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November 7, 2008

Clerk of the Fifth Judicial District Court
Snake River Basin Adjudication
253 3rd Ave. N.
P.O. Box 2707
Twin Falls, ID 83303-2707

Re: Subcase Nos. 63-123D, 63-123F, and 63-123G

Dear Clerk:

I am enclosing the original and three copies of Lexington Hills Inc.'s Rebuttal to Lexington Hills HOA's Proposed Findings of Fact and Conclusions of Law that was sent to you via facsimile today for filing. Kindly file one in each subcase and return a conformed copy in the self-addressed stamped envelope. Please contact us if you have any concerns.

Sincerely,

Tina M. Adornetto
Document Specialist

Enclosures

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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 &
63-00123G

**LEXINGTON HILLS INC.'S
REBUTTAL TO LEXINGTON HILLS
HOA'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

Lexington Hills, Inc. ("Lexington") submits the following rebuttal to arguments and assertions made by Lexington Hills Homeowners Association ("Homeowners") in its October 17, 2008 Proposed Findings of Fact and Conclusions of Law ("*Homeowners' Proposed Findings*").

1. The precipitation deficit does not equal diversion rate.

The Homeowners argue the duty of water for the irrigated acres within the Lexington Hills Subdivision ("Subdivision") should be 1.13 inches per acre. *Homeowners Proposed Findings* ¶ 25. Their argument is premised on David B. Shaw's testimony that the peak precipitation deficit for turf is 1.13 inches per acre, which they argue should translate into the diversion rate the Court should decree for their water right. The error in their argument is that

precipitation deficit and diversion rate are not synonymous and in fact are two very different things. Several factors come into play between the headgate where the water is diverted and the root zone of the crop that allow irrigators to meet peak irrigation demands of their crops with instantaneous diversion rates at the headgate that are lower.

a. Soil holds moisture that is available to meet peak demands.

The Homeowner's theory equating precipitation deficit with diversion rate fails to account for the fact that soil retains moisture from precipitation and prior irrigation applications. This moisture is available to the crop to make up the difference between the peak demand and direct irrigation applications. In the case of the Subdivision, there is enough moisture stored in the soil to make up the difference between the 1.13 miners inch precipitation deficit for turf and the historic 0.78 miner's inch diversion rate for 5 continuous days.¹ Scanlan Rebuttal at 6.

Under the Homeowners theory nearly all irrigation water rights would need diversion rates in excess of the statutory maximum of one-inch per acre. This would be true even for sprinkler irrigated crops with no conveyance losses like the landscaping in this Subdivision. For

¹ Scanlan rebuttal at 6. The calculation is as follows: The available soil moisture in the top 22 inches is 0.2 inches of water per inch of soil. Assuming that 50% of the soil moisture in the upper 6-inches of soil is available to the turf, there is a total of 0.6 inches of soil water available to meet irrigation deficits. ($50\% \times 6$ [inches of soil] $\times$ 0.2 [inches of water per inch of soil] = 0.6 [inches of soil water] or 15.24 [mm of soil water].) Because one miner's inch will deliver 12.088 mm per acre per day, 15.24 mm of soil water equals 1.26 miner's inches over 1 day, or 0.25 miner's inches over 5 days.

Utilization of soil moisture in this instance is 100% efficient (i.e., there are no additional losses to deep percolation, wind drift, etc.). To make available soil moisture equivalent to a sprinkler application rate, you need to divide it by irrigation efficiency (which is assumed to be 70% by both Homeowners' and Lexington's experts). Accordingly, 0.25 miner's inches of soil moisture per day at 70% percent irrigation efficiency is equivalent to 0.36 miner's inches irrigation rate. (0.25 [inches of soil water] / 70% [irrigation efficiency] = 0.36 [miner's inches irrigation rate].)

Thus, 0.6 inches of soil water is equivalent to an additional irrigation application of 0.36 miner's inches per day at 70% irrigation efficiency for 5 days. In other words, a short-term peak water requirement of 1.13 miner's inches per day for five days can be met through an average irrigation application of 0.77 miner's inches per day plus soil moisture. This means that 0.78 miner's inches is more than sufficient.

