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DEPARTMENT OF
WATER RESOURCES

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and Lexington Hills, Inc.

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

In Re: SRBA

Case No. 39576

Subcase Nos. 63-00123D, 63-00123F &
63-00123G

**RESPONSE TO LEXINGTON HILLS
HOMEOWNERS ASSOCIATION'S
MOTION FOR SUMMARY
JUDGMENT**

This brief presents East Hills Development LLC's and Lexington Hills, Inc.'s (collectively "Lexington") response to the Lexington Hills Homeowners' Association's (the "Association") Motion for Summary Judgment. The Association incorrectly argues the Court should reject IDWR's recommendations allocating portions of the Jacobs water right ("Jacobs Right") to Lexington and instead consolidate ownership of the right entirely with the Association. The Association's motion fails because it is premised on the faulty factual premise that Lexington did not expressly reserve the Jacobs Right in deeds conveying common areas to the Association. In fact, Lexington made an express reservation of water and then subsequently conveyed only a 2.388 cfs portion of the Jacobs Right to the Association. This quantity is consistent with the irrigation requirement for the irrigated areas in the Lexington Hills

Subdivision (the “Subdivision”). Accordingly, the Court should decree the rights at issue as follows:¹

Water Right No.	Quantity (cfs)	Owner
63-00123D	0.5246	East Hills Development LLC
63-00123F	1.692	Lexington Hills, Inc.
63-00123G	2.388	Lexington Hills Homeowners’ Association

STANDARD OF REVIEW

The Association correctly identifies the appropriate standard of review in its motion, noting that summary judgment is appropriate where the moving papers and responses show there is no genuine issue of material fact. The Association also correctly points out that all controverted facts and all reasonable inferences must be construed in favor of the non-moving party. Applying this standard in this case mandates judgment in favor of Lexington that decrees the rights at issue consistent with the allocation in the chart above.

UNDISPUTED FACTS

The cross motions for summary judgment filed in this case make clear that few facts are contested. Both sides agree that:

- Lexington acquired 4,605 cfs of the Jacobs Right when it acquired the lands upon which it built the Subdivision.
- In 1992, prior to developing the Subdivision and prior to conveying any lots in the Subdivision, Lexington recorded a Declaration of Covenants, Conditions, Restrictions and

¹ This chart represents a change from IDWR’s recommendations in that it recognizes Lexington’s concession, made in its Motion for Summary Judgment, that IDWR’s recommendations for rights 63-00123G and 63-00123F do not accurately reflect the fact that Lexington has deeded a total of 2,388 cfs to the Association.

Easements for Lexington Hills (“Master Declaration” or “CCRs”) in the Ada County real property records that was made applicable to the entire Subdivision.

- Article V the Master Declaration includes the following language reserving water rights: “Notwithstanding anything to the contrary contained in this Declaration, [Lexington] expressly reserves unto: (d) Itself all water and water rights over, upon or under or appurtenant to the [Subdivision] Property, or any portion thereof” (Arrington Aff. Ex. T.)²

The provision goes on to say that surface water for irrigation “will be conveyed to the Association as each plat is recorded.” (*Id.*)

- Lexington subsequently conveyed Subdivision lands and water rights to the Association via sixteen deeds (the “Common Area Deeds”) Of these, fifteen expressly are made “SUBJECT TO the [Master Declaration].” (Arrington Aff. Exs. D through R.) The sixteenth is for a 216 square foot parcel that is of no consequence to this motion.³

- Six of the deeds expressly convey portions of the Jacobs Right totaling 2.388 cfs.

The other 10 deeds do not convey any water rights.

- Lexington designed the Association’s irrigation system based on an irrigation requirement of 0.65 inches of water per acre. (Roylance Aff. ¶¶ 4 and 7, Ex. D.)

