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AFTER RECORDING, RETURN TO:

Dry Creek Estates, LLC
2681 East Parley's Way, Suite 203
Salt Lake City, UT 84109
ATC FILE #9585

ENT 34338 BK 4593 PG 265
RANDALL A. COVINGTON
UTAH COUNTY RECORDER
1998 Apr 08 1:35 pm FEE 16.00 BY JRD
RECORDED FOR ACTION TITLE COMPANY

Waiver and Indemnity Agreement

(Lots 1-69, inclusive, of Dry Creek Subdivision Phase 1 and Dry Creek Subdivision Phase 2)

THIS WAIVER AND INDEMNITY AGREEMENT (this "Agreement") is entered into effective APRIL 3, 1998 by the undersigned grantee(s) (collectively, the "Owner") of the lot(s) in Dry Creek Subdivision Phase 1 and/or Dry Creek Subdivision Phase 2 specified below, in favor of DRY CREEK ESTATES, L.L.C., a Utah limited liability company whose address is 2824 East 4215 South, Salt Lake City, Utah 84124 ("Estates"), DRY CREEK HIGHLANDS, L.C., a Utah limited liability company whose address is 1063 Westfield Road, Alpine, Utah 84004 ("Highlands"), and WBM TRUST, whose address is 1063 Westfield Road, Alpine, Utah 84004 ("WBM") (Estates, Highlands and WBM are collectively referred to herein as "Developer") and the other Benefited Parties specified below.

LOT 17 PHASE I DRY CREEK SUBDIVISION

RECITALS:

A. Owner owns fee simple title to Lot(s) 17 (collectively, the "Lot") of Dry Creek Subdivision Phase 1 and Dry Creek Subdivision Phase 2 (collectively, the "Subdivision"). The Lot is more particularly described on the plats of the Subdivision recorded in the official records of the recorder of Utah County, Utah.

B. Two uncovered, open, natural watercourses (collectively, the "Streams") known as "Dry Creek" ("Dry Creek") and "Bull Ditch" ("Bull Ditch") currently cross the Subdivision. Notwithstanding the potential danger of the open Streams to persons (particularly children) and property, Owner believes that the existence of the Streams will enhance the market value of Owner's Lot and the ambiance of the Subdivision and Owner's Lot.

C. To induce Developer to sell and convey the Lot to Owner, Owner desires to act as provided in this Agreement.

AGREEMENT:

NOW THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Owner hereby covenants and agrees as follows:

Section 1. **Owner's Acknowledgments.** Owner acknowledges, and desires, that the Streams crossing the Subdivision perpetually will remain in an open, uncovered, natural state. Owner further acknowledges that open waters of any type, including the Streams, may attract children and may be extremely dangerous to children, adults and animals such as domestic pets, even to permanent impairment or loss of life due to drowning. Notwithstanding such potential risks, Owner has determined that the aesthetic benefits to the Lot and the rest of the Subdivision, and the attendant enhancement of the market value of the Lot, outweigh those potential risks.

Section 2. **Waiver and Release From Liability.** In consideration of (1) the agreement by Developer to not require the piping, fencing, covering or other obstruction of "Dry Creek" crossing the Subdivision, and (2) the agreement by North Bench Irrigation Company ("North Bench") to not require the piping, fencing or other obstruction of North Bench's "Bull Ditch" crossing the Subdivision, Owner, for itself and its successors, assigns, invitees, licensees, and all other parties under its influence or control, hereby completely and irrevocably waives, releases and forever discharges North Bench, Highland City, the entities comprising Developer, the owner(s) of the Lots on which the Streams and any public or private conservation area(s) (the "Conservation Areas") within the Subdivision are located, any Subdivision owner's association or the like subsequently formed (the "Association"), and their respective owners, trustees, members, officers, managers, directors, shareholders, employees, agents, etc., of and from any and all liability in connection with any injury or death to any person(s), or any flooding or other damage to real or personal property, arising from, attributable to, or in any way associated with Dry Creek, Bull Ditch and/or the Conservation Areas.

Section 3. **Indemnification.** Owner shall indemnify and hold harmless North Bench, Highland City, the entities comprising Developer, the owner(s) of the Lots on which the Streams and/or Conservation Area(s) are located, the Association, and their respective owners, trustees, members, officers, managers, directors, shareholders, employees, agents, etc., of and from any and all damages, claims, actions or proceedings (in law or equity), of whatsoever kind or nature (including attorneys fees) arising from, attributable to, or in any way associated with Dry Creek, Bull Ditch and/or the Conservation Areas.

Section 4. **Benefited Parties.** The foregoing waivers, releases and indemnifications shall perpetually exist, and shall inure to the benefit of North Bench, Highland City, the entities comprising Developer, the owner(s) of the Lots on which the Streams and/or Conservation Area(s) are located, the Association, and their respective owners, trustees, members, officers, managers, directors, shareholders, employees, agents, etc. (collectively, the "Benefited Parties").

Section 5. **Duration.** The obligations hereunder shall be perpetual in duration.

Section 6. Covenants Run with Land. The foregoing waivers, releases and indemnifications shall be irrevocable and shall constitute a covenant running with Owner's Lot and shall bind every person having any fee, leasehold or other interest in any portion of the Lot at any time or from time to time.

Section 7. General Provisions. The following provisions are also an integral part of this Agreement:

(a) Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto.

(b) Captions. The headings used in this Agreement are inserted for reference purposes only and shall not be deemed to define, limit, extend, describe, or affect in any way the meaning, scope or interpretation of any of the terms or provisions of this Agreement or the intent hereof.

(c) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures upon any counterpart were upon the same instrument. All signed counterparts shall be deemed to be one original.

(d) Severability. The provisions of this Agreement are severable, and should any provision hereof be void, voidable, unenforceable or invalid, such void, voidable, unenforceable or invalid provision shall not affect the other provisions of this Agreement.

(e) Waiver of Breach. Any waiver by either party of any breach of any kind or character whatsoever by the other, whether such be direct or implied, shall not be construed as a continuing waiver of, or consent to any subsequent breach of this Agreement.

(f) Cumulative Remedies. The rights and remedies of the parties hereto shall be construed cumulatively, and none of such rights and remedies shall be exclusive of, or in lieu or limitation of any other right, remedy or priority allowed by law.

(g) Amendment. This Agreement may not be modified except by an instrument in writing signed by the parties hereto.

(h) Interpretation. This Agreement shall be interpreted, construed and enforced according to the substantive laws of the state of Utah.

(i) Attorneys' Fees. In the event any action or proceeding is brought by either party concerning this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees, whether such sums are expended with or without suit, at trial or on appeal.

(j) Notice. Any notice or other communication required or permitted to be given hereunder shall be deemed to have been received (a) upon personal delivery or actual receipt thereof or (b) within two (2) days after such notice is deposited in the United States mail, postage prepaid and certified and addressed to the respective addresses set forth above or to such other address(es) as may be supplied by a party to the other from time to time in writing.

(k) Time of Essence. Time is the essence of this Agreement.

DATED effective the date first-above written.

OWNER:

Ty D. Mattingly
TY D. MATTINGLY

Julie C. Mattingly
JULIE MATTINGLY

STATE OF UTAH)
):
COUNTY OF UTAH)

The foregoing instrument was acknowledged before me on APRIL 3, 1998
by TY D. MATTINGLY and JULIE MATTINGLY

Kerrie Cockbain
Notary Public

My Commission Expires:
10-23-2001
~~2-28-2002~~

Residing in: UTAH COUNTY UTAH

WSTD\4222.1

