

John K. Simpson, ISB #
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

RECEIVED

MAR 02 2007

**DEPARTMENT OF
WATER RESOURCES**

Attorneys for Lexington Home Owners' Association

**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, 63-00123F &
) 63-00123G
)
) **AFFIDAVIT OF PAUL L.**
) **ARRINGTON IN SUPPORT OF**
) **MEMORANDUM IN SUPPORT OF**
) **LEXINGTON HILLS HOME**
) **OWNERS' ASSOCIATION'S**
) **MOTION FOR SUMMARY**
) **JUDGMENT**
)

I, Paul L. Arrington, being first duly sworn upon oath, deposes and hereby states as follows:

1. I am an attorney representing Lexington Hills Home Owners' Association, the Defendant in the underlying district court proceeding referenced above. I am over the age of 18 and state the following based on my personal knowledge:

2. Attached hereto as Exhibit A is a true and correct copy of the Idaho Department of Water Resources' recommendations for water right numbers 63-123C, 63-123D, 63-123E, 63-123F, and 63-123G.

**AFFIDAVIT OF PAUL L. ARRINGTON IN SUPPORT OF MEMORANDUM IN SUPPORT
OF LEXINGTON HILLS HOME OWNERS' ASSOCIATION'S MOTION FOR SUMMARY
JUDGMENT**

3. Attached hereto as Exhibit B is a true and correct copy of an April 22, 1998 *Warranty Deed*, recorded on April 24, 1998, as Instrument No. 98039131.
4. Attached hereto as Exhibit C is a true and correct copy of a March 22, 1999 *Quitclaim Deed*, recorded on March 24, 1999, as Instrument No. 99028323.
5. Attached hereto as Exhibit D is a true and correct copy of a May 7, 1992 *Deed* for Lexington Hills Subdivision No. 1, recorded on June 18, 1992, as Instrument No. 9240025.
6. Attached hereto as Exhibit E is a true and correct copy of an April 12, 1993 *Deed* for Lexington Hills Subdivision No. 2, recorded on April 13, 1993, as Instrument No. 9326526.
7. Attached hereto as Exhibit F are true and correct copies of an April 13, 1993 *Deed* for Lexington Hills Subdivision No. 3, recorded on April 20, 1993 as Instrument No. 9328268 and a *Legal Description* for Lexington Hills Subdivision Phase 4, recorded on February 25, 1994 as Instrument No. 94017553.
8. Attached hereto as Exhibit G is a true and correct copy of a February 22, 1994 *Deed* for Lexington Hills Subdivision No. 4.
9. Attached hereto as Exhibit H is a true and correct copy of a February 22, 1994 *Deed* for Lexington Hills Subdivision No. 5, recorded on February 25, 1994, as Instrument No. 94017555.
10. Attached hereto as Exhibit I is a true and correct copy of a May 17, 1994 *Deed* for Lexington Hills Subdivision No. 6, recorded on May 25, 1994, as Instrument No. 94048845.
11. Attached hereto as Exhibit J is a true and correct copy of a June 16, 1998 *Deed* for Lexington Hills Subdivision No. 7, recorded on August 18, 1998, as Instrument No. 98078844.

AFFIDAVIT OF PAUL L. ARRINGTON IN SUPPORT OF MEMORANDUM IN SUPPORT OF LEXINGTON HILLS HOME OWNERS' ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT

12. Attached hereto as Exhibit K is a true and correct copy of a June 16, 1998 *Deed* for Lexington Hills Subdivision No. 8, recorded on June 24, 1994, as Instrument No. 98060797.

13. Attached hereto as Exhibit L is a true and correct copy of a June 16, 1998 *Deed* for Lexington Hills Subdivision No. 9, recorded on June 24, 1998, as Instrument No. 98060798.

14. Attached hereto as Exhibit M is a true and correct copy of a June 16, 1998 *Deed* for Lexington Hills Subdivision No. 10, recorded on June 24, 1998, as Instrument No. 98060799.

15. Attached hereto as Exhibit N is a true and correct copy of a November 14, 2001 *Deed* for Lexington Hills Subdivision No. 11, recorded on December 31, 2001, as Instrument No. 101139069.

16. Attached hereto as Exhibit O is a true and correct copy of a November 14, 2001 *Deed* for Lexington Hills Subdivision No. 12, recorded on December 31, 2001, as Instrument No. 101139070.

17. Attached hereto as Exhibit P is a true and correct copy of a June 1, 2001 *Deed* for Lexington Hills East Subdivision No. 1.

18. Attached hereto as Exhibit Q is a true and correct copy of a June 1, 2001 *Deed* for Lexington Hills East Subdivision No. 2, recorded on July 2, 2001, as Instrument No. 101065486.

19. Attached hereto as Exhibit R is a true and correct copy of a June 1, 2001 *Deed* for Lexington on the Rim Subdivision, recorded on July 2, 2001, as Instrument No. 101065485.

20. Attached hereto as Exhibit S are true and correct copies of a February 15, 2001 *Quitclaim Deed* for Lexington Hills, Inc., recorded on February 20, 2001, as Instrument No.

AFFIDAVIT OF PAUL L. ARRINGTON IN SUPPORT OF MEMORANDUM IN SUPPORT
OF LEXINGTON HILLS HOME OWNERS' ASSOCIATION'S MOTION FOR SUMMARY
JUDGMENT

101014388 and a *Legal Description (Lexington Hills (Remainder) 216 Square Foot Tract)*

prepared by Roylance & Associates P.A.

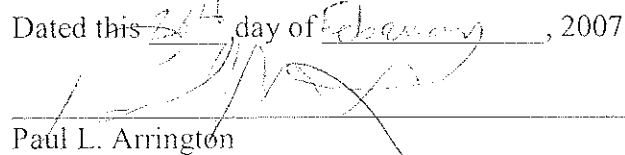
21. Attached hereto as Exhibit T is a true and correct copy of portions of the *Declaration of Covenants, Conditions, Restrictions and Easements for Lexington Hills*, recorded on February 20, 1992, as Instrument No. 9209714.

22. Attached hereto as Exhibit U is a true and correct copy of a *Map* for Lexington Hill Subdivision.

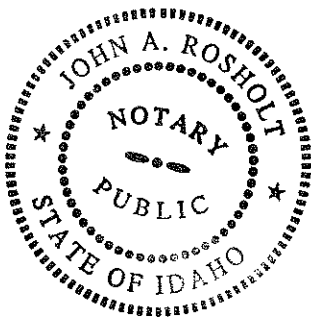
23. Attached hereto as Exhibit V is a true and correct copy of the Idaho Supreme Court's decision in *Joyce Livestock Co. v. United States*, __ P.3d __, 2007 WL 428947 (Feb. 9, 2007).

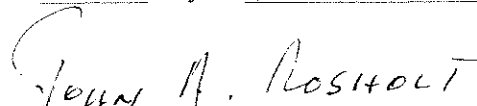
FURTHER, YOUR AFFIANT SAYETH NOUGHT.

Dated this 24 day of February, 2007


Paul L. Arrington

SUBSCRIBED & SWORN to before me this 28 day of Feb, 2007.




Notary Public in and for the State of Idaho
My Commission Expires: 2008

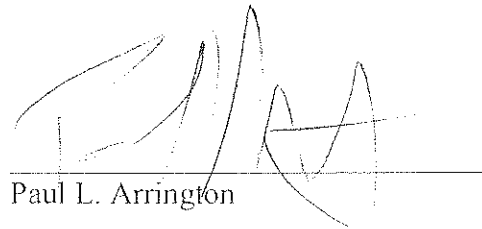
AFFIDAVIT OF PAUL L. ARRINGTON IN SUPPORT OF MEMORANDUM IN SUPPORT OF LEXINGTON HILLS HOME OWNERS' ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT

CERTIFICATE OF SERVICES

I, hereby, certify that on the 28th day of February, 2007, I served a true and correct copy of the foregoing AFFIDAVIT OF PAUL L. ARRINGTON IN SUPPORT OF MEMORANDUM IN SUPPORT OF LEXINGTON HILLS HOME OWNERS' ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT on the following via first class mail:

Director of IDWR
P.O. Box 83720
Boise, ID 83720-0098

John M. Marshall
Givens Pursley, LLP
P.O. Box 2720
Boise, ID 83701



Paul L. Arrington

AFFIDAVIT OF PAUL L. ARRINGTON IN SUPPORT OF MEMORANDUM IN SUPPORT OF LEXINGTON HILLS HOME OWNERS' ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT

Exhibit A

[Close](#)

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommended Right Report

02/09/2007

WATER RIGHT NO. 63-123C

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	FARMERS UNION DITCH CO LTD 2153 N POLLARD STAR, ID 83669 (208)286-7318
Attorney	JERRY A KISER 620 W HAYS ST BOISE, ID 83702 (208)336-1020
Original Owner	JACOBS CANAL CO

Priority Date: 06/01/1864

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
BOISE RIVER	SNAKE RIVER

--	--	--	--	--

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION	03/01	11/15	8.4 CFS	
Total Diversion			8.4 CFS	

Location of Point(s) of Diversion:

BOISE RIVER	NESENE	Sec. 05	Township 03N	Range 02E	ADA County
-------------	--------	---------	--------------	-----------	------------

Place(s) of use: Large POU Info

Conditions of Approval:

1.		THIS RIGHT IS DESIGNATED AS NO 2 IN THE STEWART DECREE AND THE BOISE WATER MASTERS RECORDS
2.	F06	THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE: 63-120G, 63-123D, 63-123E, 63-123F, 63-123G, 63-124Q, 63-125J, 63-126F, 63-165M, 63-198AG, 63-248, 63-297, 63-2360, 63-21729, 63-18700, 63-31832, 63-31937
3.	135	The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.
4.	P29	THIS RIGHT IS A COMBINATION OF OLD RIGHT NOS. 63-123A & 63-123B.
5.		THIS RIGHT IS A SPLIT FROM 63-123
		Diversion for irrigation under this water right prior to April 1 and

6.	S45	after October 31 shall occur only as authorized by the Water District 63 Water Master and only when water is being released for flood control by the United States from the Lucky Peak Dam outlet under procedures and requirements for the Memorandum of Agreement between the U.S. Department of the Army and the U.S. Department of the Interior for Flood Control Operations of the Boise River Reservoirs, dated November 20, 1953, the Water Control Manual for Boise River Reservoir dated April 1985 and any future amendments or revisions made thereto pursuant to state or federal procedures or law; provided that any such use of this water right prior to April 1 and after October 31 shall be subordinated to water rights for storage in Lucky Peak Reservoir, Lake Lowell, Arrowrock Reservoir, and/or Anderson Ranch Reservoir, as decreed in SRBA Case No. 39576.
7.	K06	THIS RIGHT IS LIMITED TO THE IRRIGATION OF 8394 ACRES WITHIN THE BOUNDARY OF THE FARMERS UNION DITCH COMPANY
8.	C18	This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.
9.	C03	Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code.
10.	F01	WATER IS DELIVERED THROUGH THE FARMERS UNION CANAL

Dates:

Other Information:

State or Federal: S

Owner Name Connector: OR

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

Close

[Close](#)

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommended Right Report

02/09/2007

WATER RIGHT NO. 63-123D

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	EAST HILLS DEVELOPMENT LLC C/O ROYLANCE & ASSOCIATES 391 W STATE, SUITE E EAGLE, ID 83616 (208)939-6000
Attorney	GIVENS PURSLEY LLP ATTN JOHN MARSHALL 601 W BANNOCK ST BOISE, ID 83702 (208)388-1200
Attorney	JOHN M MARSHALL GIVENS PURSLEY LLP 601 W BANNOCK PO BOX 2720 BOISE, ID 83702 (208)388-1200

Priority Date: 06/01/1864

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
BOISE RIVER	SNAKE RIVER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
IRRIGATION	03/01	11/15	0.5246 CFS	
Total Diversion			0.5246 CFS	

Location of Point(s) of Diversion:

BOISE RIVER	NESENE	Sec. 05	Township 03N	Range 02E	ADA County
-------------	--------	---------	--------------	-----------	------------

IRRIGATION Use:

Acre Limit: 50.26

Place(s) of use: Large POU Info

Conditions of Approval:

1.	K06	THIS RIGHT IS LIMITED TO THE IRRIGATION OF 26.23 ACRES WITHIN THE BOUNDARY OF THE LEXINGTON HILLS EAST SUBDIVISION.
2.	C05	Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.
3.	F06	THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE: 63-120G, 63-123C, 63-123E, 63-123F, 63-123G, 63-124Q, 63-125J, 63-126F, 63-165M, 63-198AG, 63-248, 63-297, 63-2360, 63-21729, 63-18700, 63-

		31832, 63-31937
4.	F01	WATER IS DELIVERED THROUGH THE FARMERS UNION CANAL
		Diversion for irrigation under this water right prior to April 1 and after October 31 shall occur only as authorized by the Water District 63 Water Master and only when water is being released for flood control by the United States from the Lucky Peak Dam outlet under procedures and requirements for the Memorandum of Agreement between the U.S. Department of the Army and the U.S. Department of the Interior for Flood Control Operations of the Boise River Reservoirs, dated November 20, 1953, the Water Control Manual for Boise River Reservoir dated April 1985 and any future amendments or revisions made thereto pursuant to state or federal procedures or law; provided that any such use of this water right prior to April 1 and after October 31 shall be subordinated to water rights for storage in Lucky Peak Reservoir, Lake Lowell, Arrowrock Reservoir, and/or Anderson Ranch Reservoir, as decreed in SRBA Case No. 39576.
5.	S45	
6.	C03	Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code.
		This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.
7.	C18	
		The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B (2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.
8.	135	
9.		THIS RIGHT IS DESIGNATED AS NO 2 IN THE STEWART DECREE AND THE BOISE WATER MASTERS RECORDS

Dates:

Other Information:

State or Federal:

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

[Close](#)

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommended Right Report

02/09/2007

WATER RIGHT NO. 63-123E

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	CAPITOL VIEW IRRIGATION INC C/O PETE NEWTON PO BOX 208 EAGLE, ID 83616 (208)939-7292

Priority Date: 06/01/1864

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
BOISE RIVER	SNAKE RIVER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
IRRIGATION	03/01	11/15	7 CFS	
Total Diversion			7 CFS	

Location of Point(s) of Diversion:

BOISE RIVER	NESENE	Sec. 05	Township 03N	Range 02E	ADA County
-------------	--------	---------	--------------	-----------	------------

IRRIGATION Use:

Acre Limit: 682

Place(s) of use: Large POU Info

Conditions of Approval:

1.	F01	WATER IS DELIVERED THROUGH THE FARMERS UNION CANAL
2.	K06	THIS RIGHT IS LIMITED TO THE IRRIGATION OF 682 ACRES WITHIN THE BOUNDARY OF THE CAPITAL VIEW IRRIGATION DISTRICT
3.	135	The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B (2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.
4.	C18	This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.
		Diversion for irrigation under this water right prior to April 1 and after October 31 shall occur only as authorized by the Water District 63 Water Master and only when water is being released for flood control by the United States from the Lucky Peak Dam outlet under

5.	S45	procedures and requirements for the Memorandum of Agreement between the U.S. Department of the Army and the U.S. Department of the Interior for Flood Control Operations of the Boise River Reservoirs, dated November 20, 1953, the Water Control Manual for Boise River Reservoir dated April 1985 and any future amendments or revisions made thereto pursuant to state or federal procedures or law; provided that any such use of this water right prior to April 1 and after October 31 shall be subordinated to water rights for storage in Lucky Peak Reservoir, Lake Lowell, Arrowrock Reservoir, and/or Anderson Ranch Reservoir, as decreed in SRBA Case No. 39576.
6.		THIS RIGHT IS DESIGNATED AS NO 2 IN THE STEWART DECREE AND THE BOISE WATER MASTERS RECORDS
7.	P21	This right is a split from former right 63-123.
8.	F06	THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE: 63-120G, 63-123C, 63-123D, 63-123F, 63-123G, 63-124Q, 63-125J, 63-126F, 63-165M, 63-198AG, 63-248, 63-297, 63-2360, 63-21729, 63-18700, 63-31832, 63-31937
9.	C03	Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code.