² The Association’s Memorandum in Support of its Motion for Summary Judgment (hereinafter, “Association Memorandum”) conspicuously fails to make any mention of this provision, but we nevertheless assume that the Association does not dispute this provision exists because it is included in Mr. Arrington’s affidavit supporting the Association’s motion

³ This is of no consequence because (1) the recorded Master Declaration served as constructive notice of Lexington’s reservation of water rights contained therein, (2) the amount of water that might be disputed as to this 216 square foot parcel is so miniscule as to make it immeasurable, and (3) Lexington has already conveyed sufficient water rights to irrigate this parcel. Lexington does not include the deed for the 216 square foot parcel as one of the Common Area Deeds

- The Subdivision contains approximately 177 acres of irrigable area. (*Id.* ¶ 7, Ex. E)

Thus, at 0.65 inches per acre, the irrigation requirement of the Association's system is approximately 115 inches, or 2.3 cfs. (*Id.* ¶ 7.)

- The Association has conveyed a total of 2.45 cfs to the Association: 2.388 cfs under the Jacobs Right, and 0.06 cfs under other rights. (*Id.*)

- The Association has rejected Lexington's overture to truth check the theoretical irrigation requirement by installing a flow meter on the Association's system. (*Id.* ¶ 8.)

These undisputed facts mandate judgment rejecting the Association's claim to all the Jacobs Right and decreeing it only the 2.388 cfs portion Lexington has conveyed.

ARGUMENT

It is undisputed that Lexington expressly reserved all Subdivision water rights to itself in the recorded Master Declaration prior to developing the Subdivision. It is further undisputed that Lexington conveyed only a 2.388 cfs portion of the Jacobs Right to the Association through express water rights conveyances in six of the Common Area Deeds. Nor is there a dispute that this quantity of water, in combination with a small amount of water under other rights, is more than sufficient to supply the irrigation water needed for the post-development irrigable areas in the Subdivision. Notwithstanding these undisputed facts, the Association asserts the Court should divest Lexington of its portion of the Jacobs Right and give it to the Association. As discussed below, the law does not support the Association's argument.

I. The Master Declaration Expressly Reserves All Of The Jacobs Right To Lexington.

The Association repeatedly asserts that Lexington "failed to reserve any water" in its conveyances to the Association and that nine of the Common Area Deeds are "silent [with regard] to the water." (*See, e.g.,* Association Memorandum, pp. 6, 9 and 10.) This is a curious

assertion given the uncontroverted fact that the Master Declaration expressly reserves all water rights, and all of the Common Area Deeds expressly make the conveyance subject to the Master Declaration, including the express water right reservation. It thus appears the Association's argument is that a reservation by reference is not legally sufficient. *Id.* (citing *Joyce Livestock v United States*, ___ P.3d ___, 2007 WL 428947, *12-13 (Feb. 9, 2007)). This is not the law. The Court in *Joyce Livestock* reiterated long-held Idaho law that water rights pass with a land conveyance "[u]nless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them." *Id.* at *13.

The reservation of water in the Master Declaration is express and could not be clearer. Nor could the reference to the Master Declaration in the Common Area Deeds. These facts end the matter. Under *Joyce Livestock*, the grantor, Lexington, clearly reserved the Jacobs Right to itself.

Moreover, Idaho law clearly sanctions express reservations through incorporation by reference. *Roos v. Belcher*, 79 Idaho 473, 482, 321 P.2d 210, 215 (1958) (holding that "a reference being definite and certain, and being to an instrument which is recorded in a public office, accessible to all interested parties, we find no legal objection to such incorporation"). And, even apart from the incorporation language in the Common Area Deeds, the Master Declaration standing alone works an effective reservation of the Jacobs Right. The Master Declaration was recorded in Ada County's real property records and thus provided constructive notice to all subsequent purchasers that Lexington reserved the water rights appurtenant to the Subdivision lands. See I.C. § 55-801 ("[a]ny instrument or judgment affecting the title to or possession of real property may be recorded"); I.C. § 55-811 (a recorded instrument "is constructive notice of the contents thereof to subsequent purchasers"). See also *West Wood*

Investments, Inc. v. Acord, 141 Idaho 75, 85, 106 P.3d 401, 411 (2005) (recorded CCRs are “notice to the world” of the contents); *Miller v. Simonson*, 140 Idaho 287, 92 P.3d 537 (2004) (even improperly recorded CCRs provide constructive notice of the contents). Lexington executed all deeds after the Master Declaration was recorded. The Association therefore took those deeds with constructive notice that Lexington reserved all water rights in Article V(d).