All of this assumes that 1.13 miners inches is the correct peak demand number, which is not the case. 1.13 is too high. The reasons why are explained in detail on pages 14 to 16 of Lexington's *Post Trial Brief*.

example, using data from the Boise WSFO Airport weather station, the precipitation deficit for alfalfa with frequent cuttings is 10.75 mm.² This is higher than the 9.58 mm number Mr. Shaw obtained for turf and translates into a flow rate of 1.27 miners inches per acre assuming a 70% irrigation efficiency.³ Thus, under the Homeowner's theory, all decrees for sprinkler irrigation of alfalfa in the Boise area would have diversion rates of 1.27 miners inches per acre. The same would be true for just about every common crop grown in the Boise Valley. Field corn would need a decreed diversion rate of 1.20 miners inches (10.20 mm), sugar beets would need 1.32 miners inches (11.22 mm), and late harvest potatoes, 1.14 miners inches (9.66 mm). For less efficient gravity irrigation methods, the decreed diversion rates would need to be even higher; yet the Subdivision and lands in the vicinity have successfully raised gravity irrigated crops for more than a century with diversion rates of less than one inch per acre. The primary reason, as explained above, is that soil retains moisture. As Terry Scanlan said during his trial testimony, "you irrigate the soil, not the crop."

b. Homeowners' analysis fails to account for storage ponds.

The Homeowners theory also fails to account for the physical storage that undeniably exists in the Subdivision. The Homeowners assert the Court should ignore this fact and make no finding with regard to the physical storage in the Subdivision ponds. *Homeowners' Proposed Findings* ¶ 26. They base this assertion primarily on the fact that no party claimed storage as a purpose of use. *Id.* However, as Lexington points out in footnote 6 of its Post-Trial Brief, under

² This is the same weather station Mr. Shaw used for his data. As explained in Lexington's *Post-Trial Brief*, this information is available at the ET Idaho website: <http://www.kimberly.uidaho.edu/ETIdaho/>. Both experts at trial agreed that the 3-day moving average, 20% exceedance is a good indicator of peak demand.

³ A miners inch will deliver 12.088 mm per acre per day. Consequently, the conversion of 10.75 mm per day for alfalfa precipitation deficit from the ET Idaho website into a flow rate with a 70% application efficiency is: $10.75 \text{ mm} / 12.088 / 0.7 = 1.27 \text{ miners inches}$. The same calculation is used to take the 9.58 mm used by David Shaw into 1.13 miners inches: $9.58 \text{ mm} / 12.088 \text{ mm} / 70\% = 1.13 \text{ miners inches}$.

IDWR rules, an irrigation purpose of use itself provides authorization for significant amounts of storage, in this case approximately 7 AF.

David H. Roylance, the lead engineer who designed the Subdivision, roughed out a calculation showing the ponds could have as much as 9 AF of storage. The purpose of the testimony was not to precisely calculate the volume—Mr. Roylance acknowledged his calculations were rough estimates—but to demonstrate the Homeowners do in fact have physical storage available to assist them in meeting peak crop demands. Under a conservative assumption that the precipitation deficit for the Subdivision landscaping is 1.13 miners inches per acre, 5 AF of storage provides enough storage to make up the difference between 0.78 miner's inches (diverted) and 1.13 miner's inches (demanded) for a period of 2 days.⁴ And this assumes there is no water stored in the soil. Adding the physical and soil storage together, the Homeowners can meet the peak water demand for their landscaping with a 0.78 miners inch diversion rate for over a week of peak heat.

c. The Homeowners mischaracterize Mr. Scanlan's testimony regarding stress.