Dates:

Other Information:

State or Federal:

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

[Close](#)

[Close](#)

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommended Right Report

02/09/2007

WATER RIGHT NO. 63-123F

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	LEXINGTON HILLS INC 1815 E STONYBROOK CT EAGLE, ID 83616 (208)939-6000
Attorney	GIVENS PURSLEY LLP ATTN JOHN MARSHALL 601 W BANNOCK ST BOISE, ID 83702 (208)388-1200

Priority Date: 06/01/1864

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
BOISE RIVER	SNAKE RIVER

--	--	--	--	--

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION	03/01	11/15	1.93 CFS	
Total Diversion			1.93 CFS	

Location of Point(s) of Diversion:

BOISE RIVER	NESENE	Sec. 05	Township 03N	Range 02E	ADA County
-------------	--------	---------	--------------	-----------	------------

Place(s) of use: Large POU Info

Conditions of Approval:

1.		THIS RIGHT IS DESIGNATED AS NO 2 IN THE STEWART DECREE AND THE BOISE RIVER WATER MASTERS RECORDS
2.	135	The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B (2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.
3.	C05	Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.
4.	F06	THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE: 63-120G, 63-123C, 63-123D, 63-123E, 63-123G, 63-124Q, 63-125J, 63-126F, 63-165M, 63-198AG, 63-248, 63-297, 63-2360, 63-21729, 63-18700, 63-31832, 63-31937
		This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the

5.	C18	water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.
6.	S45	Diversion for irrigation under this water right prior to April 1 and after October 31 shall occur only as authorized by the Water District 63 Water Master and only when water is being released for flood control by the United States from the Lucky Peak Dam outlet under procedures and requirements for the Memorandum of Agreement between the U.S. Department of the Army and the U.S. Department of the Interior for Flood Control Operations of the Boise River Reservoirs, dated November 20, 1953, the Water Control Manual for Boise River Reservoir dated April 1985 and any future amendments or revisions made thereto pursuant to state or federal procedures or law; provided that any such use of this water right prior to April 1 and after October 31 shall be subordinated to water rights for storage in Lucky Peak Reservoir, Lake Lowell, Arrowrock Reservoir, and/or Anderson Ranch Reservoir, as decreed in SRBA Case No. 39576.
7.	C03	Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code.
8.	K06	THIS RIGHT IS LIMITED TO THE IRRIGATION OF 96.4 ACRES WITHIN THE BOUNDARY OF THE LEXINGTON HILLS SUBDIVISION.
9.	F01	WATER IS DELIVERED THROUGH THE FARMERS UNION CANAL

Dates:

Other Information:

State or Federal:

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

Close

[Close](#)

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommended Right Report

02/09/2007

WATER RIGHT NO. 63-123G

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	LEXINGTON HILLS HOMEOWNERS ASSOCIATION 2354 N STONECREST PLACE EAGLE, ID 83616 (208) 364-8624
Attorney	JOHN K SIMPSON BARKER ROSHOLT & SIMPSON PO BOX 2139 BOISE , ID 83701-2139

Priority Date: 06/01/1864

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
BOISE RIVER	SNAKE RIVER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>

IRRIGATION	03/01	11/15	2.15 CFS	
Total Diversion			2.15 CFS	

Location of Point(s) of Diversion:

BOISE RIVER	NESENE	Sec. 05	Township 03N	Range 02E	ADA County
-------------	--------	---------	--------------	-----------	------------

Place(s) of use: Large POU Info

Conditions of Approval:

1.	F06	THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE: 63-120G, 63-123C, 63-123D, 63-123E, 63-123F, 63-124Q, 63-125J, 63-126F, 63-165M, 63-198AG, 63-248, 63-297, 63-2360, 63-21729, 63-18700, 63-31832, 63-31937
2.	C18	This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.
3.	C05	Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.
4.	S45	Diversion for irrigation under this water right prior to April 1 and after October 31 shall occur only as authorized by the Water District 63 Water Master and only when water is being released for flood control by the United States from the Lucky Peak Dam outlet under procedures and requirements for the Memorandum of Agreement between the U.S. Department of the Army and the U.S. Department of the Interior for Flood Control Operations of the Boise River Reservoirs, dated November 20, 1953, the Water Control Manual for Boise River Reservoir dated April 1985 and any future amendments

		or revisions made thereto pursuant to state or federal procedures or law; provided that any such use of this water right prior to April 1 and after October 31 shall be subordinated to water rights for storage in Lucky Peak Reservoir, Lake Lowell, Arrowrock Reservoir, and/or Anderson Ranch Reservoir, as decreed in SRBA Case No. 39576.
5.	F01	WATER IS DELIVERED THROUGH THE FARMERS UNION CANAL
6.	135	The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B (2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.
7.		THIS RIGHT IS DESIGNATED AS NO 2 IN THE STEWART DECREE AND THE BOISE RIVER WATER MASTERS RECORDS
8.	K06	THIS RIGHT IS LIMITED TO THE IRRIGATION OF 107.6 ACRES WITHIN THE BOUNDARY OF THE LEXINGTON HILLS SUBDIVISION.
9.	C03	Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code.

Dates:

Other Information:

State or Federal:

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:
Mitigation Plan: False

Close

Exhibit B



A Pioneer Company

PIONEER TITLE COMPANY
OF ADA COUNTY

821 West State Street / Boise, Idaho 83702-5836 / Telephone (208) 336-6700

P-167352 JB/HEH

REVIEWED AND APPROVED BY: _____

WARRANTY DEED
(INDIVIDUAL)

FOR VALUE RECEIVED EAST HILLS DEVELOPMENT, LLC, an Idaho limited liability company

Grantor, does hereby grant, bargain, sell and convey unto LEXINGTON HILLS, INC., an Idaho corporation

the Grantor, whose current address is:
the following described real property in ADA County, State of Idaho, more particularly described as follows, to-wit:
SEE THE ATTACHED EXHIBIT "A" FOR LEGAL DESCRIPTION, WHICH BY THIS REFERENCE IS INCORPORATED HEREIN.

PIONEER TITLE

RECORDED - REQUEST OF

ADA COUNTY RECORDER
J. DAVID NAVARRO
BOISE, IDAHO

FEE 6.00 DEPUTY C. MASON

1998 AP 24 PM 4:14

98039131

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, and Grantee heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, the Grantor is the owner in fee simple of said premises; that said premises are free from all encumbrances, EXCEPT those to which this conveyance is expressly made subject and those made, suffered or done by the Grantee; and subject to reservations, restrictions, dedications, easements, rights of way and agreements, (if any) of record, and general taxes and assessments, (includes irrigation and utility assessments, (if any) for the current year, which are not yet due and payable, and that Grantor will warrant and defend the same from all lawful claims whatsoever.

Dated: April 22, 1998

EAST HILLS DEVELOPMENT, LLC

BY: Bert Bradley, Member

BY: Dave Roylance, Member

ACKNOWLEDGEMENT - Limited Liability Company

STATE OF IDAHO, County of Ada, ss.

On this 22nd day of April, 1998, before me, J. David Navarro, a notary public, personally appeared Bert Bradley and Dave Roylance, known or identified to me as the member(s)/manager(s) in a limited liability company, EAST HILLS DEVELOPMENT, LLC, and the member(s)/manager(s) who subscribed said limited liability company name, and they acknowledged to me that they executed the foregoing instrument, and acknowledged to me that they executed the foregoing instrument in said limited liability company name.

Notary Public: J. David Navarro
Residing at: Boise, Idaho
My Commission Expires: March 17, 1999

EXHIBIT A

A TRACT OF LAND SITUATED IN THE SOUTHEAST QUARTER OF SECTION 3, TOWNSHIP 4 NORTH, RANGE 1 EAST, BOISE MERIDIAN, CITY OF EAGLE, ADA COUNTY, IDAHO, DESCRIBED AS FOLLOWS:
COMMENCING AT A FOUND BRASS CAP MONUMENTING THE SOUTH QUARTER CORNER OF SAID SECTION 3 AND THE CENTERLINE OF EAST FLOATING FEATHER ROAD, FROM WHICH A FOUND BRASS CAP MONUMENTING THE SOUTHEAST CORNER OF SAID SECTION 3 BEARS SOUTH 89 DEGREES 44'33" EAST A DISTANCE OF 2659.37 FEET;
THENCE ALONG SAID SECTION LINE SOUTH 89 DEGREES 44'33" EAST A DISTANCE OF 865.31 FEET TO A POINT;
THENCE LEAVING SAID SECTION LINE NORTH 00 DEGREES 15'27" EAST A DISTANCE OF 30.00 FEET TO A FOUND BRASS CAP ON THE NORTHERLY RIGHT-OF-WAY OF SAID EAST FLOATING FEATHER ROAD. SAID BRASS CAP BEING THE POINT OF BEGINNING.
THENCE ALONG SAID NORTHERLY RIGHT-OF-WAY NORTH 89 DEGREES 44'33" WEST A DISTANCE OF 482.38 FEET TO A POINT MARKING THE SOUTHEAST CORNER OF LEXINGTON HILLS SUBDIVISION NO. 5 (A RECORDED SUBDIVISION ON FILE IN BOOK 64 OF PLATS AT PAGES 6511 THROUGH 6515, RECORDS OF ADA COUNTY, IDAHO), (FROM WHICH A FOUND BRASS CAP BEARS SOUTH 89 DEGREES 34'45" WEST A DISTANCE OF 0.27 FEET);
THENCE ALONG THE EASTERLY BOUNDARY OF SAID LEXINGTON HILLS SUBDIVISION NO. 5, NORTH 00 DEGREES 25'20" WEST A DISTANCE OF 1343.45 FEET TO A SET STEEL PIN;
THENCE LEAVING SAID EASTERLY BOUNDARY SOUTH 87 DEGREES 37'00" EAST A DISTANCE OF 115.04 FEET TO A SET STEEL PIN;
THENCE NORTH 73 DEGREES 43'00" EAST A DISTANCE OF 52.70 FEET TO A SET STEEL PIN;
THENCE SOUTH 88 DEGREES 19'00" EAST A DISTANCE OF 93.50 FEET TO A SET STEEL PIN;
THENCE NORTH 86 DEGREES 39'00" EAST A DISTANCE OF 164.94 FEET TO A SET STEEL PIN;
THENCE SOUTH 83 DEGREES 47'00" EAST A DISTANCE OF 179.06 FEET TO A SET STEEL PIN;
THENCE SOUTH 47 DEGREES 58'33" EAST A DISTANCE OF 80.30 FEET TO A SET STEEL PIN;
THENCE NORTH 89 DEGREES 24'00" EAST A DISTANCE OF 193.16 FEET TO A SET STEEL PIN ON THE WESTERLY RIGHT OF WAY OF STATE HIGHWAY 55;
THENCE ALONG SAID WESTERLY RIGHT OF WAY SOUTH 01 DEGREE 10'55" WEST A DISTANCE OF 1233.13 FEET TO A FOUND STEEL PIN;
THENCE SOUTH 45 DEGREES 43'19" WEST A DISTANCE OF 71.27 FEET TO A FOUND STEEL PIN, SAID PIN BEING ON THE NORTHERLY RIGHT OF WAY OF SAID EAST FLOATING FEATHER ROAD;
THENCE ALONG SAID NORTHERLY RIGHT OF WAY, NORTH 89 DEGREES 44'33" WEST A DISTANCE OF 285.70 FEET TO A FOUND STEEL PIN;
THENCE SOUTH 00 DEGREES 15'16" WEST A DISTANCE OF 10.00 FEET TO THE POINT OF BEGINNING.

END OF LEGAL DESCRIPTION

Exhibit C

W99-23

QUITCLAIM DEED

For value received, EAST HILLS DEVELOPMENT, LLC, an Idaho Limited Liability Corporation, does hereby convey, release, remise and forever quit claim unto LEXINGTON HILLS, INC., the following described premises, to-wit:

SEE EXHIBIT "A" ATTACHED HERETO AND INCORPORATED
HEREIN AS IF SET FORTH IN FULL

TOGETHER WITH THEIR APPURTENANCES.

DATED this 22nd day of March, 1999

EAST HILLS DEVELOPMENT, LLC

By: [Signature]

STATE OF IDAHO)

:SS.

County of Ada)

On this 22nd day of March, 1999, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane Steckle, known or identified to me to be a Member of EAST HILLS DEVELOPMENT, LLC, executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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



Georgia Mackley
NOTARY PUBLIC FOR IDAHO
Residing at Meridian, ID
My Commission Expires: 6/22/2000

TRANSACTION TITLE & ESCROW

RECORDED - REQUEST OF

ADA COUNTY RECORDER
J. DAVID NAVARRO
IDAHO

FEE 6.00 DEPUTY [Signature]

1999 HR 24 PM 12:33

99028323

A TRACT OF LAND SITUATED IN THE SOUTHEAST 1/4 OF SECTION 3, TOWNSHIP 4 NORTH, RANGE 1 EAST, BOISE MERIDIAN, CITY OF EAGLE, ADA COUNTY, IDAHO, DESCRIBED AS FOLLOWS:

COMMENCING AT A FOUND BRASS CAP MONUMENTING THE SOUTHEAST CORNER OF SAID SECTION 3 AND THE CENTERLINE OF EAST FLOATING FEATHER ROAD, THEN ALONG THE SOUTHERLY LINE OF SAID SECTION 3 SAID LINE ALSO BEING THE CENTERLINE OF SAID FLOATING FEATHER ROAD NORTH 89°-44'-33" WEST A DISTANCE OF 2659.37 FEET TO A FOUND BRASS CAP MONUMENTING THE SOUTHWEST CORNER OF THE SOUTHEAST 1/4 OF SAID SECTION 3, THENCE CONTINUING ALONG THE SOUTHERLY LINE OF SAID SECTION 3, AND THE CENTERLINE OF SAID FLOATING FEATHER ROAD SOUTH 89°-44'-33" EAST A DISTANCE OF 383.35 FEET TO A POINT, THENCE LEAVING SAID SOUTHERLY LINE AND ALONG THE WESTERLY LINE OF LEXINGTON HILLS EAST SUBDIVISION NO. 1 (A RECORDED SUBDIVISION ON FILE IN BOOK 77 OF PLATS AT PAGES 8022 THROUGH 8025 RECORDS OF ADA COUNTY IDAHO) SAID LINE ALSO BEING THE EASTERLY BOUNDARY OF LEXINGTON HILLS SUBDIVISION NO. 5 (A RECORDED SUBDIVISION ON FILE IN BOOK 64 OF PLATS AT PAGES 6511 THROUGH 6515 RECORDS OF ADA COUNTY, IDAHO) NORTH 00°-25'-20" EAST A DISTANCE OF 1373.45 FEET TO A FOUND STEEL PIN MONUMENTING THE NORTHEAST CORNER OF SAID LEXINGTON HILLS EAST SUBDIVISION NO. 1, SAID PIN BEING THE POINT OF BEGINNING.

THENCE LEAVING THE WESTERLY BOUNDARY OF SAID LEXINGTON HILLS EAST SUBDIVISION NO. 1 AND CONTINUING ALONG THE EASTERLY BOUNDARY OF SAID LEXINGTON HILLS SUBDIVISION NO. 5 AND ALONG THE EASTERLY BOUNDARY OF LEXINGTON HILLS SUBDIVISION NO. 6 (A RECORDED SUBDIVISION ON FILE IN BOOK 65 OF PLATS AT PAGES 6615 THROUGH 6619 RECORDS OF ADA COUNTY, IDAHO) NORTH 00°-25'-20" WEST A DISTANCE OF 1243.34 FEET TO A FOUND STEEL PIN MONUMENTING THE NORTHEAST CORNER OF SAID LEXINGTON HILLS SUBDIVISION NO. 6 AND THE SOUTHWEST CORNER OF LEXINGTON HILLS SUBDIVISION NO. 12 (A RECORDED SUBDIVISION ON FILE IN BOOK 77 OF PLATS AT PAGES 8120, 8121 AND 8122, RECORDS OF ADA COUNTY, IDAHO); THENCE ALONG THE SOUTHERLY BOUNDARY OF SAID LEXINGTON HILLS SUBDIVISION NO. 12 SOUTH 89°-44'-33" EAST A DISTANCE OF 847.99 FEET TO A FOUND ALUMINUM CAP, SAID MONUMENT BEING ON THE WESTERLY RIGHT-OF-WAY OF REALIGNED STATE HIGHWAY 55;

THENCE LEAVING SAID SOUTHERLY BOUNDARY AND ALONG SAID RIGHT-OF-WAY THE FOLLOWING COURSES:

SOUTHEASTERLY 616.58 FEET ALONG THE ARC OF A NON-TANGENT CIRCULAR CURVE TO THE RIGHT, SAID CURVE HAVING A RADIUS OF 11389.16 FEET, A CENTRAL ANGLE OF 03°-06'-07", A CHORD BEARING OF SOUTH 01°-54'-49" EAST AND A CHORD DISTANCE OF 616.51 FEET TO A FOUND HIGHWAY MONUMENT;
THENCE SOUTH 00°-31'-18" EAST A DISTANCE OF 301.90 FEET TO A FOUND HIGHWAY MONUMENT;
THENCE SOUTH 01°-10'-55" WEST A DISTANCE OF 375.76 FEET TO A FOUND STEEL PIN MONUMENTING THE NORTHWEST CORNER OF SAID LEXINGTON HILLS EAST SUBDIVISION NO. 1;

THENCE LEAVING SAID RIGHT-OF-WAY AND ALONG THE NORTHERLY BOUNDARY OF SAID LEXINGTON HILLS EAST SUBDIVISION NO. 1 THE FOLLOWING COURSES:

SOUTH 89°-24'-00" WEST A DISTANCE OF 193.16 FEET TO A FOUND STEEL PIN, SAID PIN BEING ON THE EASTERLY RIGHT-OF-WAY OF N. PRESTWICK WAY;
THENCE NORTH 47°-58'-33" WEST A DISTANCE OF 80.30 FEET TO A FOUND STEEL PIN, SAID PIN BEING ON THE WESTERLY RIGHT-OF-WAY OF SAID N. PRESTWICK WAY;
THENCE NORTH 83°-47'-00" WEST A DISTANCE OF 179.06 FEET TO A FOUND STEEL PIN;
THENCE SOUTH 86°-39'-00" WEST A DISTANCE OF 164.94 FEET TO A FOUND STEEL PIN;
THENCE NORTH 88°-19'-00" WEST A DISTANCE OF 93.69 FEET TO A FOUND STEEL PIN, SAID PIN BEING ON THE EASTERLY RIGHT-OF-WAY OF N. MANSFIELD PLACE;
THENCE SOUTH 73°-42'-51" WEST A DISTANCE OF 52.69 FEET TO A FOUND STEEL PIN, SAID PIN BEING ON THE WESTERLY RIGHT-OF-WAY OF SAID N. MANSFIELD PLACE;
THENCE NORTH 87°-37'-00" WEST A DISTANCE OF 114.82 FEET TO THE POINT OF BEGINNING.

