his laborers,
3 subcontractors, materialmen and suppliers for all work, materials, equipment or
4 services provided for or to the above referenced project up to the date of this
5 waiver.

6 *Anson Aff'd. Ex. 11*

7 Forms of this nature have uniformly been held not to effect lien priority. In *A.A.R.*
8 *Testing Laboratory, Inc. v. New Hope Baptist Church*, 112 Wash.App. 442, 50 P.3d, 650
9 (2002) the Court was faced with analyzing a similar form and stated:

10 Absent a true subordination agreement, the priority of mechanics' and
11 materialmen's liens against real property is not compromised by waiver and
12 release agreements executed in exchange for payment through a certain date.

13 ...

14 A reading of the release indicates that Heritage only released lien rights for any
15 "labor, services, materials or equipment supplied by the undersigned [Heritage]
16 through June 30, 1998." Payment for work done after June 30, 1998 was still
17 secured by the statutory lien and the priority of that claim relates back to the date
18 work began. A waiver and release of a lien claim for work done through a certain
19 date does not extinguish the lien or change the date of commencement under the
20 statute. The interpretation of the waiver and release agreements asserted by the
21 construction lenders renders the underlying mechanics' and materialmen's lien
22 rights meaningless and allows a shifting of priority dates without the existence of
23 a corresponding subordination agreement.

24 The ruling below elevates the waiver and release documents to subordination
25 agreements. The releases cannot be read as subordination agreements.

26 *At 50 P.3d 651 and 654.*

27 A similar result construing a similar lien waiver was reached in *Metropolitan*
28 *Federal Bank of Iowa v. A.J. Allen Mechanical Contractors, Inc.*, 477 N.W. 2d 668 (Iowa
1991) where the Court stated:

The language of the waivers employed by Allen specifically waived Allen's rights
to mechanic's liens only on account of labor or material "furnished up to and
including" the date of payment. There is no language in these waivers purporting

1 to waive rights accruing subsequent to the date of payment, nor is there any
2 language purporting to waive Allen's priority.

3 *At 477 N.W2d 673, 674.*

4 Likewise, *see LePore v. Parker-Woodward Corporation*, 818 F.Supp. 1029 (E.D.
5 Mich., 1993); District Judge Owen's *Memorandum Decision* dated May 1, 2009 *In Re*
6 *Tamarack Resort Foreclosure and Related Proceedings*, Valley County Case No. CV-08-310C,
7 and see generally, *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Court App. 1997).

9 Wadsworth utilized its conditional waiver and release on progress payment form in the
10 first two applications for payments submitted to BRN prior to the final execution of the
11 contract. As the contract did not require use of the BRN conditional lien waiver, release, and
12 subordination form as attached to the contract, but merely required use of a partial lien release
13 in a form satisfactory to BRN, and as BRN made payments under the first two applications for
14 payment, Wadsworth understood that its conditional waiver and release on progress payment
15 form was acceptable to BRN.

17 Wadsworth made a total of twenty-five applications for payment to BRN. Wadsworth
18 prepared Conditional Waiver and Release on Progress Payment forms that were used on
19 seventeen of the applications and were accepted by BRN. There were five occasions when
20 the BRN prepared conditional lien waiver forms were utilized. In his affidavit Stephen
21 Harrell, the President of Wadsworth, explains that when a BRN prepared conditional lien
22 waiver form was utilized it was either because there was either a mistake in completing the
23 form, or that Wadsworth apparently neglected to enclose its conditional lien waiver form, or
24 that the amount of money that BRN proposed to pay towards an application was different
25 than the amount of the application itself. Each time that Mr. Harrell executed a BRN
26 prepared conditional lien waiver release form it was with the understanding that the only
27
28



1 difference between it and the Wadsworth prepared form was either in the amount or to
2 correct an error. At no time when Mr. Harrell either signed or authorized his signature by
3 Wadsworth to a BRN prepared conditional lien release form was there ever an intention by
4 Mr. Harrell to waive or effect Wadsworth lien priority in the event that Wadsworth were
5 forced to subsequently record a lien. Mr. Harrell never understood that there was the
6 possibility that the execution of the BRN lien release form could effect Wadsworth's lien
7 priority and he never knowingly intended to waive the Wadsworth lien priority. *Harrell*
8 *Aff'd.*

9
10
11 Marshall Chesrown, who at all relevant times was and is the president of BRN
12 testified that it did not matter to him whether the Wadsworth prepared conditional lien waiver
13 release form was used or the BRN prepared form was used. Kyle Capps, who was the BRN
14 Project Manager for the Golf Course, testified that BRN's only concern with the lien waivers
15 was that amount of the lien waiver matched the amount that BRN was paying. Leon Royer,
16 who at the time was president of American Bank, testified that the bank did not review or
17 receive any of the lien releases issued by any of the contractors or subcontractors for the BRN
18 project. *Anson Aff'd. Exs. 16, 17 and 18 [Harrell Depo. Ex. 63, at 373-379; Capps Depo. at*
19 *54-64; Capps Depo. Ex. 75, at 537]. Harrell Aff'd. [BRN Development Rule 30(b)(6) Depo.*
20 *at 10, 11, 165-167, Royer Depo. at 144-145].*

21
22
23 American Bank contends that on the five occasions when the BRN lien waiver form
24 was used because of some mistake in the Wadsworth form, or BRN's decision to pay an amount
25 different than the Wadsworth application for payment, or the inadvertence of Wadsworth to
26 include its conditional waiver and release on progress payment form with its payment
27 application, the parties created fundamental changes in the nature of the lien waivers. When
28

1 read literally, the BRN prepared lien waiver form waives any claim for payments through the
2 date of the waiver, which would include the agreed upon five percent retainage otherwise due
3 at the completion of the project, and changed the priority of any lien that may be thereafter filed
4 from the date of commencement of work to the date of the lien waiver. The parties never
5 intended these effects. The argument of American Bank fails due to a lack of consideration for
6 the relinquishment of the retainage rights and subordination of lien priority, and for the fact that
7 the usage of the BRN form was due to the mutual mistake of the parties or unilateral mistake of
8 Wadsworth.
9

10
11 **A. Lack of Consideration.**

12 The general rule is that an express waiver of a mechanic's lien must be supported by
13 consideration in order to be effective and binding. *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d
14 590 (1975). The doing of something which one is already bound by contract to do is not a valid
15 consideration. In *Louk v. Patten*, 58 Idaho 334, 73 P.2d 949 (1937) the Court stated:
16

17 A promise to do what the promisor is already bound to do cannot be
18 consideration, for if a person gets nothing in return for his promise but that to
19 which he is already legally entitled, the consideration is unreal. Therefore, as a
20 general rule, the performance of, or the promise to perform, an existing legal
21 obligation is not a valid consideration.

22 The promise of a person to carry out a subsisting contract with the promise or the
23 performance of such contractual duty is clearly no consideration, as he is doing
24 no more than he was already obligated to do, and hence has sustained no
25 detriment, nor has the other party to the contract obtained any benefit.

