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DEPARTMENT OF
WATER RESOURCES

Attorneys for East Hills Development LLC
and Lexington Hills, Inc.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re: SRBA

Case No. 39576

Subcase Nos. 63-00123D and 63-00123F

**MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

East Hills Development LLC and Lexington Hills, Inc. ("Lexington")¹ move for summary judgment dismissing the objections filed by Lexington Hills Homeowners Association (the "Association") to the recommendations for water rights 63-00123D and 63-00123F (the "Water Rights").² The Association's objections concern only the ownership element of the recommendations, which the Association claims should be changed from Lexington to the Association. The objections should be dismissed because there is no genuine dispute that

¹ East Hills Development LLC and Lexington Hills, Inc., are separate legal entities who filed separate water right claims in the Snake River Basin Adjudication ("SRBA"). They jointly developed the Lexington Hills Subdivision (the "Subdivision") and are considered a single entity for purposes of this Memorandum.

² The Water Rights are splits of the original "Jacobs Right" that was decreed to the Jacobs Canal Company in the 1906 Stewart Decree in the amount of 20.0 cfs (1000 inches). The Water Rights together total 4.6 cfs of the Jacobs Right.

Lexington reserved the Water Rights to itself prior to conveying any of the subdivision ground and has not subsequently transferred the water rights to the Association (or anyone else).³

UNDISPUTED FACTS

Prior to and during the course of developing the Subdivision, Lexington acquired all the lands comprising the Subdivision and all appurtenant water rights, including a 4.6 cfs portion of the Jacobs Right.

In 1992, prior to conveying in lots in the Subdivision, Lexington recorded a Declaration of Covenants, Conditions, Restrictions and Easements for Lexington Hills (“Master Declaration” or “CCRs”) in the real property records of Ada County. (Aff. of M. Lawrence, Ex. A.) Following this first “master” Declaration, Supplemental Declarations were recorded for each phase of the Subdivision. (*Id.*) Each Supplemental Declaration states that it is an “amendment and supplement” to the first master Declaration and expressly applies the terms of the Declaration to each new phase. (*Id.*) Lexington then conveyed deeds to the various lots in the Subdivision with an express incorporation of all the terms of the Declaration. (Aff. of M. Lawrence, Ex. B.)⁴

The Master Declaration expressly declares that the Subdivision property “shall be held, sold and conveyed subject to the following Covenants, Conditions, Restrictions and Easements.” (Aff. of M. Lawrence, Ex. A.) Of importance here, the CCRs expressly reserve unto Lexington “all water and water rights over, upon or under or appurtenant to the [Subdivision] Property.” (*Id.*, art. 5(d)). In addition, the CCRs contemplate that “[s]urface water for irrigation appurtenant

³ Lexington has conveyed a 2.388 cfs portion of the Jacobs Right to the Association. However, the recommendation for the Association’s right 63-00123G is only for 2.152 cfs. Lexington concedes that this is an error and that right 63-00123G should be adjusted to have a diversion rate of 2.388 cfs. Lexington’s right 63-00123F should suffer a corresponding reduction of 0.2360 cfs and be decreed with a diversion rate of 1.692 cfs.

⁴ Lexington has included a couple of representative samples from each phase of the subdivision because the subdivision includes over 600 lots and because the reservation in the Declaration itself is legally sufficient to support its case even apart from the reference in the deeds. However, if the Court deems it appropriate or necessary, Lexington can provide the all the deeds.

to each phase of development of the [Subdivision] Property will be conveyed to the Association as each plat is recorded.” (*Id.*) To date Lexington has conveyed portions of Jacobs Right to the Association that together comprise a 2.388 cfs portion of the right, leaving Lexington with a 2.2166 cfs portion. (Aff. of M. Lawrence, Ex. C.)

STANDARD OF REVIEW

The basic standard for summary judgment is well established: “A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party’s favor as to all or any part thereof.” I.R.C.P. 56(b). The court must grant the motion “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). This is such a case.

ARGUMENT

I. Because Lexington undisputedly reserved the Jacobs Right to itself, the Association is legally entitled only to that portion of the right Lexington has conveyed.

It is undisputed that Lexington reserved that portion of the Jacobs Right it acquired when it purchased the Subdivision lands. It is further undisputed that Lexington as conveyed a 2.388 cfs portion of the right to the Association, leaving Lexington with a 2.2166 cfs portion (0.53 (63-00123D) + 1.692 (63-00123F)). These undisputed facts end this matter. The Association simply has no legal claim to ownership of more than a 2.388 cfs portion of the Jacobs Right.

The law is clear that a conveyance of real property carries with it the water right appurtenant to the land at the time of the conveyance, unless it is specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not

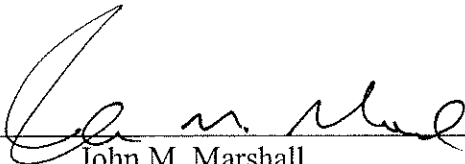
intended to be conveyed. *Silverstein v. Carlson*, 118 Idaho 456, 460, 797 P.2d 856, 860 (1990); *Russell v. Irish*, 20 Idaho 194, 198-99, 118 P. 501, 502 (1911).

Here, Lexington expressly reserved the Jacobs Right through the CCRs and the deeds. As a matter of law, therefore, Lexington retains ownership of all portions of the right it has not conveyed. The Water Rights represent this un conveyed portion of the Jacobs Right. The Association has no legal claim to the Water Rights, and the Court therefore should grant summary judgment.

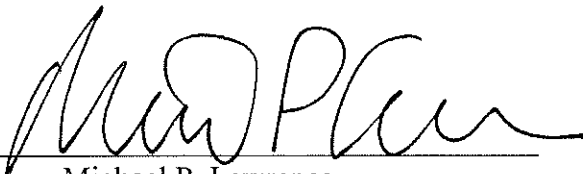
CONCLUSION

There is no genuine issue of fact or law regarding title to the Water Rights, and this Court should decree the Association as owner consistent with IDWR's recommendations, with the exception that Lexington's water right number 63-00123F should be reduced to 1.692 cfs to accurately reflect the conveyances made by Lexington to the Association.

DATED this 26th day of February, 2007.



John M. Marshall



Michael P. Lawrence

CERTIFICATE OF SERVICE

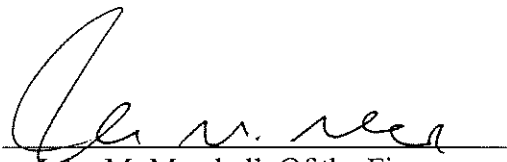
I certify that a true and correct copy of the foregoing document was mailed on February 20th, 2007, with sufficient first-class postage to the following:

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