THE ABOVE DESCRIBED TRACT OF LAND CONTAINS 24.72 ACRES, MORE OR LESS.

Exhibit D

92 30797
Re-Record
ADA COUNTY, ID. FOR *Georgia Mackley*
J. DAVID NAVARRO
RECORDER BY *Jackson*
900
'92 MAY 13 PM 2:44
DEED

92 30315
ADA COUNTY, ID. FOR *Georgia Mackley*
J. DAVID NAVARRO
RECORDER BY *Jackson*
1500
'92 MAY 12 AM 11:43

LEXINGTON HILLS, INC., an Idaho corporation, with its principal office at 2417 Bank Drive, Suite 101, Boise, Idaho 83705, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its offices at 2417 Bank Drive, Suite 101, Boise, Idaho 83705, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 1, Block 1; Lots 1, 3 and 17, Block 2; Lot 1, Block 3; Lots 3 and 15, Block 5; Lots 1 and 16, Block 7; and Lot 1, Block 8 of Lexington Hills Subdivision No. 1, according to the official plat thereof on file in the office of the County Recorder of Ada County, Idaho, in Book 59 of Plats at pages 5802 through 5804;

TOGETHER WITH a nonexclusive perpetual easement on and over the surface of Lot 2, Block 3, of Lexington Hills Subdivision No. 1, for use and enjoyment of its members as park and open space, subject to the requirements for well lots set forth in IDAPA 16.01.8601;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 1 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

TOGETHER WITH 30.60 miners inches of Jacob's water and 0.81 miners inch of Developed water, for purposes of irrigating Lexington Hills Subdivision No. 1, delivered by the Farmers Union Canal Company during the irrigating season;

SUBJECT TO an easement reserved unto the Grantor, its successors and assigns for installation and maintenance of an underground water line over and across a 20-foot wide tract of

land being a portion of Lots 1 and 2, Block 3 of Lexington Hills Subdivision (a recorded subdivision on file in Book 59 of Plats, at pages 5802, 5803 and 5804, Records of Ada County, Idaho) situated in the Southwest 1/4 of the Southwest 1/4 of Section 3, Township 4 North, Range 1 East, Boise Meridian, Ada County, Idaho, said tract being 10 feet each side of the following described centerline: Commencing at a found aluminum cap monumenting the south 1/4 Corner of said Section 3, thence North 89 degrees 44' 43" West, a distance of 2680.44 feet to a found brass cap monumenting the Southwest Corner of said Section 3, thence North 33 degrees 40' 43" East a distance of 526.93 feet to a set steel pin, said pin being the radius point of said Lot 2, said point also being the POINT OF BEGINNING. Thence North 76 degrees 36' 30" East a distance of 103.96 feet to a point on the westerly right-of-way of Stonybrook Court, said point being the terminus of this description;

SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714, records of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments, for the year 1992.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers the 7th day of May, 1992.

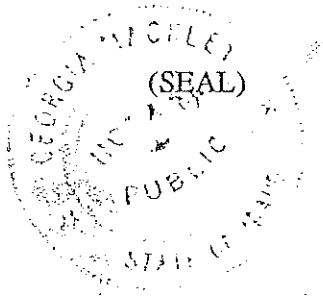
LEXINGTON HILLS, INC.


By: Bryce L. Peterson, President

STATE OF IDAHO)
 : ss.
County of Ada)

On this 7th day of May, 1992, before me, the undersigned, a Notary Public in and for said State, personally appeared Bryce L. Peterson, known or identified to me to be the President of Lexington Hills, Inc., who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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



Georgia Mackley
NOTARY PUBLIC FOR IDAHO
Residing at: Boise, Id.
My Commission Expires: 6/20/94

9240025
RE-RE-RECORD
ADA COUNTY, ID. FOR MACKLEY
J. DAVID NAVARRO
RECORDER BY Q. Wade
'92 JUN 18 PM 2 03 900

Exhibit E

9326526
Lexington Hills,
ADA COUNTY, ID. FOR Inc.
J. DAVID NAVARRO
RECORDER BY K. Larson
9/02

'93 APR 13 AM 11 51

DEED

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 1815
E. Stonybrook Court, Eagle, ID 83616, the "Grantor", hereby conveys or grants and
warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho
non-profit corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID
83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum
of
One Dollar (\$1.00) and other valuable consideration, the following described tracts of
land in

Ada County, State of Idaho:

**LOT 26 AND 31, BLOCK 5 OF LEXINGTON HILLS
SUBDIVISION NO. 2, ACCORDING TO THE
OFFICIAL PLAT THEREOF ON FILE IN THE
OFFICE OF THE COUNTY RECORDER OF ADA
COUNTY, IDAHO, IN BOOK 62 OF PLATS AT
PAGES 6152 THROUGH 6154.**

**TOGETHER WITH a nonexclusive easement ten (10)
feet wide, inside the boundary of each Lot and Common
Area of Lexington Hills Subdivision No. 2 adjacent to the
right-of-way, as shown on the plat thereof, for
construction, maintenance and repair of a pressurized
pipe irrigation system to be owned and operated by the
Association;**

**TOGETHER WITH 7.30 miners inches of Jacob's water
and 0.19 miners inch of Developed water, for purposes of
irrigating Lexington Hills Subdivision No. 2 by the
Farmers Union Canal Company during the irrigating
season;**

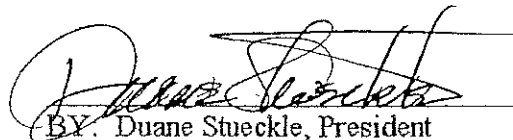
SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714 and Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 2, recorded February 26, 1993 as Instrument No. 9314234, records of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 1993.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers the 12th day of April, 1993.

LEXINGTON HILLS, INC.


BY: Duane Stueckle, President

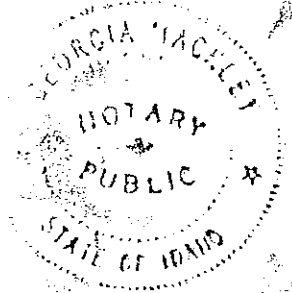
STATE OF IDAHO)

:ss.

County of Ada)

On this 12th day of April, 1993, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane Stueckle, known or identified to me to be the President of Lexington Hills, Inc. who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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



Georgia Mackley
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Id
My Commission Expires: 6/20/94

Exhibit F

9328268
Suane Stueckle
ADA COUNTY, ID. FOR
J. DAVID NAVARRO
RECORDER BY Jackson
900

DEED

'93 APR 20 AM 11 40

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of

One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in

Ada County, State of Idaho:

LOT 52, BLOCK 5 OF LEXINGTON HILLS SUBDIVISION NO. 3, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE IN THE OFFICE OF THE COUNTY RECORDER OF ADA COUNTY, IDAHO, IN BOOK 62 OF PLATS AT PAGES 6170 THROUGH 6171.

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 3 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

TOGETHER WITH 4.50 miners inches of Jacob's water and .12 miners inch of Developed water, for purposes of irrigating Lexington Hills Subdivision No. 3 by the Farmers Union Canal Company during the irrigating season;

SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714, Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 2, recorded February 26, 1993 as Instrument No. 9314234, and Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 3 recorded April 13, 1993 as Instrument No. 9326525, records of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 1993.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers the 13th day of April, 1993.

LEXINGTON HILLS, INC.


BY: Duane Stueckle, President

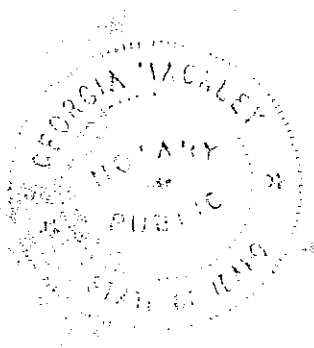
STATE OF IDAHO)

SS.

County of Ada)

On this 13th day of April, 1993, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane Stueckle, known or identified to me to be the President of Lexington Hills, Inc. who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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



Georgia Mackley
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires: 6/20/94

94017553

Lexington Hills Inc

ADA CO. RECORDER

J. DAVID NAVARRO

BOISE ID

'94 FEB 25 PM 1 33

FEE 9.00 DEP *Klaus*
RECORDED AT THE REQUEST OF

July 29, 1993
Project No. 1360

Legal Description
Lexington Hills Subdivision Phase 4
20 Foot Wide Utility Easement

Commencing at a found aluminum cap monumenting the Southeast Corner of the Southwest 1/4 of Section 3, Township 4 North, Range 1 East, Boise Meridian, Ada County, Idaho, thence along the southerly line of said Southwest 1/4, said line also being the centerline of Floating Feather Road North 89°-44'-43" West a distance of 2680.44 feet to a found brass cap monumenting the Southwest Corner of said Section 3, thence leaving said southerly line and along the westerly line of said Southwest 1/4, said line also being the westerly boundary and the southerly extension thereof, of Lexington Hills Subdivision No. 1 (a recorded subdivision on file in Book 59 of Plats at Pages 5802, 5803, and 5804, Records of Ada County, Idaho) North 00°-00'-04" East a distance of 1291.25 feet to a found iron pipe, said pipe being the point of beginning of Lexington Hills Subdivision No. 4 (a recorded subdivision on file in Book 62 of Plats at Pages 6269, 6270, and 6271, Records of Ada County, Idaho). Thence continuing along the westerly line of said Southwest 1/4, said line also being the westerly boundary of said Lexington Hills Subdivision No. 4 North 00°-00'-04" East a distance of 978.52 feet to a found steel pin. Thence leaving said westerly line and along the lot line common to Lots 9 and 10, Block 15 of said Lexington Hills No. 4 North 80°-58'-00" East to a found steel pin westerly right-of-way of E. Highgate Court. Thence leaving said right-of-way North 90°-00'-00" East a distance of 40.00 feet to a found steel pin on the easterly right-of-way of E. Highgate Court, said pin being the POINT OF BEGINNING.

Thence North 64°-17'-31" East a distance of 65.62 feet to a point,
Thence along a curve to the right a distance of 20.58 feet, said curve having a radius of 50.00 feet, a central angle of 23°-34'-41" a chord bearing North 13°-55'-08" West a chord distance of 20.43 feet to a point,
Thence South 64°-17'-31" West a distance of 60.17 feet to a point on the easterly right-of-way of E. Highgate Court,
Thence along said easterly right-of-way South 00°-00'-00" East a distance of 22.20 feet to the point of beginning.

The above tract of land described contains 0.29 acres, more or less.

Exhibit G

DEED

LEXINGTON HILLS, INC., an Idaho corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, Idaho 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its offices at 1815 E. Stonybrook Court, Eagle, Idaho 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 1, Block 15 of Lexington Hills Subdivision No. 4, according to the official plat thereof on file in the office of the County Recorder of Ada County, Idaho, in Book 62 of Plats at pages 6269 through 6271;

TOGETHER WITH a nonexclusive perpetual easement hereby granted on and over the surface of Lot 2, Block 15, of Lexington Hills Subdivision No. 4, for use and enjoyment of its members as park and open space, subject to the requirements for well lots set forth in IDAPA 16.01.8601;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 4 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

TOGETHER WITH 32.0 miners inches of Jacob's water and 0.85 miners inch of Developed water, for purposes of irrigating Lexington Hills Subdivision No. 4, delivered by the Farmers Union Canal Company during the irrigating season;

RESERVING unto the Grantor, its successors and assigns, a perpetual easement for installation, maintenance, repair and replacement of an underground water line over and across a 20-foot wide tract of land being a portion of Lot 1, Block 15 of Lexington Hills Subdivision No. 4, more described on Exhibit "A" attached hereto and incorporated herein by this reference;

SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714, and the Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 4, filed of record in the Office of the Recorder of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments, for the year 1994.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attended by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers the 22nd day of February, 1994.

LEXINGTON HILLS, INC.


Duane H. Stueckle, President

STATE OF IDAHO)
 : ss.
County of Ada)

On this 22nd day of February, 1994, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane H. Stueckle, known or identified to me to be the President of Lexington Hills, Inc., who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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




NOTARY PUBLIC FOR IDAHO
Residing at: Boise, Id
My Commission Expires: 6/20/94

Exhibit H

94017555

Lexington Hills, Inc

ADA CO. RECORDER

J. DAVID NAVARRO

BOISE ID

DEED

LEXINGTON HILLS, INC., an Idaho corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, Idaho 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its offices at 1815 E. Stonybrook Court, Eagle, Idaho 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lots 28 and 30, Block 7, Lot 1, Block 17, and Lot 1, Block 18 of Lexington Hills Subdivision No. 5, according to the official plat thereof on file in the office of the County Recorder of Ada County, Idaho, as Instrument No. 14010822;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary adjacent to the public right-of-way, of Lots 28, 30 and 33 through 48, Block 7, Lot 1, Block 17, Lots 1 through 31, Block 18, Lots 1 through 12, Block 19, Lots 1 through 10, Block 20, Lots 1 through 8, Block 21, and Lots 1 through 3, Block 22, of Lexington Hills Subdivision No. 5, as shown on the recorded plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

TOGETHER WITH 17.0 miners inches of Jacob's water and 0.44 miners inch of Developed water, for purposes of irrigating the above-referenced lots in Lexington Hills Subdivision No. 5, delivered by the Farmers Union Canal Company during the irrigating season;

RESERVING UNTO GRANTOR, its successors and assigns, a nonexclusive perpetual right-of-way for transportation of water and easement ten feet in width, lying five feet on either side of the irrigation pipeline for irrigation system, including pumps, pipelines and accessories in favor of other users of the irrigation system, their successors and assigns, for delivery of irrigation water through irrigation pipelines within the Common Area of Lexington Hills Subdivision, according to the plats thereof on file in the Office of the Record of Ada County, Idaho;

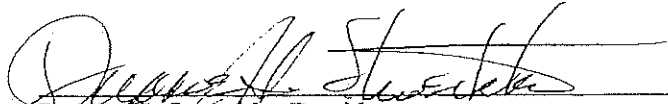
SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714, and the Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Portions of Lexington Hills Subdivision No. 5 ("Lexington Hills 5"), filed of record in the Office of the Recorder of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments, for the year 1994.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attended by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers the 22nd day of February, 1994.

LEXINGTON HILLS, INC.


Duane H. Stueckle, President

STATE OF IDAHO)
 : ss.
County of Ada)

On this 22nd day of February, 1994, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane H. Stueckle, known or identified to me to be the President of Lexington Hills, Inc., who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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

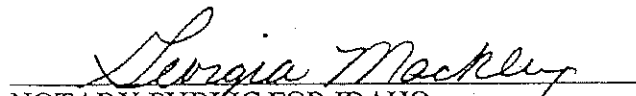

NOTARY PUBLIC FOR IDAHO
Residing at: Boise, Id
My Commission Expires: 6/20/94

Exhibit I

DEED

LEXINGTON HILLS, INC., an Idaho corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, Idaho 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its offices at 1815 E. Stonybrook Court, Eagle, Idaho 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 11, Block 20, and Lot 4, Block 22 of Lexington Hills Subdivision No. 6, according to the official plat thereof on file in the office of the County Recorder of Ada County, Idaho, in Book 65 of Plats at pages 6615 through 6619;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 6 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

TOGETHER WITH 28.0 miners inches of Jacob's water and 0.75 miners inch of Developed water, for purposes of irrigating Lexington Hills Subdivision No. 6, delivered by the Farmers Union Canal Company during the irrigating season;

RESERVING UNTO GRANTOR, its successors and assigns, a nonexclusive perpetual right-of-way for transportation of water and easement ten feet in width, lying five feet on either side of the irrigation pipeline for irrigation system, including pumps, pipelines and accessories in favor of other users of the irrigation system, their successors and assigns, for delivery of irrigation water through irrigation pipelines within the Common Area of Lexington Hills Subdivision, according to the plats thereof on file in the Office of the Record of Ada County, Idaho;

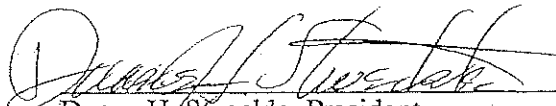
SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714, and the Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 6, filed of record in the Office of the Recorder of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments, for the year 1994.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attended by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer the 17th day of May, 1994.

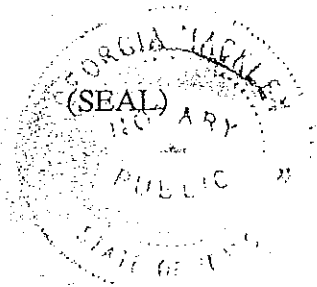
LEXINGTON HILLS, INC.

