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DEPARTMENT OF
WATER RESOURCES

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

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

In Re: SRBA

Case No. 39576

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

**LEXINGTON HILLS INC.'S MOTION
TO ALTER OR AMEND**

Lexington Hills, Inc. ("Lexington") files this Motion to Alter or Amend the Special Master's Findings of Fact and Conclusions of Law ("Order") for the above captioned water rights (the "Subdivision Rights"). By this motion, Lexington requests that the Special Master amend the Order as follows:

1. The Court should amend the recommendations for the Subdivision Rights to remove the combined use remarks that would limit the rights to a combined 0.02 cfs per acre and to 170 acres. Absent this change, the decrees for the Subdivision Rights will unnecessarily cut 65 acres of beneficial use from the Jacobs right and will effectively make Lexington's right(s) non-transferrable. This argument is explained in more detail in *Lexington's Post Trial Brief* at page 6 and is consistent with the Special Master's Finding of Fact no. 3.

2. The Court should amend the recommended quantity for right 63-123G held by the Lexington Hills Homeowners Association to 2.388 cfs (119.4 inches). This is the amount of Jacobs water that has been conveyed to the Homeowners. There is no factual or legal basis on which the Court can decree that additional water has been conveyed.

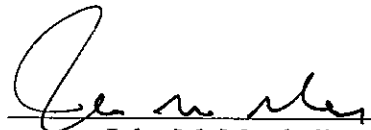
In this case the Court was asked to step beyond its role as adjudicator of the elements of water rights and to interpret the CC&Rs for the Subdivision. The Court's analysis lead to the conclusion, following summary judgment, that Lexington is required to convey water rights to the Lexington Hills Homeowners Association (the "Homeowners") sufficient to allow for the proper irrigation of the Subdivision. Trial was held to determine the quantity of water rights necessary for this purpose. The Court concluded that proper irrigation of the Subdivision requires 170 inches of water (a finding challenged below). It does not follow, however, that the Homeowners are therefore entitled to 170 inches of water right 63-123.

In its role as interpreter of the Subdivision CC&Rs, it is appropriate for the Court to order Lexington to resolve the dispute between Lexington and the Homeowners concerning the quantity of water necessary to irrigate the Subdivision and to order Lexington to provide this quantity to the Homeowners. It is not appropriate, however, for the Court to take an additional step and decree that Lexington chose to fulfill its obligation by conveying a total of 170 inches of right 63-123. Lexington has previously conveyed other water right entitlements to the Homeowners that go to meet the 170-inch obligation and has other rights and entitlements in its portfolio that it can use for this purpose. The Court should have stopped at simply ordering Lexington to provide water rights sufficient to deliver 170 inches to the Subdivision without, in effect, conveying an additional portion of right 63-123 to the Homeowners.

3. The Court should amend the finding that the Subdivision needs one inch per acre and instead rule that it may be irrigated using the historic duty of water of 0.78 inches. The Court based its decision on the recommendation of IDWR. However, the recommendation of one-inch per acre by IDWR was based on its standard recommendation for all Stewart Decree rights without consideration of the unique circumstances and history of the Jacobs right. This is explained in detail on pages 5-6 of *Lexington's Rebuttal to Lexington Hills HOA's Proposed Findings of Fact and Conclusions of Law*. The Department's recommendation also did not account for 1) the fact that conveyance loss for the water delivered to the Subdivision is accounted for through a different right held by Farmers Union Canal Company (even though IDWR testified at trial that conveyance loss was covered pursuant to another right), or 2) the storage capacity of the ponds in the Subdivision. The evidence at trial supports a finding that the historic duty of water of 0.78 inches per acre is more than adequate to irrigate the Subdivision when taking into account the storage capacity of the ponds and the soils in the subdivision.

Lexington request oral argument on this motion.

DATED this 30 day of March, 2009.



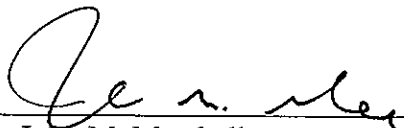
John M. Marshall

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed on March 30, 2009, with sufficient first-class postage to the following:

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