26 *At 73 P.2d 951, citations deleted.*

27 The issue before the Court in *Sussel Co. v. First Federal Savings and Loan Association*
28 *of St. Paul*, 304 Minn. 433, 232 NW.2d 88 (1975) was whether a lien waiver given in
connection with an obligated contractual payment constituted merely a waiver of past lien

1 rights or included a waiver of future lien rights and lien priorities. The Court found that there
2 was no consideration for anything other than a waiver of past lien rights. The Court stated:

3
4 However, it is clear that respondent agreed on June 27 to pay appellant in
5 exchange for appellant's waiver of past lien rights. Thus, appellant's purported
6 waiver of priorities and future lien rights on July 13 was devoid of
7 consideration, as respondent was merely doing that which it was already
8 obligated to do. Appellant received respondent's promise to pay in exchange for
9 its waiver of past lien rights. The waiver of priorities and future lien rights
10 required additional consideration, totally lacking in this case.

11
12 As a result, we hold that the check issued by respondent was not voluntary, but
13 was made pursuant to an existing legal commitment. The lien waiver printed on
14 the reverse side of the check, then, was void of the additional consideration
15 necessary to waive future lien rights from and after June 27, 1972, and was
16 unenforceable.

17 *At 232 N.W. 2d 91, citations deleted.*

18
19 A similar issue was before the Court in *Beebe Construction Corp. v. Circle R Co.*, 10
20 Ohio App.2d 127, 226 N.E.2d 573 (1967) where the Court found that there was no
21 consideration for a waiver of a mechanic's lien beyond the amount of the payment given for the
22 lien waiver. The Court stated:

23
24 In paying to plaintiff \$1,196.73, upon receipt of a waiver of mechanic's lien
25 from the plaintiff, defendant Putnam, so far as appears from the record in this
26 case, was doing only what it was legally bound to do. A waiver of mechanic's
27 lien in consideration of payments made by an owner or contractor, which he is
28 legally bound to pay to the claimant, does not constitute valuable consideration
so as to make the lien waiver effective and binding.

At 226 N.E. 2d 576, citations deleted.

BRN never paid to Wadsworth anything in addition to that which was owed under the
contract. On two occasions BRN paid substantially less. For the Wadsworth Payment
Application dated September 30, 2007 in the amount of \$1,187,951.44 BRN only paid
\$1,000,000.00. For the October 30, 2007 Wadsworth Application in the sum of \$870,484.18
BRN only paid \$58,435.64. BRN did not pay the November 30, 2007 Application nor the

1 Applications dated December 31, 2007, January 31, 2008, and February 28, 2008 until they
2 paid all four Applications with one check during April of 2008. As all of these payments were
3 in amounts different than the Wadsworth Applications and corresponding Wadsworth
4 Conditional Lien Waiver Forms, BRN prepared its Lien Waiver Form so that it would have a
5 form that corresponded to the amount of each check. No consideration was given for any
6 waiver of Wadsworth's lien priority. Likewise, no consideration was given for any waiver of
7 the right to the retainage upon the completion of the project. Wadsworth was only waiving,
8 and consideration was only given, for Wadsworth's acknowledgment that it had received the
9 amount of the payment and waived any right to file a lien based upon the amount of the
10 payment. On the basis of the foregoing, the lack of consideration makes any lien priority
11 waiver, waiver of future lien rights, and waiver of the right to retainage all ineffective.
12
13

14 **B. Mutual Mistake and Unilateral Mistake.**

15 The doctrine of mutual mistake allows one party to a contract to modify a term of the
16 contract, void the contract, or reform a contract if certain facts are present. *RESTATEMENT*
17 *(SECOND) OF CONTRACTS* § 152 (2010). In order for the doctrine of mutual mistake to
18 provide reformation or relief for one party the party must prove the following:
19

- 20 1. That both parties to the contract are mistaken as to a basic assumption on
21 which the contract was made; and
- 22 2. that the mistake was material.

23 *RESTATEMENT (SECOND) OF CONTRACTS* § 152 (2010).

24 Wadsworth submitted two applications for payment to BRN prior to finalization of the
25 final contract between Wadsworth and BRN. Each application contained a Wadsworth
26 prepared conditional waiver and release on progress payment form prepared pursuant to
27 Arizona revised statute § 33-1008. Wadsworth understood the effect of this form and knew
28

1 that it did not waive claims for retainage and that it did not affect lien priority. BRN accepted
2 the use of this form and make payments on each of the first two applications. While the final
3 contract entered into between Wadsworth and BRN contained as an attachment a BRN
4 prepared lien waiver release form, the contract did not require the use of that form but merely
5 required the use of a lien waiver form acceptable to BRN. BRN accepted the use of the
6 Wadsworth prepared form. Neither Wadsworth nor BRN ever contemplated that there could
7 possibly be a difference in the legal effect of the Wadsworth prepared form and the BRN
8 prepared form. American Bank never reviewed any of the lien release forms.
9

10
11 Wadsworth and BRN intended to use a lien release form that had the legal effect of the
12 Wadsworth prepared form. They did so on seventeen occasions. By mutual mistake, on five
13 occasions a BRN lien waiver form was used.

14
15 The contract between BRN and Wadsworth provided that BRN would withhold as
16 retainage from Wadsworth five percent of the amount of each payment application. The
17 Wadsworth prepared lien release forms specifically excluded retainage from the scope of the
18 release. The BRN prepared lien release form did not exclude retainage from its scope and
19 would act to release all claims for payment to the date of the release, notwithstanding the fact
20 that only ninety-five percent of the amount then due was being paid. Actually the parties made
21 a mistake in the calculation of retainage. From October, 2006 to October 2007, by mutual
22 mistake ten percent of the amount of the payment applications were being withheld as retainage
23 as opposed to the correct five percent amount. When the mistake was discovered the surplus
24 retainage in the sum of \$244,557.90 was paid by BRN to Wadsworth. By that time, four of the
25 BRN prepared lien release forms had been executed by mistake. Had BRN intended to rely on
26 the purported effect of its lien waiver release form it would not have paid to Wadsworth the
27
28

1 \$244,557.90 in excess retainage. The parties instead intended that the legal effect of the lien
2 waivers would be pursuant to the Wadsworth prepared lien waiver form, and the use of the
3 BRN form was purely by mistake or inadvertence.
4

5 In *Bailey v. Ewing*, 105 Idaho 636, 671 P.2d 1099 (Court App. 1983) the Court
6 explained the doctrine of mistake as follows:

7 A mistake is an unintentional act or omission arising from ignorance, surprise,
8 or placed confidence. See 13 WILLISTON ON CONTRACTS § 1535 (3d ed.
9 1970). The mistake must be material or, in other words, so substantial and
10 fundamental as to defeat the object of the parties. *Woodahl v. Mathews*, 639
11 P.2d 1165 (Mont.1982). A unilateral mistake is not normally grounds for relief
12 for the mistaken party, whereas a mutual mistake is. *Loeb Rhoades,
13 Hornblower & Co. v. Keene*, 28 Wash.App. 499, 624 P.2d 742 (1981). See
14 *Moran v. Copeman*, 55 Idaho 785, 47 P.2d 920 (1935). A mutual mistake
15 occurs when both parties, at the time of contracting, share a misconception
16 about a basic assumption or vital fact upon which they based their bargain. *Mat-
17 Su/Blackard/Stephan & Sons v. State*, 647 P.2d 1101 (Alaska 1982); *Shrum v.
18 Zeltwanger*, 559 P.2d 1384 (Wyo. 1977). Some courts require the parties to
19 have the same misconception about the same basic assumption or vital fact.
20 *E.G., Shrum v. Zeltwanger, supra*. However, mutual mistake also has been
21 defined to include situations in which the parties labor under differing
22 misconceptions as to the same basic assumption or vital fact. *RESTATEMENT
23 (SECOND) CONTRACTS* § 152, comment h (1981) [hereafter cited as
24 Restatement]. We believe the Restatement presents the better view. The
25 assumption or fact must be the same; otherwise two unilateral mistakes, instead
26 of one mutual mistake, would result.

