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DEPARTMENT OF
WATER RESOURCES

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

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

In Re: SRBA

Case No. 39576

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

**MEMORANDUM IN SUPPORT OF
MOTION IN LIMINE**

Lexington Hills, Inc. ("Lexington Hills") files this Memorandum in Support of its Motion in Limine, the purpose of which is to avoid the presentation of argument and exhibits at trial that are not relevant to the sole factual question left for determination in this case.

- 1. The sole question for trial is whether Lexington Hills is obligated to convey any additional portions of water rights 63-123D and 123F to the Lexington Hills Homeowners Association to irrigate the Subdivision.**

On April 18, 2007, this Court issued a Memorandum Decision and Order on Cross Motions for Summary Judgment ("Order") in the above-captioned subcases. The Court summarized the dispute as follows: "The above-captioned subcases involve a dispute over the ownership of water rights between the [parties]." (Order at 1.) The Order goes on to analyze the parties' respective arguments about ownership and concludes that Lexington Hills had conveyed

2.388 cfs to the Homeowners, rejecting the Homeowners' arguments that Lexington Hills had conveyed all 4.605 cfs of the appurtenant water right to the Homeowners. The Order holds that Lexington expressly reserved to itself water right 63-123 and obligated itself to convey only that portion of it to the Homeowners necessary to irrigate the Lexington Hills Subdivision. The Order grants Lexington Hills' motion for summary judgment, but consistent with Idaho Rule of Civil Procedure 56(d), the Court framed a single remaining issue left for trial: "Has [Lexington] transferred water rights to [Homeowners] in an amount that it obligated itself to transfer in the Master Declaration?" (Order at 12.) The Court ruled that pursuant to the Master Declaration Lexington Hills "intended to reserve all water rights, but to obligate itself, as the development proceeded, to transfer sufficient water rights to the Lexington HOA." (Order at 8.) Thus, the sole issue remaining in the case is whether Lexington Hills conveyed "sufficient water rights" to the Homeowners pursuant to the Master Declaration.

Following the Court's Order the parties agreed to address this factual question by exchanging expert testimony in advance of trial by addressing two questions: 1) the number of irrigated acres within the subdivision; and 2) and the quantity of water necessary to irrigate those acres. The parties have exchanged expert reports as agreed, and the two questions are squarely framed for presentation to and decision by the Court. However, in their expert report, the Homeowners have raised additional issues not relevant to the remaining issue in this case as framed by the Court. Consequently, Lexington Hills files its Motion in Limine to preserve the efficiency of the upcoming trial by seeking an order that clarifies that the trial is limited to resolving the ownership dispute through presentation of facts and opinion about the quantity of water needed to properly irrigate the Subdivision.

2. The future transferability of Lexington Hills' water rights 63-123D and 123F are not relevant to the ownership dispute at issue in this case.

In their expert report the Homeowners raise a new legal argument, which they did not present in summary judgment, suggesting that Lexington Hills is foreclosed from moving any of water right 63-123 away from the Subdivision. The argument is premised on a couple of snap shots from the administrative record from application for permit 63-11413, a ground water permit for municipal purposes with a place of use within the City of Eagle. The Homeowners assert Lexington Hills obligated itself in this administrative proceeding to leave all surface water right with the Subdivision regardless of whether the water can be beneficially used. The Homeowners do not argue that Lexington Hills obligated itself to convey all of the surface water to the Homeowners. Indeed, if they did the argument would be barred by the Court's Order, which already adjudicated the issue. Rather, the Homeowners argue that Lexington Hills, regardless of ownership, is barred from moving its portion of water right 63-123 away from the Subdivision.