The facts and law simply do not support the Association’s argument that Lexington did not reserve the Jacobs Right.

II. Lexington Expressly Conveyed Only 2.388 Of The Jacobs Right To The Association.

A. The Common Area Deeds and the Master Declaration Unambiguously Confirm Lexington’s Intent to Convey Only the Portion of the Jacobs Right Needed by the Association.

When it came time for Lexington to transfer ownership of water rights to the Association, Lexington expressly did so with specific conveyances. There is no dispute that six of the Common Areas Deeds expressly convey portions of the Jacobs Right, and that the total amount conveyed in these deeds is 2.388 cfs. These undisputed facts and the express reservation in the Master Declaration notwithstanding, the Association argues Lexington unwittingly conveyed the rest of the Jacobs Right in the nine subsequent Common Area Deeds by expressly choosing not to convey any water. (Association Memorandum, pp. 9-11.) This argument is based on the Association’s faulty presumption as to Lexington’s intent that is not supported by the undisputed facts or the law.

The undisputed facts point to the opposite conclusion than that suggested by the Association. Lexington’s express conveyance of water rights in six deeds, coupled with the subsequent express absence of a conveyance in later deeds, clearly demonstrates Lexington’s intent *not* to continue conveying water. And because the Master Declaration expressly reserved the water rights, it would take an express conveyance to then transfer ownership. Accordingly,

Lexington only conveyed water to the Association when it expressly identified the water rights it was conveying in the first six Common Area Deeds. These deeds present a plain and unambiguous intent by Lexington to convey only 2.388 cfs of the Jacobs Right. Accordingly, the Court should not decree any more than 2.388 cfs to the Association under right 63-00123G. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (“If the language of a deed is plain and unambiguous, the intention of the parties must be ascertained from the deed itself and extrinsic evidence is not admissible.”).

The Association attempts to cast doubt on Lexington’s clear intent by pointing to language from the water right reservation section in the Master Declaration that states “[s]urface water for irrigation appurtenant to each phase *will be* conveyed to the Association as each plat is recorded.” (Emphasis added). The Association effectively argues that this language itself is a conveyance. This future tense language, however, does not effect a conveyance. 23 Am. Jur. 2d Deeds § 13 (2002) (“In order to transfer title, an instrument must contain apt words of grant which manifest the grantor’s intent to make a present conveyance . . . , as distinguished from an intention to convey it at some future time.” (Footnotes omitted)). This language simply states that, despite Lexington’s complete reservation of water rights, it would later convey that portion of the rights needed to irrigate the Subdivision. That is precisely what Lexington did, through clear, unambiguous and express grants of water rights in the first six Common Area Deeds.

B. Lexington’s Intent to Convey Only a Portion of the Jacobs Right Is Confirmed By the Undisputed Facts Offered By the Grantor.

Lexington’s intent to reserve all water rights and convey only as much water as the Subdivision required for its irrigation needs is evident and clear from the deeds and Master Declaration. However, to the extent any ambiguity exists about the matter, it is resolved by the undisputed facts presented by David H. Roylance in his affidavit.

Mr. Roylance was on Lexington's Board of Directors and was Lexington's project manager and project engineer during the entire development of the Subdivision, including when Lexington recorded the Master Declaration as well as when Lexington executed each deed to the Association (Roylance Aff. ¶¶ 1, 3, 5 and 6) In addition, Mr. Roylance was on the Association's Board of Directors at all relevant times. (*Id.* ¶¶ 2 and 6)