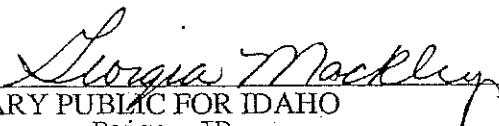

Duane H. Stueckle, President

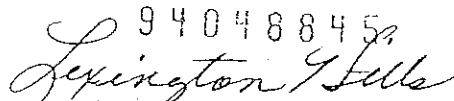
STATE OF IDAHO)
 : ss.
County of Ada)

On this 17th day of May, 1994, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane H. Stueckle, known or identified to me to be the President of Lexington Hills, Inc., who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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




NOTARY PUBLIC FOR IDAHO
Residing at: Boise, ID
My Commission Expires: 6/20/94

94048845

ADA CO. RECORDER
J. DAVID HAVARRO
BOISE ID

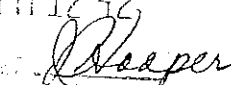
'94 MAY 25 PM 12 42
FEE 6.00 
RECORDED AT THE REQUEST OF

Exhibit J

Lexington Hills
ADA COUNTY RECORDER
DAVID NAVARRO
DEED IDAHO

1998 JUN 24 PM 2: 25

RECORDED - REQUEST OF
FEE *200* DEPUTY *dyd*
98060796

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 1, Block ²⁴~~23~~ and Lot 1, Block 25 of Lexington Hills Subdivision No. 7, according to the official plat on file in the office of the County Recorder of Ada County, Idaho, in Book 75 of plats at pages 7716 through 7718;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 7 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

RESERVING UNTO GRANTOR, its successors and assigns, a nonexclusive perpetual right-of-way for transportation of water an easement ten feet in width, lying five feet on either side of the irrigation pipeline for irrigation system, including pumps, pipelines and accessories in favor of other users of the irrigation system, their successor and assigns, for delivery of irrigation water through irrigation pipelines within the Common Area of Lexington Hills Subdivision according to the plats thereof on file in the Office of the Recorder of Ada County, Idaho;

Re-record to correct legal description from Lot 1/Block 23 to Lot 1/Block 24

SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714, Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 7, filed of record in the Office of the Recorder of Ada County, Idaho; and

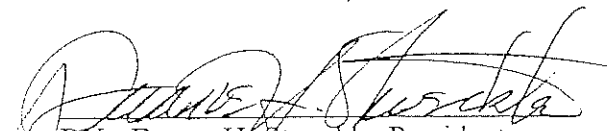
SUBJECT TO a twenty (20') foot sanitary sewer easement in favor of the Eagle Sewer District across Lot 1, Block 23, Lexington Hills Subdivision No. 7, being ten (10') feet each side of the centerline as shown on the official plat of said subdivision.

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 1998.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer the 16th day of June, 1998.

LEXINGTON HILLS, INC.


BY: Duane H. Stueckle, President

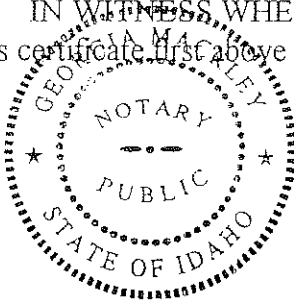
STATE OF IDAHO)

SS.

County of Ada)

On this 16th day of June, 1998, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane H. Stueckle, known or identified to me to be the President of LEXINGTON HILLS, INC. executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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



Georgia Mackley
NOTARY PUBLIC FOR IDAHO
Residing at Meridian, ID
My Commission Expires: 6/22/2000

ADA COUNTY RECORDER
J. DAVID NAVARRO
BOISE, IDAHO

1998 JUN 18 AM 10:55

RECORDED - REQUEST OF
Lexington Hills
FEE 90¢ DEPUTY Hepler
98078844

Exhibit K

Lexington Hills
ADA COUNTY RECORDER
J. DAVID NAVARRO
DEED
IDAHO

RECORDED - REQUEST OF

FEE *900* DEPUTY *Drift*

1998 JUN 24 PM 2:25

98060797

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 1, Block 27 of Lexington Hills Subdivision No. 8, according to the official plat on file in the office of the County Recorder of Ada County, Idaho, in Book 75 of plats at pages 7719 through 7721;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 8 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

RESERVING UNTO GRANTOR, its successors and assigns, a nonexclusive perpetual right-of-way for transportation of water an easement ten feet in width, lying five feet on either side of the irrigation pipeline for irrigation system, including pumps, pipelines and accessories in favor of other users of the irrigation system, their successor and assigns, for delivery of irrigation water through irrigation pipelines within the Common Area of Lexington Hills Subdivision according to the plats thereof on file in the Office of the Recorder of Ada County, Idaho;

SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714, Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 8, filed of record in the Office of the Recorder of Ada County, Idaho; and

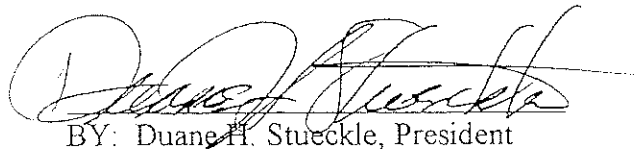
SUBJECT TO a twenty (20') foot sanitary sewer easement in favor of the Eagle Sewer District across Lot 1, Block 23, Lexington Hills Subdivision No. 8, being ten (10') feet each side of the centerline as shown on the official plat of said subdivision.

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 1998.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer the 16th day of June, 1998.

LEXINGTON HILLS, INC.

A handwritten signature in dark ink, appearing to read "Duane H. Stueckle", is written over a horizontal line. The signature is fluid and cursive.

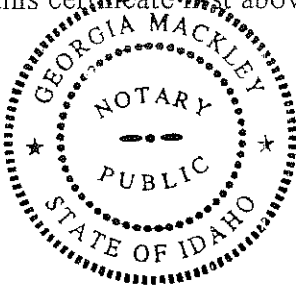
BY: Duane H. Stueckle, President

STATE OF IDAHO)

County of Ada)
:SS.

On this 16th day of June, 1998, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane H. Stueckle, known or identified to me to be the President of LEXINGTON HILLS, INC. executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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



Georgia Mackley
NOTARY PUBLIC FOR IDAHO
Residing at Meridian, ID
My Commission Expires: 6/22/2000

Exhibit L

Lexington Hills
ADA COUNTY RECORDER
DAVID NAVARRO
DEEDS, IDAHO

1998 JUN 24 PM 2: 25

RECORDED-REQUEST OF
FEE 900 DEPUTY [Signature]
98060798

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 49, 50, 69 and 83, Block 7, and Lot 1, Block 29 of Lexington Hills Subdivision No. 9, according to the official plat on file in the office of the County Recorder of Ada County, Idaho, in Book 75 of plats at pages 7805 through 7807;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 9 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

RESERVING UNTO GRANTOR, its successors and assigns, a nonexclusive perpetual right-of-way for transportation of water an easement ten feet in width, lying five feet on either side of the irrigation pipeline for irrigation system, including pumps, pipelines and accessories in favor of other users of the irrigation system, their successor and assigns, for delivery of irrigation water through irrigation pipelines within the Common Area of Lexington Hills Subdivision according to the plats thereof on file in the Office of the Recorder of Ada County, Idaho;

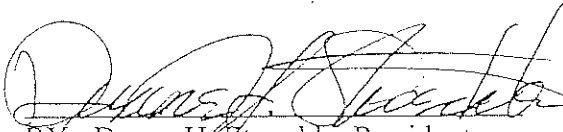
SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714, Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 9, filed of record in the Office of the Recorder of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 1998.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer the 16th day of June, 1998.

LEXINGTON HILLS, INC.



BY: Duane H. Stueckle, President

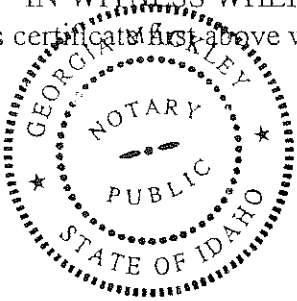
STATE OF IDAHO)

:SS.

County of Ada)

On this 16th day of June, 1998, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane H. Stueckle, known or identified to me to be the President of LEXINGTON HILLS, INC. executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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



Georgia Mackley
NOTARY PUBLIC FOR IDAHO
Residing at Meridian, ID
My Commission Expires: 6/22/2000

Exhibit M

Lexington Hills
ADA COUNTY RECORDER
DEED NAVARRO
BOISE, IDAHO

RECORDED - REQUEST OF

FEE 6.00 DEPUTY *DK*

1998 JUN 24 PM 2:25

98060799

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 1815 E. Stonybrook Court, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 87, 93, 104 and 113, Block 7, and Lot 1, Block 30 of Lexington Hills Subdivision No.10, according to the official plat on file in the office of the County Recorder of Ada County, Idaho, in Book 75 of plats at pages 7810 through 7811;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 10 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

RESERVING UNTO GRANTOR, its successors and assigns, a nonexclusive perpetual right-of-way for transportation of water an easement ten feet in width, lying five feet on either side of the irrigation pipeline for irrigation system, including pumps, pipelines and accessories in favor of other users of the irrigation system, their successor and assigns, for delivery of irrigation water through irrigation pipelines within the Common Area of Lexington Hills Subdivision according to the plats thereof on file in the Office of the Recorder of Ada County, Idaho;

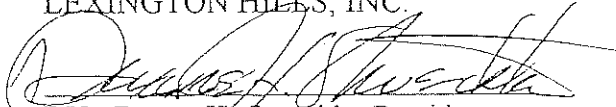
SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded February 20, 1992, as Instrument No. 9209714, Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 10, filed of record in the Office of the Recorder of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 1998.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer the 16th day of June, 1998.

LEXINGTON HILLS, INC.


BY: Duane H. Stueckle, President

STATE OF IDAHO)

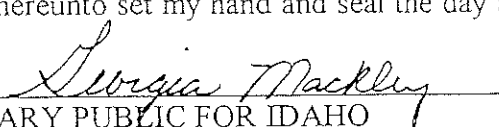
:ss.

County of Ada

On this 16th day of June, 1998, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane H. Stueckle, known or identified to me to be the President of LEXINGTON HILLS, INC. executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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




NOTARY PUBLIC FOR IDAHO

Residing at Meridian, ID

My Commission Expires: 6/22/2000

Exhibit N

ADA COUNTY RECORDER
J. DAVID NAVARRO
BOISE, IDAHO

DEED

2001 DE 31 AM 9:48

RECORDED - REQUEST OF
Lexington Hills
FEE *600* DEPUTY *Heaper*
101139069

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 1, Block 31, and Lot 48, Block 12, and Lot 1, Block 32 of Lexington Hills Subdivision No.11, according to the official plat on file in the office of the County Recorder of Ada County, Idaho, in Book 77 of plats at pages 8048 through 8050;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 11 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

RESERVING UNTO GRANTOR, its successors and assigns, a nonexclusive perpetual right-of-way for transportation of water an easement ten feet in width, lying five feet on either side of the irrigation pipeline for irrigation system, including pumps, pipelines and accessories in favor of other users of the irrigation system, their successor and assigns, for delivery of irrigation water through irrigation pipelines within the Common Area of Lexington Hills Subdivision according to the plats thereof on file in the Office of the Recorder of Ada County, Idaho;

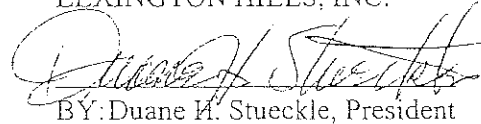
SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded December 29, 1998, as Instrument No. 99003753, Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 11, filed of record in the Office of the Recorder of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 2001.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer the 14th day of November, 2001.

LEXINGTON HILLS, INC.


BY: Duane H. Stueckle, President

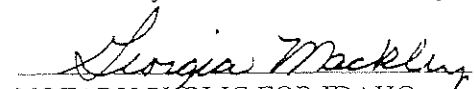
STATE OF IDAHO)

:ss.

County of Ada

On this 14th day of November, 2001, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane H. Stueckle, known or identified to me to be the President of LEXINGTON HILLS, INC. executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the

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


NOTARY PUBLIC FOR IDAHO
Residing at Eagle, ID
My Commission Expires: 6/22/2006

* NOTE
SEAL

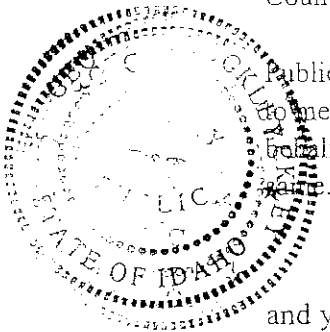


Exhibit O

ADA COUNTY RECORDER
J. DAVID NAVARRO
BOISE, IDAHO

DEED
2001 DE 31 AM 9:48

RECORDED-REQUEST OF
Lexington Hills
FEE *per* DEPUTY *Heaper*
101139070

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 63 and 70, Block 12, Lot 11, Block 28 and Lot 1, Block 33 of Lexington Hills Subdivision No.12, according to the official plat on file in the office of the County Recorder of Ada County, Idaho, in Book 77 of plats at pages 8120 through 8122;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington Hills Subdivision No. 12 adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

RESERVING UNTO GRANTOR, its successors and assigns, a nonexclusive perpetual right-of-way for transportation of water an easement ten feet in width, lying five feet on either side of the irrigation pipeline for irrigation system, including pumps, pipelines and accessories in favor of other users of the irrigation system, their successor and assigns, for delivery of irrigation water through irrigation pipelines within the Common Area of Lexington Hills Subdivision according to the plats thereof on file in the Office of the Recorder of Ada County, Idaho;

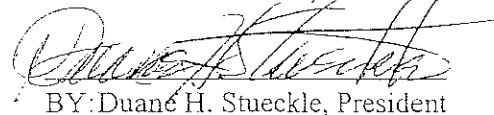
SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded December 29, 1998, as Instrument No. 99003754, Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills Subdivision No. 12, filed of record in the Office of the Recorder of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 2001.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer the 14th day of November, 2001.

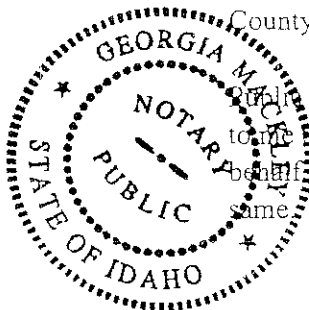
LEXINGTON HILLS, INC.


BY: Duane H. Stueckle, President

STATE OF IDAHO)

:ss.

County of Ada



On this 14th day of November, 2001, before me, the undersigned, a Notary Public in and for said State, personally appeared Duane H. Stueckle, known or identified to me to be the President of LEXINGTON HILLS, INC. executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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

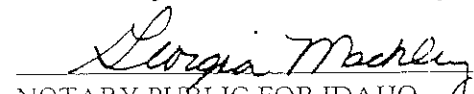

NOTARY PUBLIC FOR IDAHO
Residing at Eagle, ID
My Commission Expires: 6/22/2006

Exhibit P

DEED

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

**Lot 1, Block 1, Lot 1 and 8, Block 2, Lot 1, Block 5,
Lot 1, Block 6 and Lot 1 and 16, Block 7 of
Lexington Hills East Subdivision No. 1, according to the
official plat on file in the office of the County Recorder
of Ada County, Idaho, in Book 77 of plats at pages 8022
through 8025;**

**TOGETHER WITH a nonexclusive easement ten (10)
feet wide, inside the boundary of each Lot and Common
Area of Lexington Hills East Subdivision No. 1 adjacent to
the right-of-way, as shown on the plat thereof, for
construction, maintenance and repair of a pressurized
pipe irrigation system to be owned and operated by the
Association;**

**RESERVING UNTO GRANTOR, its successors and
assigns, a nonexclusive perpetual right-of-way for
transportation of water an easement ten feet in width,
lying five feet on either side of the irrigation pipeline for
irrigation system, including pumps, pipelines and
accessories in favor of other users of the irrigation
system, their successor and assigns, for delivery of
irrigation water through irrigation pipelines within the
Common Area of Lexington Hills Subdivision according
to the plats thereof on file in the Office of the Recorder
of Ada County, Idaho;**

SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded December 29, 1998, as Instrument No. 99003751, Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington Hills East Subdivision No. 1, filed of record in the Office of the Recorder of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 2001.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer the 1st day of June, 2001.

LEXINGTON HILLS, INC.

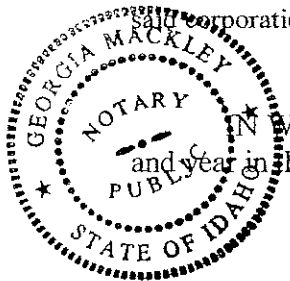
BY: Bert A. Bradley, Vice President

STATE OF IDAHO)

:SS.

County of Ada

On this 1st day of June, 2001, before me, the undersigned, a Notary Public in and for said State, personally appeared Bert A. Bradley, known or identified to me to be the Vice President of LEXINGTON HILLS, INC. executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.



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

NOTARY PUBLIC FOR IDAHO

Residing at Eagle, ID

My Commission Expires: 6/22/2006

Exhibit Q

ADA COUNTY RECORDER
J. DAVID NAVARRO
BOISE, IDAHO
DEED

2001 JL -2 AM 9:40

RECORDED - REQUEST OF
Lexington Hills
FEE 200 DEPUTY *Deeper*
101065486

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

**Lot 8, 25, 34, Block 3 of Lexington Hills East
Subdivision No. 2, according to the official plat on file in
the office of the County Recorder of Ada County,
Idaho, in Book 78 of plats at pages 8316 through 8319;**

**TOGETHER WITH a nonexclusive easement ten (10)
feet wide, inside the boundary of each Lot and Common
Area of Lexington Hills East Subdivision No. 2 adjacent to
the right-of-way, as shown on the plat thereof, for
construction, maintenance and repair of a pressurized
pipe irrigation system to be owned and operated by the
Association;**

**RESERVING UNTO GRANTOR, its successors and
assigns, a nonexclusive perpetual right-of-way for
transportation of water an easement ten feet in width,
lying five feet on either side of the irrigation pipeline for
irrigation system, including pumps, pipelines and
accessories in favor of other users of the irrigation
system, their successor and assigns, for delivery of
irrigation water through irrigation pipelines within the
Common Area of Lexington Hills Subdivision according
to the plats thereof on file in the Office of the Recorder
of Ada County, Idaho;**

*East 1 + 2
filed under
same #*

SUBJECT TO the Declaration of Covenants,
Conditions and Restrictions for Lexington Hills,
recorded August 23, 1999, as Instrument No.
99085279, Notice of Addition of Territory and
Supplemental Declaration of Covenants, Conditions and
Restrictions for Lexington Hills East Subdivision No. 2,
filed of record in the Office of the Recorder of Ada
County, Idaho; and

SUBJECT TO other easements, covenants and
encumbrances of record, and to real property taxes and
assessments, including irrigation assessments for the
year 2001.