Setting aside the merits of this argument—to be sure, Lexington Hills disagrees with the Homeowners' characterization of the proceedings in 63-11413—this case is neither the time nor the place to take up the Homeowner's argument. As the Court has already decided, this proceeding is an ownership dispute over a portion of right 63-123. The upcoming trial is solely for the purpose of determining what portion, if any, of rights 63-123D and F Lexington Hills is obligated to convey to the Homeowners pursuant to the Master Declaration. What Lexington Hills can or cannot do with its remaining portion of the right is beyond the scope of and irrelevant to this case. When and if Lexington submits an administrative application to transfer its portion of right 63-123 away from the Subdivision, the issues regarding alleged past promises

to retain surface water on the Subdivision will be ripe for decision. Until such an application is filed, the issue is merely speculative and irrelevant to the question at issue in this case in any event.

Permit 63-11413 has a 1,111 page back file. The Court could allow the parties to parse through this file at trial, examine the protests, related correspondence, department memoranda, etc. to surmise the intent of the parties to that proceeding (which did not include the Homeowners). We are confident the outcome of this exercise would be to show that the protestants' concern in that proceeding was the potential depletion of the local ground water aquifer if the right were used for landscape irrigation in lieu of existing surface water rights, and that Lexington Hills' sought to assuage the protestants' concern by committing not to move surface water away and supplant it with ground water diversions. There was no promise requested or made to arbitrarily leave surface water on the property that could not be beneficially used in the subsequently constructed subdivision.

However, as noted above, the Court need not engage in this exercise because regardless of the outcome, it is not relevant to the ownership question at issue in this SRBA proceeding. The time and place to review the administrative record for permit 63-11413 is before the Idaho Department of Water Resources when and if a transfer is filed. Accordingly, the Court should issue a pre-trial order ruling that the potential transferability of right 63-123 and a review of the record of right 63-11413 are not issues to be adjudicated at trial.

3. The interpretation and effect of the conditions of permit 63-11413 are not at issue in this case.

The Homeowners also argue they would be deprived of their ability to irrigate in the "shoulder" irrigation season if Lexington Hills were to transfer its portion of 63-123 because of the following condition from permit 63-11413:

Farmers Union Canal Company water shall be utilized for the irrigation of the lots in Lexington Hills and Trail Creek Ranch parcels equal to or greater in size than one-half acre in size during periods when water is being delivered in the canal. This water right may be used for irrigation purposes only if the entire amount of water from Farmers Union Canal Co. remains with the lands in Lexington Hills and Trail Creek Ranch. Sale or transfer of surface water from any portion of these properties will be cause for the Department to further limit the use of this right.

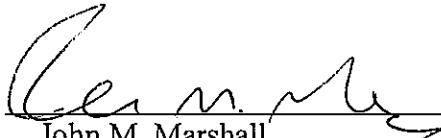
Here again, regardless of the merits of the Homeowners position—Lexington Hills obviously has a different interpretation of the language—the argument is not ripe for adjudication in the SRBA and is irrelevant to resolution of the present ownership dispute. If the Court were to allow evidence of the meaning of the conditions for permit 63-11413 in this proceeding, Department witnesses would have to be called upon in the SRBA to prejudge the effect of the language without the context of request for any specific administrative action. There is no need to engage in such an exercise. The meaning and effect of the condition will be considered when and if Lexington Hills files a transfer application. The Court should exclude from the trial the issue regarding the conditions of permit 63-11413.

CONCLUSION

For the foregoing reasons, Lexington Hills respectfully requests this Court issue an order *in limine* precluding Homeowners from offering evidence on any issue other than: (1) the number of irrigable acres within the Lexington Hills subdivision; and (2) the amount of water necessary to irrigate those acres.

DATED this 15th day of August, 2008.

GIVENS PURSLEY LLP

By: 

John M. Marshall

CERTIFICATE OF SERVICE

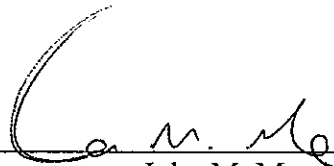
I certify that a true and correct copy of the foregoing document was mailed on August 15th, 2008, with sufficient first-class postage to the following:

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