27 At 105 Idaho 639.

28 Thus, in *Bailey v. Ewing* the Court found:

It is undisputed that Erhardt intended to sell the house with lot five and that he assumed the boundary line was located so as to allow him to sell the whole house. Erhardt believed the boundary line was somewhere east of its subsequently determined "true" location. Ewing shared this belief. Thus, both Ewing and Erhardt mistakenly believed that the boundary line was further east than it turned out to be. As a result of their ignorance concerning the true location, an act that neither of them intended occurred. Neither intended that the property sold as lot five would fail to include the whole house. This, there was an "unintentional act ... arising from ignorance." We hold, therefore, that Ewing and Erhardt made a mutual mistake regarding the location of the boundary line between lots five and six.

1
2 At 105 Idaho 639, 640.

3 When a Court reforms an instrument when it appears from the evidence that the
4 instrument does not reflect the intentions of the party and that such failure is a product of a
5 mutual mistake the Court is not rewriting the contract but instead is reforming the instrument to
6 give effect to the agreement that the parties had made and that but for reason of mistake was
7 not expressed in the writing. *Chandler v. Hayden*, 147 Idaho 765, 215 P.3d 485 (2009).

8
9 Whether a mutual mistake exists is a question of fact. *O'Connor v. Harger*
10 *Construction, Inc.*, 145 Idaho 904, 188 P.3d 846 (2008); *Belk v. Martin*, 136 Idaho 652, 39 P.3d
11 592 (2001).

12 American Bank argues that by mistakenly executing five BRN prepared lien release
13 forms, Wadsworth has waived its lien priority, and by extension and effect, has waived its
14 retainage rights. Waiver is a voluntary, intentional relinquishment of a known right. *Frontier*
15 *Federal Savings and Loan Association v. Douglass*, 123 Idaho 808, 853 P.2d 553 (1993). As
16 stated by the Court in *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 735 P.d 1047 (Ct. App.
17 1987) "Waiver is foremost a question of intent. To establish a waiver, the intention to waive
18 must clearly appear." At 112 Idaho 739. The existence of a waiver is ordinarily a question of
19 fact. *Riverside Development Company v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982). Clearly
20 on the basis of the forgoing, Wadsworth did not knowingly or intentionally waive its lien
21 priority or retainage rights.
22
23
24

25 To date, BRN has not disputed the fact that the use of the BRN prepared lien release
26 form was only by happenstance with neither party intending any legal effect different than the
27 legal effect of the Wadsworth prepared lien release. American Bank may, however, argue that
28 the mistaken use of the BRN form was a unilateral mistake on the part of Wadsworth. While a

1 unilateral mistake is not ordinarily grounds for relief it is grounds for relief when one party is
2 mistaken and the other party has knowledge of the mistake. Thus, in *Belk v. Martin*, 136 Idaho
3 652, 39 P.3d 592 (2001) the parties agreed to a lease with a rental fee of \$14,768.00. Through
4 mistake, the written lease stated that the rent was only \$1,476.80. In an action brought by the
5 lessor to reform the lease to the correct rental amount, the lessee contended that he was aware
6 of the mistake in the written lease and that relief should not be given for the unilateral mistake
7 of the lessor. The Court found that to be the exception to the rule and that reformation of an
8 agreement can be awarded if one party has knowledge that the other party suffers from a
9 unilateral mistake. If American Bank argues that the mistake was unilateral as to Wadsworth
10 then by definition BRN had knowledge of the mistake and relief should still be awarded to
11 Wadsworth to reform the BRN prepared lien release forms to be identical to the Wadsworth
12 prepared forms.

13
14
15 **4. Equitable Subrogation.**

16 American Bank knew that Wadsworth was constructing the golf course prior to its loan
17 to BRN. It lent money to BRN to pay for the development of the project. It took no action to
18 assure that the money it lent was being used to pay Wadsworth and the other contractors.
19 While presumably it required BRN to obtain lien releases, American Bank never reviewed the
20 lien releases and in all likelihood would not, in any event, have discerned any difference
21 between the Wadsworth prepared lien release form and the BRN prepared lien release form.
22 Now American Bank, and its majority loan participant, Fidelity National Timber Resources,
23 Inc., seek to foreclose upon the property and assert that its lien position is superior to the liens
24 of all of the contractors, subcontractors, and materialmen. With the decline in the economy, it
25 is between possible and probable that if American Bank is adjudged to be in the senior position,
26
27
28

1 that all of the contractors and workers on the project will receive nothing for their unpaid
2 invoices. American Bank and Fidelity will reap the benefit of all of the work and
3 improvements without having paid anything towards them. This seems inherently unfair, and
4 equity provides a remedy. In the event that this Court rejects all of Wadsworth's forgoing
5 arguments and finds that the American Bank mortgage has priority over the Wadsworth lien,
6 then Wadsworth submits that under the doctrine of equitable subrogation this Court has the
7 power and authority to subordinate the American Bank mortgage to the Wadsworth lien. As
8 stated by the court in *Houghtelin v. Diehl*, 47 Idaho 636, at 639-640, 277 P. 699 (1929):
9

10
11 Subrogation, in its broadest sense, is the substitution of one person for another,
12 so that he may succeed to the rights of the creditor in relation to the debt or
13 claim and its rights, remedies and securities. The doctrine is derived from the
14 civil law, from which it has been adopted by courts of equity. It is considered a
15 creature of equity, and is so administered as to secure real and essential justice
16 without regard to form, and it will not be allowed where it would work an
17 injustice to others, as where it would disturb the priorities of liens or defeat any
18 rights of others. Its principle is often extended to those who, because of their
19 interest in the property on which debts of others are a charge, are entitled to pay
20 such debts and be substituted to the place of the original creditor. ... The
21 doctrine of subrogation is not administered as a legal right, but the principle is
22 applied to subserve the ends of justice and to do equity. It does not rest on
23 contract, and no general rule can be laid down which will afford a test in all
24 cases for its application, and whether the doctrine is applicable to any particular
25 case depends upon the peculiar facts and circumstances of such case.

26 See also Idaho District Judge Mitchell's decision in *Van Horn v. Nelsen*, 2002 WL
27 32864540 (2002); *May Trucking Co., v. International Harvester Company*, 97 Idaho 319, 543
28 P.2d 1159 (1975) and; *Metropolitan Life Insurance Company v. First Security Bank of Idaho*,
94 Idaho 489, 491 P.2d 1261 (1971).

29 On the basis of the forgoing, if this Court is not otherwise convinced of the Wadsworth
30 lien priority it should apply the doctrine of equitable subrogation and subordinate the American
31 Bank Mortgage to the Wadsworth lien.