The officers who sign this deed hereby certify that this deed and the transfer
represented thereby was duly authorized under a resolution duly adopted by the board of
directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to
be hereunto affixed by its duly authorized officer the 1st day of June, 2001.

LEXINGTON HILLS, INC.

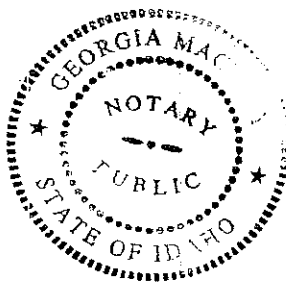
BY: Bert A. Bradley, Vice President

STATE OF IDAHO)

:SS.

County of Ada

On this 1st day of June, 2001, before me, the undersigned, a Notary Public in
and for said State, personally appeared Bert A. Bradley, known or identified to me to be
the Vice President of LEXINGTON HILLS, INC. executed the instrument on behalf of
said corporation, and acknowledged to me that such corporation executed the same.



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

Georgia Mack
NOTARY PUBLIC FOR IDAHO

Residing at Eagle, ID

My Commission Expires: 6/22/2006

Exhibit R

ADA COUNTY RECORDER
J. DAVID NAVARRO
BOISE, IDAHO

DEED
2001 JL -2 AM 9:40

RECORDED - REQUEST OF
Lexington Hills
FEE *6.00* DEPUTY *Kasper*
101065485

LEXINGTON HILLS, INC., an Idaho Corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantor", hereby conveys or grants and warrants to LEXINGTON HILLS HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, with its principal office at 340 W. State Street, Eagle, ID 83616, the "Grantee", sometimes also referred to herein as the "Association", for the sum of One Dollar (\$1.00) and other valuable consideration, the following described tracts of land in Ada County, State of Idaho:

Lot 11 and 18, Block 1 of Lexington on the Rim Subdivision, according to the official plat on file in the office of the County Recorder of Ada County, Idaho, in Book 77 of plats at pages 8026 through 8027;

TOGETHER WITH a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and Common Area of Lexington on the Rim Subdivision adjacent to the right-of-way, as shown on the plat thereof, for construction, maintenance and repair of a pressurized pipe irrigation system to be owned and operated by the Association;

RESERVING UNTO GRANTOR, its successors and assigns, a nonexclusive perpetual right-of-way for transportation of water an easement ten feet in width, lying five feet on either side of the irrigation pipeline for irrigation system, including pumps, pipelines and accessories in favor of other users of the irrigation system, their successor and assigns, for delivery of irrigation water through irrigation pipelines within the Common Area of Lexington Hills Subdivision according to the plats thereof on file in the Office of the Recorder of Ada County, Idaho;

SUBJECT TO the Declaration of Covenants, Conditions and Restrictions for Lexington Hills, recorded December 29, 1998, as Instrument No. 99003752, Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions for Lexington on the Rim Subdivision filed of record in the Office of the Recorder of Ada County, Idaho; and

SUBJECT TO other easements, covenants and encumbrances of record, and to real property taxes and assessments, including irrigation assessments for the year 2001.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attached by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer the 1st day of June, 2001.

LEXINGTON HILLS, INC.

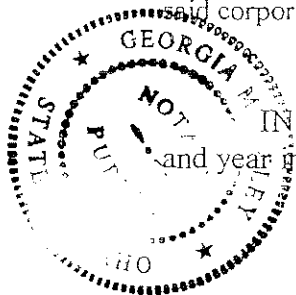
BY: Bert A. Bradley, Vice President

STATE OF IDAHO)

SS.

County of Ada

On this 1st day of June, 2001, before me, the undersigned, a Notary Public in and for said State, personally appeared Bert A. Bradley, known or identified to me to be the Vice President of LEXINGTON HILLS, INC. executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.



Liquor seal

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

Georgia Mackley
NOTARY PUBLIC FOR IDAHO

Residing at Eagle, ID

My Commission Expires: 6/22/2006

Exhibit S

ADA COUNTY RECORDER
J. DAVID NAVARRO
BOISE, IDAHO
QUITCLAIM DEED
2001 FEB 20 AM 10:08

RECORDED-REQUEST OF

Lexington Hills
FEE *6.00* DEPUTY *M. K. ...*

101014388

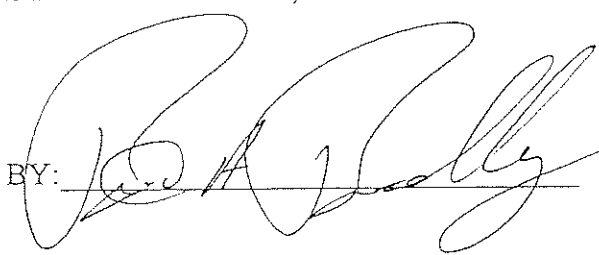
For value received, LEXINGTON HILLS, INC., an Idaho Corporation, does hereby convey, release, remise and forever quit claim unto LEXINGTON HILLS HOMEOWNERS ASSOCIATION, INC., 340 W. State, Eagle, ID 83616, the following described premises, to-wit:

SEE EXHIBIT "A" ATTACHED HERETO AND INCORPORATED HEREIN
AS IF SET FORTH IN FULL.

Together with their appurtenances.

DATED this 15th day of February, 2001.

LEXINGTON HILLS, INC.

BY: 

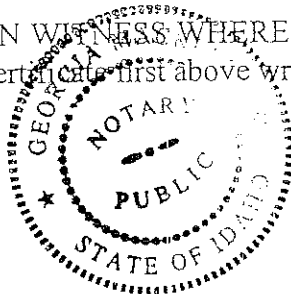
STATE OF IDAHO)

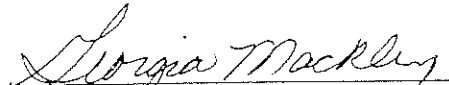
:SS.

County of Ada)

On this 15th day of February, 2001, before me, the undersigned, a Notary Public in and for said State, personally appeared DUANE H. STUECKLE, known or identified to me to be the President of LEXINGTON HILLS, INC. who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

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




NOTARY PUBLIC FOR IDAHO
Residing at Meridian, ID
My Commission Expires: 6/22/2006

January 2, 2001
Project No. 1771EX

Legal Description
Lexington Hills (Remainder)
216 Square Foot Tract

A tract of land located in the Northwest 1/4 of the Northwest 1/4 of Section 3, Township 4 North, Range 1 East, Boise Meridian, Ada County, Idaho, more particularly described as follows:

Commencing at a found 5/8 inch iron rod located at the Southeast corner of the Southwest 1/4 of the Northwest 1/4 of said Section 3, said point being the Southeast corner of Lexington on the Rim Subdivision (a recorded subdivision on file in Book 77 of Plats at Pages 8026 and 8027, Records of Ada County, Idaho), thence North 00°-30'-34" West along the easterly boundary of said Lexington on the Rim Subdivision and the easterly line of the Southwest 1/4 of the Northwest 1/4 of said Section 3, a distance of 1312.90 feet to the Northeast corner of said Lexington on the Rim Subdivision, said point also being the Southeast corner of the Northwest 1/4 of the Northwest 1/4 of said Section 3 and also being the POINT OF BEGINNING.

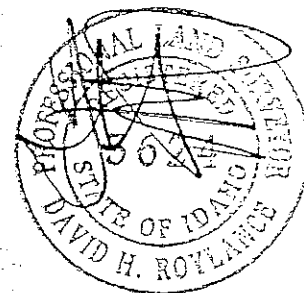
Thence continuing North 00°-30'-34" West along the easterly line of said Northwest 1/4 of the Northwest 1/4 a distance of 12.74 feet, more or less, to a point on the southeasterly boundary of Lot 4, Block 1, Rocket Bar Subdivision (a recorded subdivision on file in Book 26 of Plats at Pages 1636 and 1637, Records of Ada County, Idaho);

Thence South 69°-40'-29" West along the southeasterly boundary of said Lot 4 a distance of 36.10 feet, more or less, to a point on the northerly boundary of Lot 12, Block 1 of said Lexington on the Rim Subdivision.

Thence South 89°-40'-18" East along the northerly boundary of said Lot 12, a distance of 33.97 feet, more or less, to the POINT OF BEGINNING.

The above described tract of land contains 216 square feet, more or less, subject to all existing easements and rights-of-way.

Prepared By: ROYLANCE & ASSOCIATES P.A.
391 W. STATE STREET, SUITE E
EAGLE, IDAHO 83616
(208) 939-2824
(208) 939-2855 (FAX)



01-02-01

Exhibit T

3309714
Lexington Hills Inc
 ADA COUNTY CLERK
 J. DAVID T. SHAW
 RECORDS
[Signature]

Declaration Of
 Covenants, Conditions, Restrictions And Easements
 For
 Lexington Hills

92 FEB 20 PM 2 09
 6901

THIS DECLARATION is made on the date hereinafter set forth by LEXINGTON HILLS, INC., an Idaho corporation, hereinafter referred to as "Declarant".

Recitals: Declarant is the owner of the following real property in the City of Eagle, County of Ada, State of Idaho, hereinafter sometimes referred to as the "Property":

All of the land within the boundaries of Lexington Hills Subdivision No. 1, according to the plat thereof recorded in Book 59 of Plats at pages 2802 thru 5821, records of Ada County, State of Idaho.

ARTICLE I. DECLARATION

Declarant hereby declares that the Property shall be held, sold and conveyed subject to the following Covenants, Conditions, Restrictions and Easements which are established for the purpose of protecting the value and desirability of, and which shall run with and bind, the Property, and each and every part, parcel and lot thereof, and be binding on all parties having any right, title or interest in the Property or any part, parcel or lot thereof, their heirs, successors and assigns, and shall inure to the benefit of each Owner thereof.

ARTICLE II. DEFINITIONS

As used in this Declaration or in any supplemental Declaration, unless the context otherwise specifies or requires, the following words and phrases shall be defined as follows:

2.1 "Association" shall mean and refer to Lexington Hills Homeowners' Association, Inc., a nonprofit corporation organized under the laws of the State of Idaho, or any successor or assign of the corporation.

2.2 "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of a fee simple title to any Lot which is a part of the Property, including contract sellers, but excluding those having such interest merely as security for the performance of an obligation.

2.3 "Property" shall mean and refer to the real property consisting of Lexington Hills No. 1 Subdivision according to the official plat thereof and every part, parcel, and Lot thereof, and shall further mean and refer to such additional real property as may hereafter be made subject to this Declaration by Supplemental Declaration, pursuant to the provisions hereof for the annexation of additional parcels of real property.

2.4 "Common Area" shall mean and refer to Lot 2, Block 1; Lots 4, 5 and 17, Block 2; Lot 1, Block 3; Lots 3 and 15, Block 5; Lots 4 and 16, Block 7; and Lot 1, Block 8, of Lexington Hills No. 1 Subdivision, and to any Lot or parcel designated as COMMON AREA in

ARTICLE V. RIGHTS RESERVED BY DECLARANT

Notwithstanding anything to the contrary contained in this Declaration, Declarant expressly reserves unto:

(a) Itself, its employees, successors and assigns, agents, representatives, contractors and their subcontractors and employees, easements and rights-of-way on, over and across all or any part of the streets for vehicular and pedestrian ingress and egress to and from any part of the Property, or any adjacent real property owned by Declarant, or its successors or assigns;

(b) Itself, its employees, successors and assigns, and its agents, representatives, contractors and their subcontractors and employees (including any district, company, unit of local government, association or other entity providing water, sewer, gas, oil, electricity, telephone, cable television, or other similar services), easements, access and rights-of-way on, over, under and across all or part of the Common Area and utility easements on, over and under all Lots and Common Area as provided on any recorded subdivision plat of the Property for installation, use, maintenance and repair of all lines, wires, pipes, pumps, water wells, facilities, and other things necessary for all such services, provided that any installation, maintenance or repair of such lines, wires or pipes shall be performed with reasonable care and that the surface of said easement area shall be restored to the level and condition that existed prior to the doing of work; and

(c) Itself, its employees, agents, representatives, contractors and their subcontractors and employees, and its successors and assigns, the right to use the Common Area and Common Facilities, where applicable, to facilitate and complete the development of the Property, and any Annexed Property, including without limitation the use of the Common Area and Common Facilities, where applicable, for:

- (i) Construction, excavation, grading, landscaping, parking and/or storage;
- (ii) Maintenance and operation of a sales office and model units for sales purposes;
- (iii) The showing to potential purchasers of any unsold Lot, unit or improvements within the Project;
- (iv) Display of signs to aid in the sale of any unsold Lots and units, or all or part of the Project;
- (v) Construction, operation and maintenance of all or any portion of any Common Area or Common Facilities by Declarant, its successors or assigns;
- (vi) Use of the irrigation system for irrigation water for Common Area and expansion and connection of the irrigation system to property annexed to the Project pursuant to the provisions hereof for the annexation of additional parcels, and the use and enjoyment of water therefrom.

(d) Itself, its agents, contractors, subcontractors and employees, successors and assigns, all water and water rights over, upon or under or appurtenant to the Property, or any portion thereof, and a nonexclusive easement ten (10) feet wide, inside the boundary of each Lot and the Common Area adjacent to the right-of-way for construction of a pressurized pipe irrigation system to be conveyed to and operated by the Association. Groundwater appropriated for the domestic water system will be owned by the City of Eagle. Surface water for irrigation appurtenant to each phase of development of the Property will be conveyed to the Association as each plat is recorded.

(e) Itself, its successors and assigns, all right, title and interest in and to Lot 2, Block 3, which shall be conveyed to the owner of the domestic water system as a well lot subject to a nonexclusive perpetual easement in favor of the Association on and over the surface thereof for the use and enjoyment of its members for park and open space subject to the requirements for well lots set forth in IDAPA 16.01.8601, as amended from time to time.

ARTICLE VI. MAINTENANCE

6.1 Common Area and Common Facilities: Among its other responsibilities, the Association shall be responsible for maintenance of all Common Area and Common Facilities including operation of the irrigation water system. The Association may employ the services of a manager and other personnel to carry out the management of such responsibilities. Such Common Area and Common Facilities shall be maintained in a neat, landscaped and becoming manner. Common Area within the Property hereinabove described shall include Lot 1, Block 1; Lots 1, 3 and 17, Block 2; Lot 1, Block 3; Lots 3 and 15, Block 5; Lots 1 and 16, Block 7; and Lot 1, Block 8, according to the plat of the Property on file in the office of the recorder of Ada County, Idaho, together with easements and rights-of-way as shown upon the recorded plat for pedestrian paths, streams, lakes and the irrigation system constructed and to be constructed for the Project whether or not within said Common Area. Common Area and Common Facilities shall also include such other real and personal property as may be conveyed to the Association from time to time by Declarant, or designated by it as Common Area in any Supplemental Declaration.

6.2 Private Property: Owners of Lots shall be responsible for and perform all exterior maintenance upon such Lots and all improvements thereon. In the event an Owner fails to maintain the premises of a Lot and the improvements situated thereon in a manner satisfactory to the Board of Directors of the Association, upon a 2/3 vote of the Board of Directors, the Association shall have the right to give a 30 day written notice of its intended action, and if satisfactory arrangements are not then made by such Owner, the Association shall have the right through its agents, employees and contractors, to enter upon said Lot and to repair, maintain and restore the Lot and the exterior of any improvements located thereon. The cost of such activity shall be added to and become part of the assessment to which such Lot is subject. In the event the Board of Directors declares an emergency by a 3/4 vote, such action to repair, maintain and restore may be taken at any time after written notice is given to the Owner.

Exhibit U

Map of Project: show clearly the point of diversion, place of use, section number, township, and range number.
Scale: 2 inches equals 1 mile.

The outlines shows the approximate location of the Lexington Hills Subdivision all within Section 3, Twp 4N Rge 1E, B.M.



Last Name _____ Ident. Number _____

Exhibit V

--- P.3d ---

--- P.3d ---, 2007 WL 428947 (Idaho)

(Cite as: --- P.3d ---)

HBriefs and Other Related Documents

In re SRBA Case No. 39576Idaho,2007.Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Idaho,

Twin Falls, November 2006 Term.

In re SRBA CASE NO. 39576, (Subcase Nos.

55-10135, 55-11061, 55-11385 and 55-12452).

Joyce Livestock Company, Appellant-Respondent,

v.

United States of America, Respondent-Appellant.

Nos. 32278, 32279, 32846.

Feb. 9, 2007.

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for Twin Falls County. The Hon. John M. Melanson, District Judge. The judgment is affirmed in part, vacated in part, and remanded for further proceedings.