According to Mr. Roylance, Lexington never intended to convey all water rights to the Association because Lexington knew from the project's inception that the Subdivision would not require all of the water rights to meet its irrigation needs. (*Id.* ¶¶ 5-6.) Mr. Roylance's assertion is supported by a 1991 study commissioned by Lexington prior to developing the Subdivision, showing that the Subdivision would only require 50% of the water rights acquired by Lexington with the Subdivision lands. (*Id.* ¶¶ 4-5, Ex. D at p. 5) Armed with this knowledge, Lexington executed and recorded the Master Declaration—including Article V(d)—with the intention of reserving unto itself all water rights appurtenant to the Subdivision lands, and then later conveying to the Association the quantity of water rights the Subdivision would require to meet its irrigation needs, but not additional water the Association could not put to beneficial use on non-irrigated lands within the Subdivision. (*Id.* ¶ 5.) Mr. Roylance explains that the subsequent deeds to the Association were each made subject to the Master Declaration to incorporate, among other things, Article V(d)'s express reservation of all water rights unto Lexington. (*Id.* ¶ 6.) Mr. Roylance further explains that Lexington expressly conveyed water rights to the Association in six deeds, but then stopped conveying water once Lexington determined it had likely conveyed sufficient water rights to meet the Subdivision's irrigation needs at full build-out (*Id.*) Finally, Mr. Roylance explains that in 2001 (following the Subdivision's full build-out) Lexington commissioned another study to determine whether it had indeed conveyed

sufficient water rights to the Association to meet the Subdivision's irrigation needs. (*Id.* ¶ 7, Ex. E.) This study confirmed Lexington had conveyed more than sufficient water rights. (*Id.*) In sum, Mr. Roylance confirms what the Common Area Deeds show on their face—that Lexington intended to convey only 2.388 cfs of the Jacobs Right to the Association.

The Association has not offered any evidence supporting its assertion that the parties intended for the Association to receive all of the Jacobs Right. Mr. Roylance's sworn affidavit and its supporting documentation, on the other hand, show clearly that the intent was to convey only the 2.388 cfs the Subdivision needs for irrigating its lands.

III. The Association Does Not Need Any Additional Water to Irrigate the Subdivision.

Finally, the Association suggests it would be unfair if it does not receive all 4.605 cfs of the Jacobs Right because portions of the Subdivision lands would be without water rights. (Association Memorandum, p. 11.) This assertion is unfounded. The Idaho Department of Water Resources' recommendation for the Association's water right number 63-00123G includes the entire Subdivision as the place of use, and no objections have been filed as to this aspect of the water right. Accordingly, the Association can use the entire 2.388 cfs throughout the Subdivision, which is more than enough water to properly irrigate the 177 irrigable acres in Subdivision. Indeed, because the irrigation system is designed to apply 0.65 inches per acre to the irrigated lands (for a total of 115 inches, or 2.3 cfs), and because Lexington has conveyed a total of 2.45 cfs to the Association (2.388 of the Jacobs Right and 0.06 cfs under other rights), the Association has more than enough water to irrigate the Subdivision. (Roylance Aff. ¶ 7.)⁴

⁴ Lexington has offered to split the cost of installing flow metering equipment on the Subdivision's irrigation system as another means of assessing whether the Association has sufficient water rights to meet the Subdivision's irrigation needs. The Association, however, has rejected Lexington's offers to install such equipment (Roylance Aff. ¶ 8.)

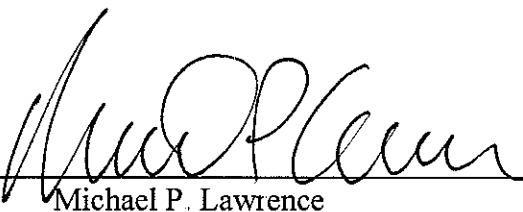
Consequently, the Association has no legitimate claim to the water,⁵ and the Court should deny the Association's motion.

CONCLUSION

As discussed above, the Association is not entitled to summary judgment other than to adjust its right to a quantity of 2 388 cfs in accordance with the quantity of water Lexington has conveyed to the Association.

DATED this 26TH day of March, 2007.

 FOR
John M. Marshall


Michael P. Lawrence

⁵ Because it does not need and cannot beneficially use the water rights for irrigation, the Association presumably wants the rights so that it can sell them for profit. This clearly is not the intent of the developer. In addition to the Master Declaration's express reservation of water, the Association's Articles of Incorporation state "[t]his Association does not contemplate financial gain or profit." (Roylance Aff. Ex. B, art. IV.)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed on March 26th 2007, with sufficient first-class postage to the following:

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