1 CONCLUSION

2 Wadsworth respectfully submits that on the basis of the forgoing that the American
3 Bank Motion for Summary Judgment should be denied and that this Court should grant
4 summary judgment in favor of Wadsworth as against American Bank holding either that lien
5 priority is not relevant and that Wadsworth may proceed to judgment against the surety on the
6 bond, or that if lien priority is relevant, that the Wadsworth lien has priority over the lien of
7 American Bank, and if not, that under the doctrine of equitable subrogation that this Court
8 subordinate the lien of American Bank to the Wadsworth lien.
9

10 Respectfully submitted this 12th day of November, 2010.
11

12 

13 Edward J. Anson
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18

CERTIFICATE OF SERVICE

I certify that on this 12th day of November, 2010, I caused a true and correct copy of WADSWORTH'S MEMORANDUM IN RE SUMMARY JUDGMENT MOTIONS to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

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STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
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10 *Attorneys for Defendant Wadsworth Golf*
11 *Construction Company of the Southwest,*
12 *The Turf Corporation, and Precision Irrigation, Inc.*

13 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

14 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

15 AMERICAN BANK, a Montana banking
16 corporation,

17 Plaintiff and Counterdefendant,

18 vs.

19 BRN DEVELOPMENT, INC., an Idaho
20 corporation, BRN INVESTMENTS, LLC, an
21 Idaho limited liability company, LAKE VIEW
22 AG, a Liechtenstein company, BRN-LAKE
23 VIEW JOINT VENTURE, an Idaho general
24 partnership, ROBERT LEVIN, Trustee for the
25 ROLAND M. CASATI FAMILY TRUST,
26 dated June 5, 2008, RYKER YOUNG, Trustee
27 for the RYKER YOUNG REVOCABLE
28 TRUST, MARSHALL CHESROWN a single
man, IDAHO ROOFING SPECIALIST, LLC,
an Idaho limited liability company, THORCO,
INC., an Idaho corporation, CONSOLIDATED
SUPPLY COMPANY, an Oregon corporation,
INTERSTATE CONCRETE & ASPHALT
COMPANY, an Idaho corporation,
CONCRETE FINISHING, INC., an Arizona
corporation, WADSWORTH GOLF
CONSTRUCTION COMPANY OF THE
SOUTHWEST, a Delaware corporation, THE

NO. CV-09-2619

WADSWORTH'S STATEMENT OF
UNCONTESTED MATERIAL FACTS

WADSWORTH'S STATEMENT OF UNCONTESTED
MATERIAL FACTS - Page 1

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WITHERSPOON • KELLEY
Attorneys & Counselors

1 TURF CORPORATION, an Idaho corporation,
2 POLIN & YOUNG CONSTRUCTION, INC.,
3 an Idaho corporation, TAYLOR
4 ENGINEERING, INC., a Washington
5 corporation, PRECISION IRRIGATION, INC.,
6 an Arizona corporation and SPOKANE
7 WILBERT VAULT CO., a Washington
8 corporation, d/b/a WILBERT PRECAST,

9 Defendants, Counterclaimants,
10 Crossclaimants and Crossdefendants.

11 Wadsworth Golf Construction Company of the Southwest (henceforth "Wadsworth")
12 submits its Statement of Uncontested Material Facts.

13 1. BRN Development, Inc. (henceforth "BRN") intended to develop Black Rock
14 North as a high end residential golf course community. The project consisted of approximately
15 one thousand acres located to the north and east of the original Club at Black Rock
16 development. The one thousand acres were designed for the development of three hundred
17 twenty-five (325) residential units segmented into a total of one hundred ninety-eight (198)
18 single family detached lots ranging in size from 0.9 acres to 11 acres and one hundred twenty-
19 seven (127) residential units designed for cluster housing, town homes, and condominiums.
20 The golf course traverses throughout the entire project and consists of approximately two
21 hundred (200) acres. *Anson Aff'd. Exs. 1, 2, and 3 [Capps Depo. at 13-14, Harrell Depo. Ex.*
22 *1, BRN Development Depo. Ex. 181].*

23 2. Marshall Chesrown, the president of BRN, described the purpose of building
24 the golf course is to increase the value of the adjoining properties. Marshall Chesrown
25 described the business plan as follows:
26

27 So the plan always was for repayment to the bank, and everything was
28 always structured around the 325 residential units. That was the only
opportunity to create revenue, the only opportunity to pay off debt, all those

1 kinds of things. Because golf courses lose money. I mean, none of them make
2 money.

3 So – but that again, what it did is you take lots that – let's say just – not
4 in this case, but I'll just use round numbers. If, you know, a normal lot in your
5 market sells for 50,000 and it costs 25,000 to build them, you got 25,000 in
6 margin, of course. In this world, you just take that same lot, and all of a
7 sudden it costs the same to build typically, all right, but now you take the cost
8 of that golf course and amortize it over those lots. And so now your lot cost
9 goes from 25 to 100, but your value goes from 100 to 400. So now you have
10 300,000 of margin to play with. So that's how the business model was built.

11 *Anson Aff'd. Exs. 4 and 5 [BRN Development Depo. at 11, Chesrown Depo., Vol. 2, at 77-78].*

12 3. Wadsworth initially submitted a bid for both the golf course construction and
13 for mass excavation outside of the golf course boundaries. Ultimately ACI was awarded a
14 contract for the mass excavation and Wadsworth was awarded the contract for the actual golf
15 course construction. *Anson Aff'd. Ex. 3 [Capps Depo. at 25-26].*

16 4. BRN prepared a conditional letter of intent dated September 18, 2006 and
17 transmitted it to Wadsworth. Wadsworth executed the conditional letter of intent and returned
18 it to BRN. On behalf of BRN, Kyle Capps executed the conditional letter of intent on or about
19 October 10, 2006. *Anson Aff'd. Exs. 4 and 5 [Capps Depo. at 27-28, Harrell Depo. Ex. 4].*

20 5. The conditional letter of intent governed the relationship between Wadsworth and
21 BRN until a final contract was signed. Wadsworth commenced work on the golf course project
22 after the execution of and in reliance upon the conditional letter of intent. During October,
23 November, and December of 2006 Wadsworth worked on the layout of various tees, fairways,
24 greens, and a lake. Wadsworth additionally did shaping work on holes six and seven including
25 supervising earth moving for holes four, five, six, seven, and related erosion control. BRN
26 desired to have the golf course substantially complete by the fall of 2008 to allow for limited
27 golf play at that time and to allow for full golf play during the spring of 2009. To meet that
28 construction schedule BRN requested that Wadsworth commence construction during the fall of

1 2006 prior to finalization of the final contract. Had Wadsworth not commenced during that
2 time, the golf course would not have been substantially completed by the fall of 2008. *Anson*
3 *Aff'd. Exs. 7, 8, and 9 [Capps Depo. at 30-31; 113-114, and Capps Depo. Exs. 77, 78], Harrell*
4 *Aff'd.*