McQuaid Bedford & Van Zandt LLP, San Francisco, California, and Roger D. Ling, Rupert, counsel for Joyce Livestock Company. Elizabeth P. Ewens argued.

United States Department of Justice for the United States of America. Ellen J. Durkee argued.

EISMANN, Justice.

*1 This is an appeal from a judgment upholding Joyce Livestock Company's claim to instream water rights on federal rangeland for watering livestock, determining the priority dates of those water rights, and rejecting the claim of the United States that it also has instream water rights based upon appropriations by those it permitted to use the rangeland after enactment of the Taylor Grazing Act in 1934. The district court also denied Joyce Livestock Company's request for an award of attorney fees. We affirm the district court's holding that Joyce Livestock Company has instream water rights, vacate its determination of priority, and remand for a redetermination of the priority dates of such rights. We uphold its denial of the water

rights claimed by the United States and its denial of Joyce Livestock Company's request for attorney fees.

I. FACTS AND PROCEDURAL HISTORY

*1 Joyce Livestock Company (Joyce Livestock), a limited partnership formed in 1985, is a cattle operation located in Owyhee County, Idaho. It owns approximately 10,000 acres of land that is an accumulation of twenty-nine different homesteads and small ranches. The earliest patents in the chain of title of the properties owned by Joyce Livestock were issued in 1898. It filed a claim for instream ^{FN1} stockwater rights in Jordan Creek with a priority date of 1898. The United States filed overlapping claims for instream stockwatering with a priority date of 1934, the year of adoption of the Taylor Grazing Act, 43 U.S.C. § 315 et seq.

FN1 Although we refer to them as "instream" water rights, the water sources do not need to be streams. They can be any natural water source, including springs that simply form pools of water. Calling them instream water sources simply means that the water was applied to a beneficial use without diverting it from the water source.

*1 The matter was first heard by a special master. He recommended that the water rights claimed by Joyce Livestock be denied because there was no evidence that Joyce Livestock's predecessors had attempted to exclude other ranchers from using the water source used by the predecessors. Absent such evidence, the special master concluded that the predecessors lacked the requisite intent to acquire water rights. The special master also recommended that the water right claimed by the United States be granted, with a priority date of June 28, 1934, the date of enactment of the Taylor Grazing Act. According to the special master, the actions of the United States, through the Bureau of Land Management, in making the rangeland available to ranchers combined with its management of the rangeland demonstrated an intent to appropriate water and constituted a diversion of the water and an application of it to a beneficial use.

*1 The district court reviewed the special master's recommendations. It held that the special master erred in holding that Joyce Livestock's predecessors lacked the intent required to obtain a water right. The district court ruled that the necessary intent could be inferred from the act of watering livestock. The district court determined, however, that Joyce Livestock's predecessors could not have obtained water rights on federal land unless their applications for grazing permits filed under the Taylor Grazing Act showed that they understood or believed they had acquired such water rights. Because such evidence was lacking from the grazing permit applications, the district court held that the earliest priority date Joyce Livestock could establish for its water rights was April 26, 1935. That was the date on which John T. Shea filed an application for a grazing permit.

*2 The district court also denied the United States's water rights claim. There was no evidence that the United States had appropriated any water by grazing livestock. The district court noted that under Idaho law, a water right obtained by the lessee of real property is owned by the lessee unless the lessee was acting as an agent of the lessor in acquiring the water right. In this case, the United States did not show that any of Joyce Livestock's predecessors were acting as its agent when they acquired water rights.

*2 The district court entered a judgment awarding Joyce Livestock a water right with a priority date of April 26, 1935, and denying the claims of the United States. It certified the judgment as final pursuant to Rule 54(b) of the Idaho Rules of Civil Procedure.

*2 Joyce Livestock sought an award of attorney fees against the United States. The district court held that it was not entitled to an award under Idaho Code § 12-121 because the United States did not act frivolously, unreasonably, or without foundation in asserting its water rights claim and opposing the claim of Joyce Livestock. It likewise denied an award pursuant to 28 U.S.C. 2412(d) because it found the position of the United States substantially justified. Both Joyce Livestock and the United States appealed.

II. ISSUES ON APPEAL

*2 1. Did the district court err in finding that Joyce Livestock had acquired a water right on federal land for watering stock?

*2 2. Did the district court err in determining the priority date of Joyce Livestock's water right?

*2 3. Did the district court err in denying Joyce Livestock's request for an award of attorney fees under Idaho Code § 12-121 and 28 U.S.C. § 2412(d)?

*2 4. Did the district court err in denying the United States's claim for a water right for watering stock?

*2 5. Is Joyce Livestock entitled to an award of attorney fees on appeal?

III. ANALYSIS

A. Did the District Court Err in Finding that Joyce Livestock Had Acquired a Water Right on Federal Land for Watering Stock?

*2 1. An appropriator can obtain a water right in nonnavigable waters located on federal land. When the arid regions of the West were initially settled, local custom and usage held that the first appropriator of water for a beneficial use had the better right to the use of the water to the extent of his actual use. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). "The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection." *Id.* at 154. That custom likewise prevailed among the early settlers in what became the State of Idaho. As this Court explained in *Drake v. Earhart*, 2 Idaho 750, 753-54, 23 P. 541, 542 (Idaho Terr.1890), with respect to the early emigrants to this area:

*2 They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, they disregarded the traditions of

the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take all he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire west, and became the basis of the laws we have to-day on that subject. Very soon these customs attracted the attention of the legislatures, where they were approved and adopted, and next we find them undergoing the crucial test of judicial investigation.

*3 "This general policy [of prior appropriation] was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866." California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154 (1935). Section 9 of that Act, codified at 30 U.S.C. § 51, provided: *3 Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

*3 "This provision was 'rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.' " *Id.* at 155 (quoting Bruder v. Natoma Water & Min. Co., 101 U.S. 274, 276 (1879)).

*3 In 1877 Congress passed the Desert Land Act to encourage and promote the economic development of the arid and semiarid public lands of the Western United States, including those in what would become the State of Idaho. "The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separ-

ately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately." Ickes v. Fox, 300 U.S. 82, 95 (1937). As the Supreme Court said two years earlier in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 161 (1935), with reference to the Desert Land Act, "It is hard to see how a more definite intention to sever the land and water could be evinced." The Court also stated that the Desert Land Act "simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation.... The public interest in such state control in the arid land states is definite and substantial." *Id.* at 164.

*3 Thus, the appropriation of the nonnavigable waters within this State, including those located on federal land, is a matter of state law. "[A]ll nonnavigable waters were reserved for the use of the public under the laws of the various arid-land states." Ickes v. Fox, 300 U.S. 82, 95 (1937). "While the basics of the doctrine of prior appropriation is the same from state to state, the doctrine has evolved to meet the specific needs of each state and thus differs among the western states. Congress understood this fact and that is why the laws concerning appropriation were left up to each individual state." Idaho Dept. of Water Resources v. U.S., 122 Idaho 116, 124, 832 P.2d 289, 297 (1992).

*4 "One who has appropriated water and beneficially used it has a right to the use of the water independent of his ownership of the land." Sanderson v. Salmon River Canal Co., 34 Idaho 145, 160, 199 P. 999, 1003 (1921). Idaho has long recognized that an appropriator can obtain a water right in waters located on federal land. Keiler v. McDonald, 37 Idaho 573, 218 P. 365 (1923); Short v. Praisewater, 35 Idaho 691, 208 P. 844 (1922); Sarret v. Hunter, 32 Idaho 536, 185 P. 1072 (1919); Le Quime v. Chambers, 15 Idaho 405, 98 P. 415 (1908); Hillman v. Hardwick, 3 Idaho 255, 28 P. 438 (1891). The appropriator simply must follow Idaho law in obtaining that water right.

*4 The United States argues that prior to the enact-

ment of the Taylor Grazing Act, the ranchers should not have been able to obtain a water right by grazing livestock on public lands because they did not have the right to exclude others from those lands or from water sources located on those lands. The United States is correct that one rancher did not have the right to exclude another from grazing livestock on public lands. *Buford v. Houtz*, 10 U.S. 305 (1890). A water right, however, is not based upon having exclusive access to a water source. It does not constitute ownership of the water. See, *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 156-57, 911 P.2d 748, 749-50 (1995) ("The state's ownership of the water that is the subject of the adjudication, is not before the SRBA court, nor is that ownership interest in any way diminished by the adjudication of claimants' rights. The proprietary rights to use water, which are the subject of the SRBA, are held subject to the public trust"). The prior appropriation doctrine recognizes that two or more parties can obtain a right to use water from the same source. "[T]wo parties may at the same time be in possession of water from a creek and neither hold adverse to the other; each may justly claim the right to use the water he is using, without affecting the rights of the other." *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475, 480-81 (1943) (quoting from *St. Onge v. Blakely*, 245 P. 532, 536 (Mont.1926)). Thus, an appropriator need not have exclusive access to federal lands in order to obtain a water right in waters situated on those lands.

***4 2. Under the constitutional method, an appropriator could obtain a water right for stock watering without diverting the water from the water source.** "Until 1971 Idaho recognized two methods of appropriating water of the state both of which were equally valid: the statutory method of appropriation and the constitutional method of appropriation." *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996). In 1971 the legislature amended *Idaho Code* §§ 42-103 and 42-201 to require compliance with the statutory application, permit, and license procedure in order to acquire new water rights. Ch. 177, §§ 1 & 2, 1971 Idaho Sess. Laws 843-44. "Although new appropriations could not be made under the constitutional

method after 1971, the validity of existing constitutional appropriations continues to be recognized." *State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000) (citation omitted).

***5** The constitutional method of appropriation generally requires an actual diversion in order to obtain a water right. Under the constitutional method, however, "[n]o diversion from a natural watercourse or diversion device is needed to establish a valid appropriative water right for stock watering." *State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). Thus, Joyce Livestock's predecessors could obtain a water right under the constitutional method by watering their livestock at water sources on the public range without having to divert the water or modify the water source.

***5** Even though we refer to it as the constitutional method of appropriating water, the Idaho Constitution did not create the doctrine of prior appropriation. "The rights of appropriators were regulated in the first instance by local customs, and out of these initial sources grew our present laws and rules with respect to irrigation." *Sarret v. Hunter*, 32 Idaho 536, 542, 185 P. 1072, 1074 (1919). "The framers and adopters of our Constitution were familiar with the prevailing customs and rules governing the manner in which water might be appropriated ..., and they gave it form and sanction by writing it in the fundamental law of the state." *Id.* at 543, 185 P. at 1075. "The rule in this state, both before and since the adoption of our constitution, is ... that he who is first in time is first in right." *Brossard v. Morgan*, 7 Idaho 215, 219-20, 61 P. 1031, 1033 (1900). Thus, water rights obtained in a manner that is now called the constitutional method of appropriation are entitled to protection even though the water was appropriated prior to the adoption and ratification of our Constitution in 1889 and its approval by Congress in 1890. *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 66 P.2d 115 (1937) (upholding priorities of 1864, 1869, and 1887); *Bramstetter v. Williams*, 6 Idaho 574, 57 P. 433 (1899) (upholding priority of 1863); *Drake v. Earhart*, 2 Idaho 716, 23 P. 541 (1890) (upholding priority of 1879).

***5 3. Joyce Livestock's predecessors obtained wa-**

ter rights on federal land for stock watering. Under the constitutional method of appropriation, "a water user could make a valid appropriation without a permit, most commonly by diverting the water and putting it to beneficial use." *State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). Because no diversion is required in order to obtain a water right for stock watering under the constitutional method, *Id.*, Joyce Livestock's predecessors could obtain water rights for stock watering simply by applying the water to a beneficial use. There is no dispute that watering livestock is a beneficial use of water. *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969). Therefore, they could obtain water rights simply by watering their livestock in the springs, creeks, and rivers on the range they used for forage.

*5 The United States argues that there must also be evidence that Joyce Livestock's predecessors intended to obtain a water right. The district court agreed, but held that the intent could be inferred if the predecessors applied the water to a beneficial use. We have not held that an intent to obtain a water right was a requirement for appropriating water under the constitutional method.

*6 The two essentials for obtaining a water right under the constitutional method were typically diversion and application to a beneficial use. *State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). As we stated in *Morgan v. Udy*, 58 Idaho 670, 680, 79 P.2d 295, 299 (1938), "In other words, in this state one may have a valid appropriation though only a temporary and revocable way of conveyance for his water; diversion and application to a beneficial use being the two essentials." The statement in *Morgan v. Udy* is consistent with the history of obtaining water rights prior to the adoption of our Constitution.

*6 The first act passed by the territorial legislature concerning the appropriation of water was in 1881. *Kirk v. Bartholomew*, 3 Idaho 367, 369-70, 29 P. 40, 41 (1892). That act, compiled at Idaho Revised Statutes §§ 3155 *et seq.* (1887), provided a statutory procedure for obtaining a water right. The person first posted a written notice at the point of diversion and then, within sixty days, commenced construction of the diversion works. If the person diligently prosec-

uted that construction work to completion, the priority date of the water right would relate back to the date the notice was posted. The act also included a provision recognizing the validity of water rights that had been acquired prior to 1881 by diverting the water and applying it to a beneficial use, stating that such diversion and application to a beneficial use "shall be taken to have secured the right to the waters claimed." ^{FN2} The territorial legislature did not indicate that there was an additional intent element to obtaining valid water rights under the constitutional method.

FN2. In *Kirk v. Bartholomew*, 3 Idaho 367, 369-70, 29 P. 40, 41 (1892), we quoted that portion of the statute as follows:

Section 8 of said act secures to persons who had made appropriations of water prior to the date of said act all of the water so appropriated, and is as follows: "Sec. 8. All ditches, canals, and other works heretofore made, constructed, or provided, and by means of which the waters of any stream have been diverted and applied to any beneficial use, shall be taken to have secured the right to the waters claimed, to the extent of the quantity which said works are capable of conducting, and not exceeding the quantity claimed, without regard to or compliance with the requirements of this act."

*6 "The right to appropriate unappropriated water is guaranteed by article XV, section 3 of the Idaho Constitution." *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982). "Prior to adoption of a mandatory permit system in 1971 this constitutional declaration was construed as authorizing a person to appropriate the water of a stream simply by 'actually diverting the water and applying it to a beneficial use.'" *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996) (quoting from *Sand Point Water & Light Co. v. Panhandle Dev. Co.*, 11 Idaho 405, 413, 83 P. 347, 349 (1905)). As we stated in *Cantlin v. Carter*, 88 Idaho 179, 186, 397 P.2d 761, 765 (1964), "By actually diverting and applying water to a beneficial use, a legal appropriation is made." Likewise, in *Furey v. Taylor*,

22 Idaho 605, 127 P. 676, 678 (1912), we said, “[T]he appellant having made an appropriation of 350 inches from the water flowing in Pass creek by actually diverting the water and applying the same to a beneficial use, such appropriation was legal and clearly authorized by section 3, art. 15, of the Constitution.”

*6 The district court held that there must be an “intent to appropriate” in order to have obtained a water right under the constitutional method. It is not clear what the district court meant by an intent to appropriate. The court could have meant an intent to obtain a water right that would be recognized and protected under the law, or it could have meant an intent to apply the water to a beneficial use. We have not required either intent in order to obtain a water right under the constitutional method of appropriation.

*7 The district court read Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 101 Idaho 677, 619 P.2d 1130 (1980), as requiring three elements for a valid appropriation under the constitutional method: (1) intent to appropriate, (2) physical diversion from a natural watercourse, and (3) application of the water to a beneficial use. That case involved a dispute between two appropriators, and the issue being addressed was whether the actions of one of them were sufficient to constitute diverting water from a spring. When addressing that issue, we stated:

*7 First, Hidden Springs argues that the water constituting Spring A was never successfully diverted by Hagerman, and therefore could not have been included in the 1906 decree. Based on the record, we do not find this argument persuasive. Diversion is a prerequisite to appropriation of water, along with the application of such water to a beneficial use, but diversion as such has not been defined. For example: “The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use.” Sarret v. Hunter, 32 Idaho 536, 541, 185 P. 1072, 1074 (1919). “It is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply it to some beneficial use, existing at the time or contemplated in the future, followed by diversion from the natural channel by means of a ditch, canal, or other structure and

also an active application of the water, within a reasonable time, to a beneficial use.” 78 Am.Jur.2d Waters § 321 (1975) (footnotes omitted). I.C. § 42-101 provides that the “waters of the state, when flowing in their natural channels,” are subject to appropriation. See also Rahido v. Furey, 33 Idaho 56, 190 P. 73 (1920). It is Hidden Springs’ contention that the diversion necessary for appropriation must be from the natural source of the water, and that here the spring field is the natural source, including both Spring A and the springs from which the water first emerged. Since the water never left the spring field, Hidden Springs argues the water was never diverted. In considering this contention, we rely upon those cases which refer to diversion from the natural channel of the water, making it sufficient, for establishing diversion, that the water flows in a different channel than it would have done absent intervention by the appropriator.

*7 Here, there can be no dispute that Hagerman did divert the water from its natural channel; instead of running downhill directly into the creek, the water entered a pipe and traveled approximately one-half mile before the water here in dispute was lost as seepage and re-emerged as Spring A. There can be no question but that had Hagerman made use of the water at the point of the seepage loss, it would have been considered diverted for purposes of appropriation.