The Homeowners assert that Mr. Scanlan agreed that the landscaping in the Subdivision has a duty of water in excess of one inch per acre but that the landscaping should be stressed in peak demands period. *Homeowners Proposed Findings* ¶ 25. This demonstrates a complete misunderstanding on the part of the Homeowners of Mr. Scanlan's testimony. Mr. Scanlan agrees that the peak precipitation deficit—but not the diversion rate—is just over one-inch per acre (making very conservative assumptions). However, as noted above, he explains that the

⁴ The difference between 1.13 miners inches per acre and 0.78 miners inches per acre is 0.35 miner's inches per acre. 0.35 miners inches per acre for 170 acres equals 59.5 miner's inches or 1.19 cfs. (59.5 miner's inches x 1.00 cfs / 50 miner's inches = 1.19 cfs.) Consequently, to make up the difference between peak crop demand and a 0.78 miner's inches per acre diversion rate over 170 acres takes 1.19 cfs, or 2.35 AF per day. (1.19 cfs x 1.98 acre feet/cfs/day.) Seven acre feet is therefore sufficient to supply the difference for 3 days. (7 acre feet / 2.35 acre-feet/day.) Lexington's *Post-Trial Brief* inadvertently and inaccurately states 5 AF will supply the difference for 3 days. Five AF is sufficient to make up the difference for 2 days.

Subdivision landscaping can make up the difference between peak precipitation deficit and application rate by utilizing water stored in the soil and the ponds. With regard to crop stress, he merely pointed out that crops, including turf, can experience some theoretical stress without detriment to the crop, or in the case of urban landscaping, detriment to aesthetics. Lexington's *Post Trial Brief* at 15. Even so, he still points out that even using the 1.13 miners inches per acre precipitation deficit, there is no crop stress—even under theoretically optimum growing conditions that do not exist for the Subdivision—during a week of peak heat with a diversion rate of 0.78 miners inches per acre.

2. Jacobs water rights were not originally decreed at 1 inch per acre.

The Homeowners also incorrectly state that water appurtenant to the Subdivision lands was originally decreed in the Stewart Decree at one inch per acre. *Homeowners' Proposed Findings* ¶ 24. In fact, the Stewart Decree decreed water right 63-123 to the Jacobs Canal Company for street sprinkling, sewer flushing and other municipal purposes in a place of use surrounding the original Boise townsite. See *Farmers' Co-Operative Ditch Co. v. Riverside Irrigation Dist.*, 16 Idaho 525, 536, 102 P. 481, 484 (1909) (describing "Allotment No. 2 . . . to the Jacobs Canal Company");⁵ see also *IDWR Exhibit 6 (Memo to file from Mel Shulte)* at 1.⁶ Water right 63-123 was later transferred to its current place of use. *Id.* Because right 63-123 was not decreed for irrigation, it is not encumbered by any decreed duty of water. The historic

⁵ The Supreme Court's original decision remands the matter to the district court for a new trial on the duty of water for all of the decreed rights. On petition for rehearing, however, the Court modified its original decision "to make the new trial apply to acreage tracts, and not to the irrigation of certain town lots, street sprinkling, parking purposes, sewerage, domestic, and power purposes." *Id.* at 539-40, 102 P. at 485. As a result, the Stewart Decree court made no finding as to the duty of water for the Jacobs water rights.

⁶ Mr. Shulte's memo does not identify the purpose of use. However, Mr. Shulte notes that right 63-123 "is possibly one of the rights that cannot be cut in time of scarcity." *IDWR Exhibit 6* at 1. He is correct about this. Unlike the Stewart Decree irrigation rights, which by post-decree agreement have been subject to a phased reduction in the duty of water as the Boise River flow drops each irrigation system in lieu of completing the duty of water remand, a couple of rights, including right 63-123, are immune from the reduction because they are not irrigation rights. As stated by Mr. Shulte, and confirmed in the publically available IDWR backfile, the right was later transferred and converted to irrigation.

irrigation duty of water for the right is established by its use post-transfer. As discussed in Lexington's *Post-Trial Brief* at 4-5 and Proposed Findings of Fact and Conclusions of Law ("*Lexington's Proposed Findings*") at 3, it is undisputed that the historic duty of water for the Subdivision's lands based on decades of agricultural irrigation on the Subdivision's lands was 0.78 miners inches per acre.