6 6. During October, 2006 Steve Harrell prepared the contract with one of his
7 subcontractors, Precision Irrigation, Inc. In connection with its preparation he attached to the
8 contract various documents, some of which were documents that he had received from BRN. A
9 true and correct copy of the Wadsworth contract with Precision Irrigation together with all
10 documents attached is attached to the Deposition of Stephen A. Harrell as Exhibit 4. One of the
11 documents attached to the contract was the BRN prepared lien waiver form. At times Precision
12 Irrigation would utilize the BRN prepared lien waiver form and at other times Precision
13 Irrigation would utilize its own prepared lien waiver form. Attached to the Deposition of
14 Stephen A. Harrell as Exhibit 5 are copies of the Precision Irrigation prepared lien waiver forms
15 as used on the project. It is Steve Harrell's understanding that the contract between Wadsworth
16 and Precision Irrigation did not require the use of any particular lien waiver form. *Harrell Aff'd.*

19 7. From mid December, 2006 through March, 2007, Wadsworth maintained the
20 jobsite and performed the sensitive erosion controls that were necessary both to preserve the
21 work performed up to that time as well as to remain compliant with the various environmental
22 requirements. Erosion controls included installing, maintaining, and repairing silt fences,
23 erosion fabric, straw mulch, straw wattle rolls, and straw bails to control water flow on the
24 slopes of the golf holes to prevent sediment from getting into the water which was running off
25 the site. If erosion controls were not properly maintained and an event occurred which caused
26 sedimentation of off-site water ways and water sheds, such an occurrence would have had the
27
28

1 affect of shutting down the project until remedial action had taken place. This remedial action
2 would take months and even perhaps a year during which time no work could be performed on
3 the project. The Storm Water Prevention and Pollution Control Plan would be required to be
4 reviewed and a new plan could be required for submission and approval. *Harrell Aff'd.*

6 8. Wadsworth submitted to BRN its first Application and Certification for
7 Payment dated October 31, 2006 for that period ending October 31, 2006 in the total amount of
8 \$42,500.00, of which \$4,250.00 represented retainage, leaving an amount due of \$38,250.00.
9 *Anson Aff'd. Exs. 10 and 11, [Capps Depo. at 39-44, Capps Depo. Ex. 75 at BRN510-*
10 *BRN516], Harrell Aff'd.*

12 9. Included within the first Application for Payment was a Conditional Waiver and
13 Release on Progress Payment prepared by Wadsworth. Kyle Capps, who is a Vice President of
14 BRN and in charge of the golf course development, reviewed the Application for Payment and
15 Conditional Waiver and he approved it for payment on or about November 20, 2006. The
16 Application for Payment was paid by a check dated December 8, 2006 in the amount then due.
17 *Id., Harrell Aff'd.*

19 10. The first Wadsworth Application and Certification for Payment contained a
20 Wadsworth prepared Conditional Waiver and Release on Progress Payment form. This is a
21 form that Wadsworth uses in its ordinary course of business. It is prepared pursuant to Arizona
22 Revised Statute § 33-1008. It is Mr. Harrell's understanding that conditioned upon bank
23 clearance of a check in the sum of the application, that Wadsworth was acknowledging payment
24 in full for work performed to the date set forth in the form, excluding retention, pending
25 modifications, and changes or items furnished after the date used. It is Mr. Harrell's
26 understanding that this document does not effect lien priority in the event that a lien is recorded
27
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1 subsequent to the date of the document, and that further, under the law no waiver of lien priority
2 is effective unless given for consideration other than mere payment of the amount then due and
3 owing under the contract. *Harrell Aff'd.*

4
5 11. The second Application for Payment was originally made on December 26,
6 2006 in the sum of \$177,862.50. In reviewing this application Mr. Capps believed that too
7 much was being billed for mobilization charges. Wadsworth and BRN agreed to reduce the
8 mobilization charge and a revised second Application for Payment was sent on December 31,
9 2006 in the sum of \$117,247.50. This revised second application was also accompanied by a
10 Conditional Waiver and Release on Progress Payment prepared by Wadsworth in the revised
11 sum of \$117,247.50. The application and conditional waiver were each received and approved
12 by Kyle Capps and was paid by BRN with a check dated January 24, 2007. *Anson Aff'd. Exs.*
13 *12 and 13 [Capps Depo. at 46-54 and Capps Depo. Ex. 75 at BRN521 and BRN525-530].*

14
15 12. Wadsworth utilized its Conditional Waiver and Release on Progress Payment
16 form in the two applications for payments submitted to BRN prior to the final execution of the
17 contract. As the contract did not require use of the BRN Conditional Lien Waiver, Release and
18 Subordination as set forth as an exhibit to the contract, but merely required use of a partial lien
19 release in a form satisfactory to BRN, and as BRN made the payments under the first two
20 applications for payment, it was Mr. Harrell's understanding that the use of the Wadsworth
21 prepared Conditional Waiver and Release on Progress Payment form was acceptable to BRN.
22
23 *Harrell Aff'd.*

24
25 13. Between October 10, 2006 and January 27, 2007 there was a fair amount of
26 give and take between Wadsworth and BRN negotiating the terms of the final contract. *Anson*
27 *Aff'd. Ex. 14 [Capps Depo. at 130 and 131].*

1 14. As maintained by Wadsworth, the final contract consists of various exhibits,
2 documents, a Performance Bond, and copies of correspondence, all with various dates. *Anson*
3 *Aff'd. Ex.15 [Harrell Depo. Ex. 66]*.

4 15. The initial two page Contract Agreement is dated the ___ day of _____,
5 2006. At the bottom of each page of the agreement appears to be a revision date of September
6 6, 2006 and a print date of January 26, 2007. The following document is an undated Contract
7 General Conditions. Following that is a three page exhibit of inclusions and exclusions
8 undated but apparently showing a revision date of September 6, 2006 and a print date of
9 January 26, 2007. Following that is an attachment A-1 Contract Qualifications and
10 Clarifications bearing a date of December 6, 2006. Following that is a BRN prepared
11 Conditional Lien Waiver, Release and Subordination which appears to show a revision date of
12 August 8, 2006. Following that is a Subcontractors Application for Payment Form which is
13 undated. Following that is a Substance Abuse Program Requirements which is undated but
14 bares a revision date of September 6, 2006 and an apparent print date of January 26, 2007.
15 Following that is another form of a Substance Abuse Program Requirements bearing a date of
16 September 18, 2006 with a revision date of September 6, 2006 and an apparent print date of
17 January 26, 2007. Following that is the same document bearing the execution by Steven
18 Harrell of Wadsworth dated December 4, 2006. Following that is an undated Substance Abuse
19 Policy. Following that is a certificate of DOT Drug and Alcohol Program Enrollment bearing
20 the date of October 1, 2007. Following that is a quarterly mailing stamped received August 18,
21 2006. Following that are six pages of undated insurance forms. Following that is an Insurance
22 Compliance Statement dated December 19, 2006. Following that is a Certificate of Liability
23 Insurance dated December 29, 2006. Following that is a Request for Tax Payer Identification
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1 Number executed by Steven Harrell dated January 29, 2007. Following that is a letter from
2 Kyle Capps to Steve Harrell dated January 27, 2007 which states that the final contract
3 between BRN and Wadsworth in its entirety is enclosed. Following that is a memorandum
4 from Steve Harrell to Kyle Capps dated December 26, 2006 transmitting copies of five various
5 documents. Following that is an undated Safety and Health Program. Following that is an
6 undated Unit Prices for Adjustments. Following that is an undated list of contract drawings
7 with contract drawing bearing various dates from April 14, 2006 to October 13, 2006.
8 Following that is a letter from Kyle Capps to Steven Harrell dated November 10, 2006.
9 Following that is a Performance Bond dated December 5, 2006 bearing a copy of an
10 acknowledgment dated December 5, 2006. *Id.*