*7 101 Idaho at 679-80, 619 P.2d at 1132-33. The district court read our quotation from American Jurisprudence Second as adding the requirement that an appropriator must intend to apply the water to some beneficial use. The appropriator’s intent was not even an issue in the Hidden Springs case. Had we intended to add intent as a required element, we would not have included the quotation from Sarret v. Hunter stating, “The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use.” There is no mention in that quotation of also having an intent to apply the water to a beneficial use.

*8 Application to a beneficial use was necessary to obtain the water right under the constitutional method of appropriation. You could certainly infer that a person who diverts water and applies it to a beneficial

purpose intended to do so. In such case, however, the intent is shown by the person's actions. In order for that person to have obtained a water right under the constitutional method of appropriation, there did not also have to be evidence showing that when the person applied the water to a beneficial use, he or she intended to do so.

*8 We have mentioned an intent to apply water to a beneficial use when discussing the permit method of appropriation. For example, in Sarret v. Hunter, 32 Idaho 536, 541-42, 185 P. 1072, 1074 (1919) (citation omitted), we stated:

*8 In determining whether a valid appropriation of water has been made, or the respective priorities of contending appropriators, the law does not concern itself with disputes relative to the title to the lands for which it is claimed the water was appropriated. The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use. When one diverts water hitherto unappropriated and applies it to a beneficial use, his appropriation is complete, and he acquires a right to the use of such water, which is at least coextensive with his possession, and so when one makes application for a permit to divert and appropriate water, the query is, not upon whose lands does he intend to apply it, but upon what lands he intends to apply it, and to what use does he expect to put it when so applied. His right to possession, or the character of his occupancy as between claimants to the right to the use of the public waters of the state, is not in issue.

*8 An intent to apply the water to a beneficial use was relevant when making an application for a permit. At the time Sarret v. Hunter was decided, that application was made to the state engineer. The application for the permit had to set forth "the nature of the proposed use." Rev.Codes of Idaho § 3253 (1908). The engineer could issue a permit if the application "contemplate[d] the application of water to a beneficial use." Rev.Codes of Idaho § 3254 (1908). If the application did not indicate an intent to apply the water to a beneficial use, the state engineer would not issue a permit. If a permit was issued, the applicant then had to timely complete the diversion works and apply the water to a beneficial use. "After the holder of a permit has fulfilled all the requirements of

the statute, and made proof to the state engineer that he has put the water to the beneficial use for which the diversion was intended, he is entitled to a license from the state engineer confirming such use." Ba-singer v. Taylor, 30 Idaho 289, 297, 164 P. 522, 524 (1917). It was the license, not the permit, that granted the water right, but the priority date related back to the date the permit was issued. Id.; Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (1915).

*9 Under the constitutional method of appropriation, a water user could make a valid appropriation without a permit by diverting the water and putting it to beneficial use. State v. U.S., 134 Idaho 106, 996 P.2d 806 (2000). Because no diversion is required in order to obtain a water right for stock watering under the constitutional method, Id., Joyce Livestock's predecessors could obtain water rights for stock watering simply by applying the water to a beneficial use, which they did by watering their stock.

*9 The United States asks us to require a mental element in this situation because without it "a livestock grazer could appropriate a water right without actually being aware of the fact." From its arguments, the mental element that the United States would require includes two aspects. First, there would have to be evidence showing that the rancher grazing livestock on public land knew of the water sources on the land and knew that his or her livestock were drinking from those water sources. Second, there would have to be evidence showing that the rancher understood or believed that a water right recognized by law could be obtained by the instream watering of livestock.

*9 With respect to the first aspect, the early settlers to this area could obtain homesteads of 160 or 640 acres, depending upon when they made entry on the federal lands. The Homestead Act of 1862 authorized the entry of 160 acres, and it was amended in 1891 to permit the entry of 640 acres. The Stock-Raising Homestead Act enacted in 1916 permitted the entry of 640 acres. Regardless of whether the settler obtained a patent to 160 acres or 640 acres, the patented property alone was not sufficient to sustain a livestock operation capable of supporting a single family unit in this arid part of the country. Livestock must

have adequate forage and water. To succeed, the rancher had to use adjoining or nearby public lands and the water on those lands. The demand for water in this arid region was greater than the supply. The argument of the United States assumes that these ranchers would have acquired a homestead and several hundred head of livestock without first making any investigation to see whether there was sufficient forage and water to support those livestock. In other words, the government's argument assumes that these ranchers lacked common sense. It is inconceivable that a rancher would either homestead or purchase land and invest in hundreds of head of livestock without having made any investigation as to whether there was sufficient water available for the livestock to survive. The rancher's hope was to raise horses, cattle, or sheep for market, not to have them die from lack of water. When putting livestock out onto the range, the rancher clearly wanted them to drink water from the available water sources.

*9 With respect to the second aspect, we have never held that in order to obtain a valid water right under the constitutional method of appropriation there must have been evidence showing that the appropriator understood that the manner in which he or she was securing and using the water would ultimately be recognized under the law as creating a valid water right. We have never required appropriators to be lawyers or seers. Water rights based upon prior appropriation were recognized by custom in the land that later became the State of Idaho before there were any statutes or controlling court decisions on the issue.

*10 The doctrine of prior appropriation grew out of the sense of justice of the miners who came to the west in search of gold and other precious metals. Atchison v. Peterson, 87 U.S. 507 (1874). Congress first recognized the doctrine in 1866. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). It was not until 1881 that the legislature of the Idaho Territory first enacted legislation concerning the appropriation of water. Kirk v. Bartholomew, 3 Idaho 367, 29 P. 40 (1892). The Supreme Court of the Territory of Idaho first recognized the doctrine of prior appropriation in 1888. Milled Valley Irrigation Co. v. Campbell, 2 Idaho 378, 18 P.

52 (1888). Yet, we have recognized a water right with a priority date of 1864, Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist., 57 Idaho 403, 66 P.2d 115 (1937), which would have been obtained before there were any statutes or court decisions recognizing the doctrine of prior appropriation in what became Idaho.

*10 "It should be noted that a 'constitutional appropriation' is not pursuant to specific procedures specified by the constitution, but instead is allowed by the grant of authority of the constitutional language." State v. U.S., 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). It was not until 1974 that we addressed whether diversion was required in order to appropriate water under the constitutional method. State Dept. of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974). It was not until 2000 that we held that a water right could be obtained for stock watering without diverting the water from the watercourse. State v. U.S., 134 Idaho 106, 996 P.2d 806 (2000). Adopting the intent element urged by the United States would result in a holding that no water rights for instream stock watering could have been obtained before those cases were decided unless the court also found that those watering their stock at the water source decades ago were sufficiently prescient to have known how we would decide those cases. It could also affect the priorities of water rights originally obtained under the constitutional method of appropriation if the original appropriator is no longer available to testify as to his or her understanding of water law.

*10 4. **The water rights that ranchers obtained by watering their livestock on federal land were appurtenant to their patented properties.** The district court held that the water rights obtained by Joyce Livestock's predecessors on federal grazing land were appurtenant to their patented properties. The district court reasoned, "[M]any livestock owners nonetheless depended on the use of adjacent public rangeland in conjunction with their patented property to support a viable livestock operation.... It can be reasonably concluded that both the rangeland as well as the water right benefited the livestock owners patented property." In seeking to have that holding reversed, the United States argues, "[A]n instream stock water

right appropriated on a public grazing allotment has no physical relationship to base property and cannot be an appurtenance to it in any recognized sense.” We have not held, however, that appurtenance is dependent upon a “physical relationship” as contended by the United States.

***11** In Nelson v. Johnson, 106 Idaho 385, 679 P.2d 662 (1984), the Wakes owned real property that they used for a dry farming operation and a cattle ranch. Each year they would drive their cattle from the home ranch down a county road and then over an access road on their farmland to Butler Springs, also located on their land. The cattle would then graze on adjacent federal land, returning each day to the springs for water. At the onset of winter, the Wakes drove their cattle back along the same route to winter on their home ranch.

***11** In 1956 the Wakes sold the farmland to the Hesses and reserved water rights in Butler Springs and an easement in the land surrounding the springs. They did not reserve an easement in the access road that ran from the county road to the springs. Several years later, the Hesses sold the farmland to the Johnsons.

***11** In 1964 the Wakes sold their home ranch and cattle operation. After several mesne conveyances, the Nelsons purchased the cattle ranch in 1973. In 1979 the Johnsons prevented the Nelsons from using the access road to the Butler Springs area, and the Nelsons filed suit to enforce their right to use the access road and the area around the springs.

***11** In defending the lawsuit, the Johnsons contended that the easement in the land surrounding Butler Springs was not appurtenant to the ranch property and therefore did not pass with the ranch property when it was conveyed to the Nelsons. The trial court held that the easement around Butler Springs reserved by the Wakes in 1956 when they sold the farmland was appurtenant to the ranch property and therefore passed with it in the subsequent conveyances of the ranch property. This Court affirmed, reasoning as follows:

***11** The definitions of “appurtenant” and “in gross” further make it clear that the easement is appurtenant.

The primary distinction between an easement in gross and an easement appurtenant is that in the latter there is, and in the former there is not, a dominant estate to which the easement is attached. An easement in gross is merely a personal interest in the land of another, whereas an easement appurtenant is an interest which is annexed to the possession of the dominant tenement and passes with it. An appurtenant easement must bear some relation to the use of the dominant estate and is incapable of existence separate from it; any attempted severance from the dominant estate must fail. The easement in the Butler Springs area is a beneficial and useful adjunct of the cattle ranch, and it would be of little use apart from the operations of the ranch. Moreover, in case of doubt, the weight of authority holds that the easement should be presumed appurtenant. Accordingly, the decision of the trial court is affirmed as to the reserved easement.

***11** 106 Idaho at 387-88, 679 P.2d at 664-665 (citations omitted).

***11** When deciding that a water right passes with the property to which it is appurtenant even though not mentioned in the deed, we reasoned by analogy from the law applicable to easements. In Bothwell v. Keefer, 53 Idaho 658, 27 P.2d 65 (1933), the issue was whether an attachment of real property which had an appurtenant water right created a lien on the water right when the water right was not mentioned in the writ of attachment. We held that an appurtenant water right passed with the land even though not expressly mentioned. In doing so, we reasoned by analogy from appurtenant easements, holding that water rights and easements were sufficiently similar to have the relevant law applicable to appurtenant easements apply to appurtenant water rights.

***12** This court has held, construing the Shannon Case [Cooper v. Shannon, 85 P. 175 (Colo.1906)], that a water right passes with the realty to which it is appurtenant unless there is intention to the contrary, and easements pass with the realty, concerning which this court has held the following: “And the general rule is that, where an easement is annexed to land, either by grant or prescription, it passes as an appurtenance with the conveyance ‘of the dominant estate, although not specifically mentioned’ in the deed, or even without the use of the term ‘appurtenances.’

'unless expressly reserved from the operation of the grant.' "

*12 Conceding that an easement is different from a water right, water rights and appliances connected therewith have been considered, so far as the point here is concerned sufficiently similar to easements, to pass with the land though not mentioned as such or as appurtenances.

*12 53 Idaho 662, 27 P.2d at 66-67 (citations omitted).

*12 Like the easement around Butler Springs in *Nelson v. Johnson*, the water rights on public lands obtained by the predecessors of Joyce Livestock were beneficial and useful adjuncts to their cattle ranches and would be of little use apart from the operations of their ranches. Indeed, the patented property alone was not sufficient to sustain a livestock operation capable of supporting a single family unit in this arid part of the country. Also, those water rights would be of little use independent of the ranch properties. It would be illogical to hold that an easement on the land surrounding a spring can be appurtenant to the cattle ranch as in *Nelson v. Johnson*, but that a water right in that spring cannot be appurtenant because the water is not used on the ranch. The sole purpose of the easement on the land surrounding the springs in *Nelson v. Johnson* was to permit the cattle to congregate there in order to drink water from the springs. We therefore hold that the district court did not err in holding that the water rights on federal land acquired by the predecessors of Joyce Livestock were appurtenant to their deeded ranches.

***12 5. A water right appurtenant to real property is conveyed with the real property unless it is expressly reserved or the parties clearly intended that the conveyance not include the water right.** The district court held that predecessors of Joyce Livestock had stockwater rights on federal land that were appurtenant to their deeded properties. The court also held that whether those appurtenant water rights passed with the land when it was conveyed depended upon the intent of the grantor. With respect to proof of that intent, the court stated, "Intent is evidenced by the terms of the instrument conveying the land, or, when the instrument is silent or ambiguous,

then by other facts and circumstances surrounding the conveyance." The district court then conducted an analysis of the documents in the record to determine whether the grantors intended to convey appurtenant water rights with the land when the water rights were not mentioned in the deeds. In doing so, the district court erred.

*13 Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention "appurtenances." *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990); *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933). Thus, the inquiry is not whether there is evidence indicating that the grantor intended to convey the water rights with the land. Rather, the inquiry is whether the water rights were expressly reserved in the deed conveying the land or whether there is clear evidence that the parties intended that the grantor would reserve them. There is nothing in the record indicating that any of Joyce Livestock's predecessors in interest intended to reserve their water rights on public land when they conveyed their ranches. Therefore, the conveyances of the land included the appurtenant water rights.

*13 The United States argues that the statute of frauds prevents a conveyance of water rights unless they are expressly mentioned in the deed. It relies upon *Olson v. Idaho Department of Water Resources*, 105 Idaho 98, 666 P.2d 188 (1983); *Gard v. Thompson*, 21 Idaho 485, 123 P. 497 (1912); and *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911). None of those cases support the position of the United States.

*13 The *Olson* case held that an executory oral agreement to settle a lawsuit by changing priority dates and amounts of use of the parties' water rights was within the statute of frauds. The *Gard* case held that merely handing water permits to another person with no intention to pass title did not constitute a conveyance of the water rights represented by the permits. The *Russell* case held that a conveyance of land included the appurtenant water rights even though they were not specifically mentioned in the deed.

*13 The deeds executed by Joyce Livestock's predecessors conveyed the land and, under the law, any appurtenances including water rights. No separate writing or express mention of the water rights was required by the statute of frauds. A separate writing would be required if there had been an attempt to convey the water rights separately.

B. Did the District Court Err in Determining the Priority Date of Joyce Livestock's Water Right?

*13 Joyce Livestock claimed twenty different places of use along Jordan Creek. The district court determined that the earliest priority would be April 26, 1935, the date that a predecessor-in-interest John T. Shea applied for a grazing permit under the Taylor Grazing Act. In making that determination, the district court held that it would not recognize any earlier priority absent an historical document acknowledging the existence of the water rights or showing where cattle were grazed.

*13 On April 26, 1935, Shea applied for a grazing permit under the Taylor Grazing Act, which had been enacted the preceding year. In that application, he stated that he had been grazing specified areas of federal rangeland for ten years. Likewise, on June 12, 1935, Joyce Bros. Livestock Co. submitted an application for a grazing permit on federal rangeland. In that application, it stated that it began using that rangeland in 1866. The district court held that because these applications for grazing permits did not state that Shea and Joyce Bros. Livestock Co. believed they had water rights on the federal rangeland, they could not have had any such water rights. The court held, however, that they did obtain water rights by grazing their livestock on that same rangeland pursuant to the grazing permits subsequently issued. In making this determination, the district court erred in several respects.

*14 First, it held that it would not recognize instream water rights on federal rangeland unless the applications for grazing permits identified those water rights. These predecessors of Joyce Livestock filed applications for grazing permits, not applications for water rights. The federal government could not grant water rights under the applicable law.

*14 Second, the district court apparently construed certain answers on the applications as disclaiming any water rights on federal rangeland. The application completed by Shea included a question asking, "Do you own or control any source of water supply needed or used for livestock purposes? Describe it?" Shea answered, "Usual water right acquired with lands under the laws of Idaho." The district court upheld the special master's finding that Shea's answer referred to water sources on his deeded land. Based upon that interpretation, the district court held that Shea's answer indicated he did not believe he owned any water rights on federal rangeland, and therefore he could not have intended to convey any such water rights. The identical question was included on the application completed by Joyce Bros. Livestock Co., and the answer did not identify any water rights on federal land. The district court likewise concluded that Joyce Bros. Livestock Co. therefore did not have any water rights on federal land when it made the application.

*14 The question did not ask whether the applicant for a grazing permit claimed any water rights on federal land. It asked him whether the applicant owned or controlled any source of water needed or used for livestock purposes. A water right does not make the appropriator the owner of the source of water, nor does it give the appropriator control over that source. Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909) (the right to divert all of the water out of a watercourse during the irrigation season does not make the appropriator the sole and exclusive owner of the watercourse). It does not even make the appropriator the owner of the water. We have long recognized that an appropriator may not waste water, but must permit others to use the water when the appropriator is not applying it to a beneficial use. Hall v. Bluckman, 8 Idaho 272, 68 P. 19 (1902) (although the owner of real estate need not make or allow any use of the land, an appropriator cannot waste the water but must permit others to use it when the appropriator is not applying it to a beneficial use). A water right simply gives the appropriator the right to the use of the water from that source, which right is superior to that of later appropriators when there is a shortage of water.

*14 The abandonment of water rights requires both the intent to abandon and the actual surrender or relinquishment of the water rights. Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981). "The intent to abandon a water right must be evidenced by clear, unequivocal and decisive acts and mere non-use is not per se abandonment." *Id.* at 847, 623 P.2d at 459. Nothing in the grazing applications states that the failure to list all water rights claimed will constitute an abandonment of the water rights. The failure to list a water right in the application for a grazing permit would not constitute clear and unequivocal evidence of an intent to abandon the omitted water right, nor would it show non-use of the water right.

