

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

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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
)
) **MEMORANDUM IN SUPPORT OF**
) **LEXINGTON HILLS HOME**
) **OWNERS' ASSOCIATION'S**
) **MOTION FOR SUMMARY**
) **JUDGMENT**
)

INTRODUCTION

This case involves a dispute over the amount of water that was transferred by a developer, Lexington Hills, Inc. ("Lexington Hills"), to a homeowners association, Lexington Hills Home Owners' Association ("Lexington HOA"). Notably, all parties agree that Lexington HOA owns at least some of the water. Furthermore, there is no dispute as to the full extent of the water right.

Lexington Hills, however, argues that it only transferred a portion of the water right historically appurtenant to the lands of the development. Idaho law does not support such a contention. Indeed, while some of the deeds transferred a specific quantity of water to irrigate specific lands, most of the deeds transferring lands to Lexington HOA were silent as to water.

Idaho law demands that all of the appurtenant water be transferred to the Lexington HOA. *See* I.C. § 42-1402.

STATEMENT OF FACTS

The Stewart decree adjudicated numerous water rights including a right in Ada County commonly referred to as “Jacobs water.” This water right was originally decreed to the Jacobs Canal Company for 20 cfs. Since then, this water right has been transferred and divided as different entities, including Farmers Union Ditch Company and Capitol View Irrigation, Inc., began using the water. As reported to the SRBA Court, the Director of the Department of Water Resources recognizes at least five different interests in Jacobs water. *See Affidavit of Paul L. Arrington in Support of Motion for Summary Judgment (“Arrington Aff.”)*, Ex. A (recommendations of Director regarding Jacobs water).

Over time, a portion of Jacobs water was acquired by private individuals who used the water to irrigate lands that are now within a subdivision composed of three parts: Lexington Hills Subdivision, Lexington Hills East and Lexington on the Rim (collectively the “developments”). *See Id.* (Recommendations for water rights 63-123D, 63-123F and 63-123G).

Lexington Hills is the developer of these subdivisions. To that extent, Lexington Hills acquired the lands upon which the developments would be built, together with appurtenant water rights. *See Id.* Ex. B&C. Indeed, two parcels of land, used in the development, were acquired by Lexington Hills in 1998 and 1999 from East Hills Development, LLC. *Id.* at Exs. B&C. These deeds indicate that the land was being transferred together “with their appurtenances.” *Id.* The deeds are otherwise silent regarding the water rights appurtenant to the land. *Id.* These lands are now a portion of the developments.

Lexington Hills built the developments, and pursuant to the Covenants Conditions and Restrictions (“CC&R’s”), a homeowners association, Lexington HOA, was established to manage the developments and hold the water rights appurtenant to all lands within the developments for irrigation. According to the “Master Declaration” of CC&R’s, the “Association” would receive title to water “over, upon ... or appurtenant to the Property ... as each plat is recorded.” *Aff. Ex. T*. As used in the CC&R’s, the term “property” is defined as “the real property consisting of Lexington Hills 1 Subdivision ... according to the original plat thereof and *every part, parcel and Lot thereof*.” *Id.* (emphasis added). Although the master declaration was specific to Lexington Hills 1, every deed was made “Subject to the Declaration of [CC&R’s] for Lexington Hills, recorded February 20, 1992 as Instrument No. 9209714.” *Id.* at Exs. D through R. All potable water for the developments was to be provided by the city of Eagle.

After completing portions of the developments, Lexington Hills began deeding the common areas throughout the subdivisions to Lexington HOA along with all water appurtenant to the developments. In the first six deeds, *Aff. Ex. D* through *I*, Lexington Hills deeded 119.4 inches (2.388 cfs) of Jacobs water to Lexington HOA as shown in the following chart:

Aff. Ex.	Miner’s Inches Deeded	Cfs Equivalent ¹
D	30.60	0.612
E	7.30	0.146
F	4.50	0.09
G	32.0	0.64
H	17.0	0.34
I	28.0	0.56
TOTAL	119.4	2.388

Accordingly, at a minimum, Lexington HOA should be granted 2.388 cfs as evidenced in these deeds. Each of the deeds indicates that the water being deeded was “for purposes of irrigating” specific portions of the Lexington Hills Subdivision. *Id.* at Ex. D-I.