11
12
13 16. Prior to American Bank making its subject loan to BRN during December 2006,
14 Leon Royer who was then President of American Bank, inspected the Black Rock North
15 property. He viewed the construction that had taken place up to that time. He noticed that the
16 property had undergone dirt work and that a retention pond had been constructed. He noticed
17 that there were "big things that had been moved." *Anson Aff. Ex. 18 (Royer Depo. at 132-134).*

18
19 17. On February 2, 2007 American Bank entered into a revolving credit agreement
20 with BRN. BRN executed and delivered to American Bank a revolving credit note and a
21 mortgage. The American Bank Mortgage is dated February 2, 2007 and was recorded in the
22 records of Kootenai County, Idaho on February 6, 2007. *Klein Aff.*

23
24 18. The third Application for Payment was made on February 28, 2007 in the sum
25 of \$42,334.18. This was accompanied by a Wadsworth prepared Conditional Waiver and
26 Release on Progress Payment which inadvertently described the project as being the Ridge
27 Creek Golf Course. The records of BRN do not contain a copy of this third conditional waiver,
28

1 but do contain a copy of a BRN prepared Conditional Lien Waiver, Release and Subordination
2 executed by Wadsworth. The Wadsworth records do not have a copy of this BRN prepared
3 conditional lien waiver. Kyle Capps testified that typically Wadsworth would submit their
4 own conditional lien waivers and as long as the waiver matched the amount of the payment,
5 BRN would issue payment. However, in the event that there were revisions, adjustments,
6 partial payments, or anything else BRN would send to Wadsworth their own waiver form for
7 Wadsworth's execution so that everything corresponded and matched. Mr. Capps opined that
8 the reason that BRN prepared this conditional lien waiver was because of the fact that the
9 Wadsworth lien waiver had the name of the wrong golf course on it. In his affidavit Mr.
10 Harrell states that when the error in the project identification was discovered in the third
11 application for payment, BRN submitted to him its lien waiver form and that he signed it with
12 the understanding that the only difference between the two forms was the correction of the
13 name of the project. This third application for payment was then approved and paid by BRN
14 with a check dated April 6, 2007. *Anson Aff'd. Ex. 16 [Harrell Depo. Ex. 63, at 373-379;*
15 *Capps Depo. at 54-64; Capps Depo. Ex. 75, at 536]; Harrell Aff'd.*

19 19. Wadsworth made a total of twenty-five applications for payment to BRN.
20 Wadsworth prepared conditional Waiver and release on progress payment forms that were used
21 on seventeen of the applications and were accepted by BRN. There were five occasions when
22 the BRN prepared conditional lien waiver forms were utilized. In his affidavit Mr. Harrell
23 explains that when a BRN prepared conditional lien waiver form was utilized it was either
24 because there was either a mistake in completing the form, or that Wadsworth apparently
25 neglected to enclose its conditional lien waiver form, or that the amount of money that BRN
26 proposed to pay towards an application was different than the amount of the application itself.
27
28

1 Each time that Mr. Harrell executed a BRN prepared conditional lien waiver release form it
2 was with the understanding that the only difference between it and the Wadsworth prepared
3 form was either in the amount or to correct an error. At no time when Mr. Harrell either signed
4 or authorized his signature by Wadsworth to BRN prepared conditional lien release form was
5 there ever an intention by Mr. Harrell to waive or effect Wadsworth lien priority in the event
6 that Wadsworth was forced to subsequently record a lien. Mr. Harrell never understood that
7 the possibility of an execution of the BRN lien release form could effect Wadsworth's lien
8 priority and he never knowingly intended to waive the Wadsworth lien priority. *Harrell Aff'd.*

11 20. Marshall Chesrown, who at all relevant times was and is the president of BRN
12 testified that it did not matter to him whether the Wadsworth prepared conditional lien waiver
13 release form was used or the BRN prepared form was used. Leon Royer, who at the time was
14 president of American Bank, testified that the bank did not review or receive any of the lien
15 releases issued by any of the contractors or subcontractors for the BRN project. *Anson Aff'd.*
16 *Exs. 17 and 18 [BRN Development Rule 30(b)(6) Depo. at 10, 11, 165-167, Royer Depo. at*
17 *144-145].*

19 21. The fourth Application for Payment was made on March 28, 2007 in the sum of
20 \$406,067.82. It was accompanied by a Wadsworth prepared Conditional Lien Waiver in that
21 amount. It was approved and paid by a BRN check dated May 8, 2007. *Anson Aff'd. Exs. 19*
22 *and 20 [Harrell Depo. Ex. 63, at 380-385; Capps Depo. Ex. 75 at 539].*

24 22. The fifth Application for Payment was made on May 29, 2007 in the sum of
25 \$251,734.88. It was accompanied by a Wadsworth prepared Conditional Lien Waiver in that
26 amount. It was approved and paid by a BRN check dated June 7, 2007. *Anson Aff'd. Exs. 21*
27 *and 22 [Harrell Depo. Ex. 63 at 396-412; Capps Depo. Ex. 75 at 541].*

1 23. The sixth Application for Payment was made on June 29, 2007 in the amount of
2 \$719,304.62. Wadsworth's copy of this application does not contain a copy of a conditional
3 lien waiver. Kyle Capps assumes that because Wadsworth did not include a lien waiver, BRN
4 prepared its form of the conditional lien waiver and sent it to Wadsworth, who then executed it
5 and returned it to BRN. BRN then approved the application and paid it by check dated August
6 1, 2007. *Anson Aff'd. Exs. 23, 24 and 25 [Harrell Depo. Ex. 63 at 413-425; Capps Depo. at*
7 *70-75; Capps Depo. Ex. 75 at 543; Ex. 76 at 4].*
8

9 24. The seventh Application for Payment was made on July 31, 2007 in the sum of
10 \$545,132.86. It was accompanied by a Wadsworth prepared Conditional Lien Waiver in that
11 amount. It was approved and paid by a BRN check dated September 13, 2007. *Anson Aff'd.,*
12 *Exs. 26 and 27 [Harrell Depo. Ex. 63 at 426-437; Capps Depo. at 78; Capps Depo. Ex. 75 at*
13 *545].*
14

15 25. The eighth Application for Payment was made on September 4, 2007 in the
16 amount of \$1,270,508.80. It was accompanied by a Wadsworth prepared Conditional Lien
17 Waiver in that amount. It was approved and paid by a BRN check dated October 30, 2007.
18 *Anson Aff'd., Exs. 28, 29 and 30 [Harrell Depo. Ex. 63 at 438-450; Capps Depo. at 83-84;*
19 *Capps Depo. Ex. 75 at 545].*
20

21 26. The ninth Application for Payment was made on September 30, 2007 in the
22 amount of \$1,187,951.44. Wadsworth's records do not contain a copy of any Wadsworth
23 prepared conditional lien release pertaining to this ninth application for payment. BRN
24 proposed to pay \$1,000,000.00 of the application and prepared its own form of a conditional
25 lien release in that amount. Wadsworth executed that conditional lien release and returned it to
26
27
28