*15 Third, the district court failed to give consideration to the fact that at least Shea was issued Class 1 grazing rights. The significance of Class 1 grazing rights was explained by the United States Supreme Court in Public Lands Council v. Babbitt, 529 U.S. 728, 734 (2000) (emphasis theirs). "The rules [for allocating grazing privileges under the Taylor Grazing Act] consequently gave a first preference to owners of stock who also owned 'base property,' i.e., private land (or water rights) sufficient to support their herds, and who had grazed the public range during the five years just prior to the Taylor Act's enactment." A Class 1 permit could have been issued to Shea only if he had been grazing the public range for at least five years prior to the enactment of the Taylor Grazing Act in 1934.

*15 Any water rights obtained by Joyce Livestock's predecessors must be based upon their application of the water to a beneficial use by grazing livestock where they would have access to the water sources at issue. Their water rights are not based upon whether or not there are historical documents indicating that they claimed or believed they had acquired water rights. Their claim was not based upon the permit system of obtaining a water right but upon the constitutional method of appropriation.

*15 The district court was correct in holding that it must examine where the individual predecessors grazed their livestock when determining whether they had acquired any water rights. When purchasing the various parcels of land and their appurtenant water

rights, Joyce Livestock could acquire no greater water rights than the grantor had. Beecher v. Cassia Creek Irrigation Co., 66 Idaho 1, 154 P.2d 507 (1944).

*15 Because the district court erred in its analysis of Joyce Livestock's priority, we vacate that part of the judgment and remand this case for a redetermination of priority in a manner consistent with this opinion.

C. Did the District Court Err in Denying Joyce Livestock's Request for an Award of Attorney Fees under Idaho Code § 12-121 and 28 U.S.C. § 2412(d)?

*15 The district court found that Joyce Livestock was the prevailing party in this litigation. Joyce Livestock requested an award of attorney fees against the United States pursuant to Idaho Code § 12-121 and 28 U.S.C. § 2412(d). The district court denied the requested award under § 12-121 on the ground that the United States did not assert a claim or defense frivolously, unreasonably, or without foundation. The district stated that there were two issues of first impression: whether the administration of grazing allotments on federal land was sufficient to support the claim of the United States to an instream appropriation of water and whether instream water rights obtained by ranchers on federal land were appurtenant to the ranchers' deeded properties. The district court stated, "The 'bottom-line' in this matter is that the issues pertaining to the ownership of stockwater rights on the public domain are not well settled.... Additionally, the resolution of these issues is conflicting among other states." The district court also denied the request for an award of attorney fees pursuant to 28 U.S.C. § 2412(d). It held that the position of the United States in this litigation was substantially justified in that it had a reasonable basis in law and fact. Based upon that finding, the district court declined to address whether 28 U.S.C. § 2412(d) authorized state courts to award attorney fees. Joyce Livestock asserts on appeal that the district court erred in denying its request for an award of attorney fees.

*16 "An award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discre-

tion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation.” McGrew v. McGrew, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). “If there is a legitimate, triable issue of fact or a legitimate issue of law, attorney fees may not be awarded under this statute even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation.” Thomas v. Madsen, 142 Idaho 635, 639, 132 P.3d 392, 396 (2006).

*16 There was at least one legitimate issue of law presented in this case. We had not previously addressed whether instream water rights in water sources not located on the appropriator’s land could be appurtenant to the appropriator’s real property. The district court therefore did not err in denying Joyce Livestock’s request for attorney fees under Idaho Code § 12-121.

*16 Joyce Livestock also challenges the district court’s denial of its request for an award of attorney fees pursuant to subsection (d) of 28 U.S.C. § 2412, which provides:

*16 (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) ... brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

*16 Joyce Livestock argues that the statute permits “any court having jurisdiction of the action” to award attorney fees and the district court had jurisdiction over the United States pursuant to the McCarran Amendment, 43 U.S.C. § 666. The United States argues that the statute does not constitute a waiver of sovereign immunity permitting state courts to award attorney fees against the United States. The United States Supreme Court has not addressed the issue of whether the statute applies to litigation in state courts.

*16 “There is no doubt that waivers of federal sovereign immunity must be ‘unequivocally expressed’ in

the statutory text.” United States v. Idaho Dept. of Water Resources, 508 U.S. 1, 6 (1993). In Kennecott Copper Corp. v. State Tax Comm’n, 327 U.S. 573 (1946), the United States Supreme Court held that a Utah statute authorizing actions to recover taxes to be brought against the state “in any court of competent jurisdiction” did not include federal courts. In so holding, the Court noted that a clear indication of a state’s consent to suit against itself in federal court is required because of the direct impact such litigation upon the state’s finances. Although the Kennecott case dealt with a state’s waiver of sovereign immunity, such waiver is closely analogous to the federal government’s waiver of sovereign immunity. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

*17 The statute at issue is part of the Equal Access to Justice Act (EAJA). “The EAJA renders the United States for attorney’s fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States.” Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 137 (1991). The EAJA states, “[C]ourt” includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims.” 28 U.S.C. § 2412(d)(2)(F). Had the Congress intended that the word “court” also include state courts, it undoubtedly would have expressly included them. Since the EAJA involves a partial waiver of sovereign immunity by the United States, it is much more unlikely that the word court would be construed to include state courts than it is that it would be construed to include the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims. If Congress had intended that state courts also be included, it certainly would also have included a specific reference to them. We therefore hold that 28 U.S.C. § 2412(d) does not authorize state courts to award attorney fees against the United States. We affirm the district court’s denial of Joyce Livestock’s request for an award of attorney fees under that statute.

D. Did the District Court Err in Denying the United States’s Claim for a Water Right for Watering Stock?

*17 The United States claimed instream water rights for stock watering based upon its ownership and control of the public lands coupled with the Bureau of Land Management's comprehensive management of public lands under the Taylor Grazing Act. The district court held that such conduct did not constitute application of the water to a beneficial use, and denied the claimed water rights. The United States appealed that ruling.

*17 Under the constitutional method of appropriation, "a water user could make a valid appropriation without a permit, most commonly by diverting the water and putting it to beneficial use." State v. U.S., 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). Because no diversion is required in order to obtain a water right for stock watering under the constitutional method, *Id.*, the United States could obtain water rights for stock watering simply by applying the water to a beneficial use. Whether by implied license, Buford v. Hout, 133 U.S. 320 (1890), or express permission after the enactment of the Taylor Grazing Act, the United States has permitted ranchers to graze their livestock on public lands. The United States has not, however, used any of the water at issue to water its livestock. Under Idaho law, a landowner does not own a water right obtained by an appropriator using the land with the landowner's permission unless the appropriator was acting as agent of the owner in obtaining that water right.

*17 This court has repeatedly held that a water right is not necessarily appurtenant to the land on which it is used and may be separated from it, and this is the general rule.

*18 If the water right was initiated by the lessee, the right is the lessee's property, unless the lessee was acting as the agent of the owner.

*18 First Security Bank of Blackfoot v. State, 49 Idaho 740, 746, 291 P. 1064, 1065 (1930). The United States does not contend that any of the ranchers who obtained the water rights at issue did so as an agent of the United States. The Taylor Grazing Act expressly recognizes that the ranchers could obtain their own water rights on federal land. The United States seeks to distinguish First Security Bank of Blackfoot v. State on the ground that the appropriator in that case was a tenant while the ranchers in this

case were licensees. That is a distinction without a difference.

*18 Under Idaho law, an appropriator need not have a possessory interest in the land upon which the water source is located in order to obtain a water right. "[I]n this state one may have a valid appropriation though only a temporary and revocable way of conveyance for his water; diversion and application to a beneficial use being the two essentials." Morgan v. Udy, 58 Idaho 670, 680, 79 P.2d 295, 299 (1938). The limitation is that a water right cannot be initiated by trespass upon private property. Lemmon v. Hardy, 95 Idaho 778, 519 P.2d 1168 (1974).

*18 The United States cites Idaho Code § 42-501 in support of its argument that it acquired water rights in the water sources on the federal land at issue in this case. That statute, enacted in 1939,^{FN3} permits the Bureau of Land Management to "appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain" by using the permit procedure for obtaining a water right. The United States does not contend that it attempted to obtain any water rights by complying with the statute. Rather, it argues that if it could have obtained a water right under the statute without actually using any of the water, it should also be able to do so under the constitutional method of appropriation.

FN3. As enacted in 1939, the statute provided:

The division of grazing of the department of Interior of the United States may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain. The department of Reclamation shall, upon application in such form and of such content as it shall by rule prescribe issue permit and license and certificate of water right within a reasonable time in such form as it shall prescribe for such appropriation. With each such application there shall be paid to the department of Reclamation a fee of one dollar and there shall be no further fee required for the issuance of the permit or license and certificate of water right, nor for any other proceedings in connection

with such application. Such permit, license and certificate of water right shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefore on the public domain. The maximum flow for which permit, license and certificate of water right may issue hereunder shall be five miner's inches, and the maximum storage for which permit, license and certificate of water right may issue hereunder shall be fifteen acre feet in any one storage reservoir.

Ch 205, § 1, 1939 Idaho Sess. Laws 412, 413. The statute was amended in 1971 to change the "division of grazing" to the "bureau of land management," to change the "department of reclamation" to the "department of water administration," and to set the application fee at \$10.00. Ch. 152, § 1, 1971 Idaho Sess. Laws 752.

***18** The constitutional method of appropriation requires that the appropriator actually apply the water to a beneficial use. Sarret v. Hunter, 32 Idaho 536, 541, 185 P. 1072, 1074 (1919); Reno v. Richards, 32 Idaho 1, 178 P. 81 (1918). If that use is stock watering, then the appropriator must actually water stock. The constitutional method of appropriation and the permit method were two separate means for acquiring water rights. A statute creating a procedure for obtaining a water right under the permit system does not amend the constitutional method for obtaining a water right.

***18** In State v. U.S., 134 Idaho 106, 996 P.2d 806 (2000), the United States claimed a nondiversionary water right for wildlife habitat under the constitutional method of appropriation. It based its claim upon our opinion in State, Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974), where we upheld the ability of the Department of Parks to comply with a statute directing it to utilize the permit process to appropriate the unappropriated natural spring flow of Malad Canyon for scenic beauty and recreation without having to make a physical diversion of the water. We held that our opinion in the *State, Department of*

Parks case did not support the claimed constitutional appropriation because the water right at issue there was made pursuant to the permit system of appropriation, not the constitutional method. "The limited public purpose exception stated in *State, Department of Parks* does not support the United States' claim because it applies only to appropriations made under Idaho's permit system." 134 Idaho at 112, 996 P.2d at 812. We concluded, "The United States has not requested, pursuant to I.C. § 42-1504, that the Idaho Water Resource Board file an application for appropriating a minimum streamflow for Smith Springs. Therefore, the limited public purpose exception does not apply to its claim." *Id.*

***19** The same reasoning applies here. The United States has not sought a water right pursuant to Idaho Code § 42-501. Rather, it bases its claim upon the constitutional method of appropriation. That method requires that the appropriator actually apply the water to a beneficial use. Since the United States has not done so, the district court did not err in denying its claimed water rights.

***19** The United States contends that the denial of its claimed water rights conflicts with the Taylor Grazing Act and any requirement of state law that it actually apply the water to a beneficial use is invalid under the Supremacy Clause of the Constitution of the United States. The United States does not point to any provision of the Taylor Grazing Act allegedly in conflict with Idaho water law. Rather, it claims that application of Idaho water law to it would violate the purposes underlying the Act. It argues,

***19** Recognition of a private appropriative water right to take water from streams on public lands in the course of grazing would likewise effectively lead to monopoly of federal grazing and interfere with federal administration of the lands *unless* the ability of others to graze there under permit by BLM under the Taylor Grazing Act is preserved through a decree of stock water rights to BLM that could be used by common and future permittees.

***19** The argument of the United States reflects a misunderstanding of water law.

***19** A water right does not constitute the ownership

of the water; it is simply a right to use the water to apply it to a beneficial use. Idaho Conservation League, Inc. v. State, 128 Idaho 155, 911 P.2d 748 (1995). "In the absence of a beneficial use, actual or at least potential, a water right can have no existence." Strong v. Twin Falls Canal Co., 44 Idaho 427, 434, 258 P. 173, 175 (1927). A person who is not applying the water to a beneficial purpose cannot waste it or exclude others from using it. Hall v. Blackman, 8 Idaho 272, 68 P. 19 (1902). Ownership of a water right does not include the right to trespass upon the land of another in order to access the water. Braunson v. Miracle, 107 Idaho 221, 227, 687 P.2d 1348 (1984). Indeed, Idaho law could not authorize anyone to trespass upon federal land. Joyce Livestock cannot water its livestock at water sources located on federal rangeland unless the government grants it permission to have its livestock on such land. It also cannot transfer the place of use of the water without first obtaining permission after following the required statutory procedure. First Sec. Bank of Blackfoot v. State, 49 Idaho 740, 291 P. 1064 (1930); I.C. § 42-108.

*19 Other than making the assertion, the United States has been unable to explain how denying its claim or affirming the water rights of Joyce Livestock will in any way lead to a monopoly of the federal rangelands. As the United States has held, Congress has severed the ownership of federal lands from the ownership of water rights in nonnavigable waters located on such lands. Lakes v. Fox, 300 U.S. 82, 95 (1937); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 161 (1935). Joyce Livestock's ownership of water rights in water sources located on federal rangeland would not give Joyce Livestock a possessory interest in the rangeland. It does not give Joyce Livestock ownership or control of the water sources. Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909). Such water rights would not give Joyce Livestock the right to interfere with the government's administration of the rangeland, nor would it give Joyce Livestock the right to exclude from that rangeland others who had been granted permission by the government to be there.

E. Is Joyce Livestock Entitled to an Award of Attorney Fees on Appeal?

*20 Joyce Livestock seeks an award of attorney fees on appeal pursuant to Idaho Code § 12-121 and 28 U.S.C. § 2412(d). As we have held, the latter statute does not authorize state courts to award attorney fees against the United States.

*20 Attorney fees can be awarded on appeal under Idaho Code § 12-121 only if the appeal was brought or defended frivolously, unreasonably, or without foundation. Gustaves v. Gustaves, 138 Idaho 64, 57 P.3d 775 (2002). If there is a legitimate issue presented by the appeal, attorney fees cannot be awarded under this statute. Lamprecht v. Jordan, 139 Idaho 182, 75 P.3d 743 (2003); D & M Country Estates Homeowners Ass'n v. Romriell, 138 Idaho 160, 59 P.3d 965 (2002). The United States has presented a legitimate issue of whether water rights on federal rangeland can be appurtenant to real property owned by the appropriator. We had not previously addressed that issue. We therefore deny Joyce Livestock's request for an award of attorney fees on appeal.

IV. CONCLUSION

*20 We affirm the judgment of the district court holding that Joyce Livestock has established a water right, disallowing the water right claims of the United States, and denying Joyce Livestock's request for an award of attorney fees. We vacate the district court's determination of the priority date(s) of Joyce Livestock's water rights and remand this case for redetermination of such priority date(s) in a manner consistent with this opinion. We deny Joyce Livestock's request for an award of attorney fees on appeal.

Chief Justice SCHROEDER, and Justices TROUT, BURDICK and JONES concur.
Idaho, 2007.

In re SRBA Case No. 39576

--- P.3d ----, 2007 WL 428947 (Idaho)

Briefs and Other Related Documents ([Back to top](#))

- [2006 WL 3293504](#) (Appellate Brief) Appellant's Reply Brief (Oct. 19, 2006)
- [2006 WL 3247034](#) (Appellate Brief) Brief for the United States as Respondent (Oct. 16, 2006)
- [2006 WL 3247018](#) (Appellate Brief) United States' Reply Brief as Appellant in No. 32279 (Oct. 13,

--- P.3d ----

--- P.3d ----, 2007 WL 428947 (Idaho)

(Cite as: --- P.3d ----)

2006)

- [2006 WL 3247019](#) (Appellate Brief) Appellant's Reply Brief (Oct. 12, 2006)
- [2006 WL 3087806](#) (Appellate Brief) Appellant's Opening Brief (Sep. 28, 2006)
- [2006 WL 3328093](#) (Appellate Brief) Brief Amicus Curiae of Pacific Legal Foundation, Idaho Farm Bureau Federation, Custer County Farm Bureau, Idaho County Farm Bureau, Owyhee Cattlemen's Association, Owyhee County Farm Bureau, Senator Skip Brandt, Bill & Betty Deveny, Mike Hanley, Jerry L. Hoagland, and Brad & Mary Huff to File Brief Amicus Curiae in Support of Appellant Joyce Livestock Company (Jul. 11, 2006)
- [2006 WL 2291239](#) (Appellate Brief) United States' Answering Brief as Respondent in No. 32278 (Jun. 15, 2006)
- [2006 WL 1981517](#) (Appellate Brief) Joyce Livestock's Responsive Brief as Respondent in No. 32279 (Jun. 14, 2006)
- [2006 WL 1287383](#) (Appellate Brief) United States' Opening Brief AS Appellant In No. 32279 (Apr. 19, 2006) Original Image of this Document (PDF)
- [2006 WL 1287382](#) (Appellate Brief) Appellant's Opening Brief (Apr. 17, 2006) Original Image of this Document (PDF)

END OF DOCUMENT