¹ 1 cfs = 50 Miner’s Inches

Ten other deeds were executed to transfer additional tracts of land to Lexington HOA. *Id.* Ex. J through S. Nine of these deeds indicate they are transferring certain properties together with an easement “for construction, maintenance and repair of a pressurized pipe irrigation system *to be owned and operated by the Association.*” *Id.* at Ex. J through R (emphasis added). These deeds were silent as to the quantity of water that was being transferred, but were made subject to the “Declaration of Covenants, Conditions and Restrictions [“CC&R’s”] for Lexington Hills.” *Id.* As stated above, the CC&R’s provide that that “surface water for irrigation appurtenant to each phase of development of the Property will be conveyed to the Association as each plat is recorded.” *Id.* Ex. T at Article V(d).

The final of these ten deeds, *Aff. Ex. S*, indicates that certain lands were being deeded “Together with their appurtenances.” As before, the deed was otherwise silent as to the quantity of water that was being transferred. *Id.*

The lands to which the original 4.605 cfs of Jacobs water were appurtenant, are now completely contained within the developments which are being irrigated by a pressurized system owned and operated by Lexington HOA. **None** of these lands were retained by Lexington Hills or East Hills Development. To that extent, Lexington HOA filed a Notice of Claim to a Water Right, 63-123G, claiming all water that was originally appurtenant to the lands within the developments – 4.605 cfs. East Hills Development has filed a Notice of Claim for 0.5246 cfs appurtenant to the lands transferred to Lexington Hills. Finally, Lexington Hills has filed a Notice of Claim for 1.93 cfs appurtenant to lands no longer owned by Lexington Hills that are within the boundaries of the developments.

Notwithstanding the above facts, the Director has recommended as follows:

1. Water Right 62-123D for .5246 cfs in the name of East Hills Development, LLC;

2. Water Right 62-123F for 1.93 cfs in the name of Lexington Hills, Inc; and
3. Water Right 62-123G for 2.15 cfs in the name of Lexington Hills Homeowners Association.

Notably, these recommendations are consistent with the ditch company's delivery records but do not recognize the current conditions on the property. Lexington HOA filed objections to these recommendations as they do not reflect the current status of the land and water in question.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Intermountain Eye & Laser Centers, PLLC v. Miller*, 142 Idaho 218, 127 P.3d 121, 125 (2005). In analyzing the motion, the court must construe "all controverted facts ... in favor of the nonmoving party," and "draw all reasonable inferences in favor of the party resisting the motion." *Heritage Excavation, Inc. v. Briscoe*, 141 Idaho 40, 43, 105 P.3d 700, 703 (Idaho App. 2005). Furthermore, the "fact that ... cross-motions for summary judgment [are filed] does not change the standard of review, and [the court] evaluate[s] each party's motion on its own merits." *Id.*

LEGAL ANALYSIS

1. The Sole Question Before this Court is the Scope of Ownership

The Jacobs water right was originally decreed for 20 cfs. It was thereafter split into multiple rights. *See Arrington Aff.* at Ex. A. In relation to the lands underlying the developments, it is undisputed 4.605 cfs of water, from Jacobs water right, is appurtenant. It is this 4.605 cfs that Lexington HOA originally claimed. While Lexington Hills and East Hills Development contest the extent of Lexington HOA's ownership, it is undisputed that Lexington

HOA owns at least a portion of the water. *See Id.* Ex. D through I. In fact, Lexington Hills deeded 2.388 cfs to Lexington HOA. *Id.* This water is used for irrigation and, pursuant to the CC&R's, is held for the benefit of the individual property owners. Therefore, the question of ownership, by Lexington HOA, is not before this Court.

Additionally, the cumulative diversion rate of 4.605 cfs is not in dispute. The Director's recommendations for water rights 63-123D, 63-123F, and 63-123G total 4.605 cfs. In other words, after analyzing the claims and reviewing the history of the rights, the Director recognized that in 1987 the land underlying the developments was being irrigated and that 4.605 cfs of Jacobs water was included in the water supply for those lands. *Id.* Ex. U. Accordingly, the total diversion rate is not in dispute before this Court.