1 BRN. BRN then paid the \$1,000,000.00. *Anson Aff'd., Exs. 31 and 32 [Harrell Depo. Ex. 63,*
2 *at 451-465; Capps Depo. Ex. 76 at 8].*

3
4 27. The tenth Application for Payment was made on October 30, 2007 in the
5 amount of \$870,484.18. This application likewise did not appear to have been accompanied by
6 a Wadsworth prepared conditional lien waiver. BRN proposed to pay \$58,435.64 of this
7 statement and prepared its form of conditional lien waiver in that amount and sent it to
8 Wadsworth, who executed it and returned it to BRN. BRN then paid the sum of \$58,435.64
9 upon this payment application. *Anson Aff'd Exs. 33 and 34 [Harrell Depo. Ex. 63 at 466-479;*
10 *Capps Depo. Ex. 76 at 11].*

11
12 28. Like the tenth application, the 11th Application for Payment was also dated
13 October 30, 2007 and was in the amount of \$244,557.90. It was accompanied by a Wadsworth
14 prepared conditional lien waiver. This application for payment was not for work done during
15 the preceding time period but rather to correct a mistake in the amount of retention in the prior
16 payments. Up until this time, ten percent of certain payments were being withheld as
17 retainage. The correct amount that should have been retained was determined to be five
18 percent. The \$244,557.90 represented a payment to Wadsworth of the excess five percent.
19 This amount was approved by BRN and paid to Wadsworth. *Anson Aff'd., Exs. 35 and 36*
20 *[Harrell Depo. Ex. 63 at 494-499; Capps Depo. at. 90-95].*

21
22
23 29. The twelfth Application for Payment was made on November 30, 2007 in the
24 amount of \$195,905.12. It was accompanied by a Wadsworth prepared conditional lien
25 waiver. The next three applications, being 13, 14, and 15 were dated December 31, 2007,
26 January 31, 2008, and February 28, 2008. They were in the amounts of \$13,050.00,
27 \$13,775.00, and \$18,975.74. Each of these three applications were for winter maintenance and
28

1 none of the three were accompanied by a lien waiver. BRN decided to pay these three
2 applications, together with the preceding twelfth application during April of 2008. BRN
3 prepared its form of the conditional lien waiver and sent it to Wadsworth who executed it and
4 returned it to BRN. BRN then paid the cumulative total of the four applications in the sum of
5 \$242,430.86. Mr. Capps explained as follows:
6

7 Q. If a check was being issued in an amount different than a lien release, for
8 example, Wadsworth were to give BRN a lien release for \$195,000, and later
9 BRN issues a check for \$242,00, would the \$195,000 lien release be utilized?

10 A. I don't think so. It's my understanding that a check wasn't issued without
11 a lien release that matched the amount. We didn't use – my understanding was
12 Wadsworth submitted their lien with – their lien form with their application for
13 payment every time we – they requested payment. We issued – we made sure
14 that a lien waiver was attached that matched the dollar amount for whatever
15 check we were issuing, whether that was a full invoice amount or a partial
16 payment amount. On full invoice amounts that matched Wadsworth numbers, it
17 was typically their lien form that appears to be used. You know, any time we
18 didn't have an application or we made a partial payment, we would send them
19 one of our forms.

20 *Anson Aff'd., Exs. 37 and 38 [Harrell Depo. Ex. 63, at 500-531; Capps Depo. Ex. 76, at 12,*
21 *Capps Depo. Ex. 75 at 551 and Capps Depo. at. 95-102].*

22 30. The sixteenth Application for Payment was made on March 31, 2008. It was
23 accompanied by a Wadsworth prepared conditional lien waiver in that amount. It was
24 approved and paid by a BRN check dated April 28, 2008. *Anson Aff'd., Exs. 39 and 40*
25 *[Harrell Depo. Ex. 63 at 532-537; Capps Depo. Ex. 75 at 553].*

26 31. The seventeenth Application for Payment was made on April 30, 2008 in the
27 sum of \$55,349.03. It was accompanied by a Wadsworth prepared conditional lien waiver in
28 that amount. It was approved and paid by a BRN check dated June 4, 2008. *Anson Aff'd., Exs.*
41 and 42 [Harrell Depo. Ex. 63 at 538-545; Capps Depo. Ex. 75 at 555].

1 32. The eighteenth Application for Payment was made on May 31, 2008 in the sum
2 of \$108,630.60. It was accompanied by a Wadsworth prepared conditional lien waiver in that
3 amount. It was approved and paid by a BRN check dated July 7, 2008. *Anson Aff'd., Exs. 43*
4 *and 44 [Harrell Depo. Ex. 63 at 546-560; Capps Depo. Ex. 75 at 557].*

6 33. The nineteenth Application for Payment was made on June 30, 2008 in the sum
7 of \$629,936.58. While Wadsworth did not maintain a copy of the Conditional Lien Waiver,
8 BRN received a copy and produced it at the Kyle Capps deposition. The application was
9 approved and paid by a BRN check dated July 31, 2008. *Anson Aff'd., Exs. 45 and 46 [Capps*
10 *Depo. Ex. 76 at 16; Capps Depo. Ex. 75 at 559].*

12 34. The twentieth Application for Payment was made on July 31, 2008 in the sum
13 of \$1,088,124.23. It was accompanied by a Wadsworth prepared conditional lien waiver in
14 that amount. It was approved and paid by a BRN check dated September 22, 2008. *Anson*
15 *Aff'd., Exs. 47 and 48 [Harrell Depo. Ex. 63 at 566-571; Capps Depo. Ex. 75 at 561].*

17 35. The twenty-first Application for Payment was made on August 31, 2008 in the
18 sum of \$1,169,728.66. It was accompanied by a Wadsworth prepared conditional lien waiver
19 in that amount. It was approved and a partial payment was made by BRN check dated October
20 10, 2008 in the sum of \$1,000,000.00. *Anson Aff'd., Exs. 49 and 50 [Harrell Deposition Ex. 63*
21 *at 598-603 and 639; Capps Depo. Ex. 75 at 563].*

23 36. The twenty-second Application for Payment was made on September 30, 2008
24 in the sum of \$919,972.62. It was accompanied by a Wadsworth prepared conditional lien
25 waiver in that amount. The application was not paid by BRN. *Anson Aff'd., Exs. 51 and 52*
26 *[Harrell Depo. Ex. 63 at 640-645; Capps Depo. at 107-108].*

1 37. The twenty-third Application for Payment was made on October 31, 2008 in the
2 sum of \$298,095.06. It was accompanied by a Wadsworth prepared conditional lien waiver in
3 that amount. The application was not paid by BRN. *Anson Aff'd., Exs. 53 [Harrell Depo. Ex.*
4 *63 at 646-654].*

6 38. The twenty-fourth Application for Payment was made on November 30, 2008 in
7 the sum of \$448,385.33. It was not accompanied by a Wadsworth prepared conditional lien
8 waiver. BRN did not prepare its form of a conditional lien waiver and did not pay the
9 application. *Anson Aff'd. Ex. 54 [Harrell Depo. Ex. 63 at 655-659].*

11 39. The twenty-fifth Application for Payment was made on November 30, 2008 in
12 the sum of \$473,328.04. This application was for the retainage withheld from the prior BRN
13 payments. It was not accompanied by a Wadsworth prepared conditional lien waiver. BRN
14 likewise did not prepare a conditional lien waiver for this application and did not pay this
15 application. *Anson Aff'd., Ex. 55 [Harrell Depo. Ex. 63 at 660-670].*

17 40. The BRN records show that based on their calculations the amount owing to
18 Wadsworth by BRN is the sum of \$2,329,439.74. By coincidence, that amount is actually two
19 cents more than the amount Wadsworth is claiming is owing to it. During his deposition Mr.
20 Capps testified as follows:

21 Q: To your knowledge – well, let me ask you first if you know. Do you
22 know whether or not BRN is contesting the allegation of Wadsworth that BRN
23 owes Wadsworth the sum of \$2,239,439.70 and some cents?