3. Homeowners' recommended water right allows irrigation of the entire Subdivision.

At one point in their proposed findings, the Homeowners appear to be attempting to reargue an issue decided in summary judgment concerning the place of use, asserting that the water right conveyances made by Lexington Hills are for only limited portions of the Subdivision. *Homeowners' Proposed Findings* ¶¶ 17, 18. Later, the Homeowners appear to back away from the argument by recognizing they claimed, and IDWR recommended, the entire Subdivision as the appropriate outside perimeter for their water right. *Homeowners' Proposed Findings* ¶¶ 21, 28. This conclusion is not in dispute, so this issue appears moot. But to the extent the Homeowners are attempting to reopen the argument about their only having discrete, limited places of use in portions of the Subdivision, the Court conclusively addressed the issue in the *Memorandum Decision and Order on Cross Motions for Summary Judgment* ("*Summary Judgment Order*") at 10 (Apr. 18, 2007).

4. East Hills's water rights were conveyed to Lexington.

The Homeowners assert that water right 63-123D, which was originally recommended to East Hills Development, LLC ("*East Hills*"), should be decreed to the Homeowners. *Homeowners' Proposed Findings* ¶ 22. Later, the Homeowners assert the right should disallowed. *Id.*, p. 8. Both of these conflicting arguments are based on the Court's determination on summary judgment that East Hills does not own 63-123D. Although this is

true, the Court ruled this is because East Hills conveyed the right to Lexington. *Summary Judgment Order* at 11. Accordingly, Lexington, not the Homeowners, own right 63-123D and the associated SRBA claim.

5. This Court has authority to determine all elements of the water rights.

In the past, the Homeowners have argued that the place of use element for Lexington's water rights 63-123D and 63-123F must be limited to 26.23 acres and 96.4 acres respectively because Lexington did not object to the Director's recommendations for these rights. The Homeowners appear to be advancing this argument again in paragraphs 5 and 6 of their proposed Conclusions of Law. (*Homeowners' Proposed Findings*, p. 7). The Homeowners assert that "any element of a water right that is not objected to, will not be at 'issue to be heard' at hearing." *Id.* This is incorrect.

Once an objection is filed, the Court has authority to address all issues necessary to determine the elements of the objected-to water right (indeed, perhaps even the elements of uncontested overlapping water rights as well) and issue accurate decrees. The water code clearly gives the SRBA Court authority to determine all elements of a water right regardless of which issues were raised in the objection. In addition, the Idaho Rules of Civil Procedure ("IRCP") provide a procedural mechanism for doing so. *See* IRCP 15(b) ("When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.") Thus, the Court has authority to decree the places of use for rights 63-123D and 63-123F with 33.63 acres and 108.46 acres respectively based on evidence presented at trial regarding the allocation of the historically irrigated acreage among the rights at issue (this is explained in detail on pages 5-7 of Lexington's *Post Trial Brief*).

6. The Homeowners' proposed remark language is overbroad.

Lexington agrees that a remark referencing conditions in ground water right permit 63-11413 should be placed on all of the water rights involved in these subcases, but disagrees with the Homeowner's proposed remark. The Homeowner's proposal seeks to have this Court permanently lock in place via decree their interpretation of a separate administrative proceeding. Lexington previously has explained why this would be overreaching and unnecessary and why the Court should instead adopt the following remark:

"Administration of this right is subject to the conditions of permit number 63-11413."

This language will recognize the relationship between the Jacobs water rights and permit 63-11413 and ensure the Jacobs water rights will not be changed without consideration of permit 63-11413's conditions—whatever they might be or mean when that time comes

CONCLUSION

For all the above reasons, the Court should decree the water rights at issue as follows:

Water Right	Owner	Diversion rate		Acre limit within Place of Use
		inches	cfs	
63-123G	Lexington Hills Homeowners Association, Inc.	119.4	2.388	153.08 acres
63-123F	Lexington Hills, Inc.	84.6	1.692	108.46 acres
63-123D	Lexington Hills, Inc.	26.23	0.5246	33.63 acres

DATED this 7th day of November, 2008.


John M. Marshall


Michael P. Lawrence

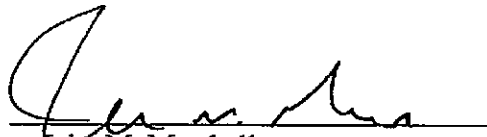
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed on November 7, 2008, with sufficient first-class postage to the following:

Lexington Hills Homeowners
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Director of IDWR
PO Box 83720
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By: _____


John M. Marshall