24 A: I believe, in our responses to your interrogatories, we have disputed it,
25 because we were off by a few cents.

26 Q: And that's the only reason that there is a dispute, is a two cent
27 difference?

28 A: As far as I know, is a – is the dollar amount is slightly different.

1 *Anson Aff'd., Ex. 56 [Capps Depo. at 111; Capps Depo. at 116].*

2 41. Mr. Capps also testified that the golf course is substantially complete with only
3 some minor work and warranty work remaining to be done. Mr. Capps described the quality
4 of the work performed by Wadsworth in constructing the golf course as being of good quality.
5 Mr. Capps testified that the only reason Wadsworth has not been paid the full amount of their
6 invoices is because BRN lacks the funds to do so. *Anson Aff'd. Ex. 57 [Capps Depo. at 115-
7 117].*

8
9 42. The last payment that Wadsworth received from BRN under the golf course
10 construction contract was \$1,000,000.00 received on or about October 30, 2008. Since that date
11 Wadsworth has received no further payments from BRN and the principal sum of
12 \$2,329,439.72, together with accrued interest in the sum of \$477,118.32 calculated to September
13 15, 2010, with interest accruing thereafter at the rate of \$765.84 per day, together with costs and
14 attorney's fees is now owing by BRN to Wadsworth. *Harrell Aff'd.*

15
16 43. On January 6, 2009 Wadsworth caused a Notice of Claim of Lien to be recorded
17 against the BRN real property. A true and correct copy of the Notice of Claim of Lien showing
18 recordation is attached as Exhibit 8 to the Harrell affidavit. *Harrell Aff'd.*

19
20 44. The entire BRN North Golf Course development was intended to be developed as
21 a high-end residential community. The entire development consists of approximately one
22 thousand acres. The Wadsworth constructed golf course provides benefit to the entire project.
23 The Wadsworth Claim of Lien is upon the entire development. Attached as Exhibit 9 to the
24 Affidavit of Stephen A. Harrell is a true and correct copy of the BRN North conceptual master
25 plan depicting the location of the golf course and the remainder of the property. *Harrell Aff'd.*

1 45. In connection with the Wadsworth application for payments and issuance of
2 conditional lien waivers, at no time did Wadsworth receive anything in addition to the amounts
3 then owing under the contract. With regard to the five conditional lien waivers which utilized
4 the BRN prepared forms the following is a summary of the amounts of the applications and the
5 amounts paid:
6

7 Application Date	Application Amount	Amount Paid
8 February 28, 2007	\$ 42,334.18	\$ 42,334.18
9 June 29, 2007	\$ 719,304.62	\$ 719,304.62
10 September 30, 2007	\$1,187,951.44	\$ 1,000,000.00
11 October 30, 2007	\$ 870,484.18	\$ 58,435.64
12 Various dates	\$ 242,430.86	\$ 242,430.86

13 *Harrell Aff'd.*

14 46. Other than dates and amounts, the language used in each of the Wadsworth
15 prepared conditional lien waivers was identical. Likewise, other than the dates and amounts, the
16 language used in each of the BRN prepared conditional lien waivers was identical. *Harrell*
17 *Aff'd.*

18 47. Of the \$2,329,439.72 in principal now owing to Wadsworth by BRN under the
19 golf course construction contract, \$473,258.04 represents the amount retained from each
20 progress payment. *Harrell Aff'd.*

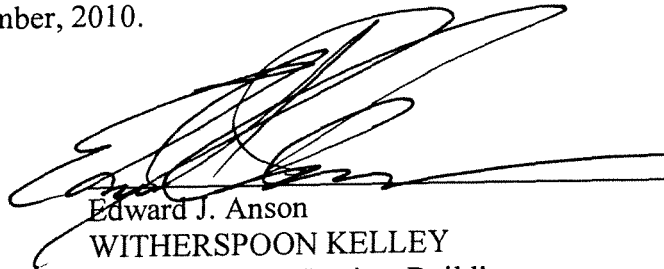
21 48. From December 26, 2007 to October 30, 2008 BRN made approximately twenty-
22 three progress payments to Wadsworth. From each progress payment BRN would hold as
23 retainage five percent of the payment application amount, excluding amounts representing costs
24 pertaining to stored materials. *Harrell Aff'd.*

25 49. Wadsworth obtained an Idaho Public Works contractor's license from the Idaho
26 Public Contractor's License Board on December 26, 2000 which expired on January 31, 2007.
27
28

1 In addition, Wadsworth received a Contractor's License from the Idaho Contractor's Board on
2 January 9, 2007 which expires on January 9, 2011. *Harrell Aff'd.*

3 50. That on April 27, 2010 this Court entered an Order releasing the Wadsworth
4 Notice of Claim of Lien from the real property described in the BRN mortgage to American
5 Bank and replaced it with a release of mechanic's lien bond in the sum of \$3,494,159.58.
6

7 DATED this 12th day of November, 2010.



8
9
10 Edward J. Anson
11 WITHERSPOON KELLEY
12 The Spokesman Review Building
13 608 Northwest Boulevard, Suite 300
14 Coeur d'Alene, Idaho 83814-2146
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CERTIFICATE OF SERVICE

I certify that on this 12th day of November, 2010, I caused a true and correct copy of WADSWORTH'S STATEMENT OF UNCONTESTED MATERIAL FACTS to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

Nancy L. Isserlis U.S. Mail
Elizabeth A. Tellessen Hand Delivered
Winston & Cashatt Overnight Mail
Bank of America Financial Center Via Fax: 208-765-2121
601 W. Riverside, Suite 1900
Spokane, Washington 99201-0695
Attorney for Plaintiff

Randall A. Peterman U.S. Mail
C. Clayton Gill Hand Delivered
Moffatt Thomas Barrett Rock & Fields Chtd. Overnight Mail
101 S. Capital Blvd., 10th Floor Via Fax: 208-385-5350
Boise, Idaho 83702
*Counsel for American Bank's Claim on their
Extended Title Policy No. 6001-17833
(Transnation)*

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*Attorney for Defendant, Polin & Young
Construction, Inc.*

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Attorney at Law Hand Delivered
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Counsel for Thorco, Inc.

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Coeur d'Alene, Idaho 83814 Overnight Mail
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Robert Leven, Trustee for the Roland M.
Casati Family Trust, Marshall Chesrown and
Ryker Young, Trustee of the Ryker Young
Revocable Trust*

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