The only issue before the Court, therefore, is the extent of Lexington HOA's ownership. As discussed in greater detail below, Lexington Hills has deeded all of the lands within the developments and failed to reserve any water. As such, Idaho law rejects any claim to the water by Lexington Hills. Furthermore, pursuant to the CC&R's, Lexington HOA holds all the appurtenant water for the benefit of the landowners. *See Id.* Exs. T. As such, Lexington Hills has no claim to Jacobs water. Such water should be held by Lexington HOA.

II. As a Matter of Law, East Hills Development has No Claim to Water Right 63-123D.

Idaho Code section 42-1402 states that a water right "confirmed by [a] decree ... shall be appurtenant to and shall become a part of the land on which such water is used, and such right will pass with the conveyance of such land." Stated another way, water rights are appurtenant to the land upon which they are applied and, absent explicit language to the contrary, will pass with the land upon conveyance. This rule was recognized, once again, by the Supreme Court in *Joyce*

Livestock v. United States, ___ P.3d ___, 2007 WL 428947, *12-13 (Feb. 9, 2007) (*Arrington Aff.*

Ex. V):

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.

This court has held, construing the Shannon Case [*Cooper v. Shannon*, 85 P 175 (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.’ “

...

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.*

(Emphasis added). Accordingly to this “silent deed rule,” anything less than an explicit statement in a deed will not prevent water rights from transferring with the property to which they are appurtenant.

The water right appurtenant to the lands once owned by East Hills Development were originally decreed in the Stewart Decree as part of a larger right which has become known as

“Jacobs water.” *Arrington Aff.* Ex. A (Water Right Recommendation Report 63-123D, comment #9). These water rights are, therefore, appurtenant to, and would pass with, the land unless *specifically* reserved.

In 1998 and 1999, East Hills Development deeded two parcels of land to Lexington Hills together “with their appurtenances.” *Id.* Ex. B. These deeds are silent as to the water rights appurtenant to that land. Rather, the deeds make clear that *all appurtenances* were conveyed to Lexington Hills. As such, East Hills Development conveyed its entire interest in the waters appurtenant to the land in question to Lexington Hills.

That notwithstanding, East Hills Development has claimed a right to 0.5426 cfs appurtenant to the lands transferred to Lexington Hills. East Hills Development has no right to this water. Regardless of this Court’s decision relative to the dispute between Lexington Hills and Lexington HOA, discussed below, East Hills Development’s claim must be rejected.

III. Lexington Hills Specifically Deeded 2.388 cfs to Lexington HOA, Therefore, 63-123G Should Properly Reflect this Amount and Not Rely on the Record of Farmers’ Union Ditch Company.

“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.” *Benninger v. Derifield*, 142 Idaho 486, 129 P.3d 1235, 1238 (2006). Here, it is indisputable that Lexington Hills expressly conveyed to Lexington HOA 2.338 cfs. *See Arrington Aff.* Ex. D-1. The deeds are unambiguous. Clearly the Director’s recommendation of 2.15 cfs is wrong. Lexington HOA is entitled to more water than recommended.

This 2.338 cfs constitutes more than half of the available 4.605 cfs of Jacobs water — leaving only 2.217 cfs that could even *arguably* be available to claim. Yet, East Hills Development claimed 0.5246 cfs and Lexington Hills claimed 1.93 cfs. The Director

recommended these as claimed for a total of 2.4546 cfs. Since the deeds are clear on their face and transfer a minimum of 2.338 cfs to Lexington HOA, the Director's recommendation for 2.15 cfs to Lexington HOA is in error. Lexington HOA should be decreed the full amount of water appurtenant to the land of the developments.

IV. Since the Remaining Deeds were Silent, Lexington Hills Transferred All Water Rights Appurtenant to the Lands Subject to Those Deeds

When considering whether or not a water right was conveyed with the property to which it is appurtenant, "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." *Joyce Livestock*, 2007 WL 428947 at *13 (emphasis added). In other words, decreed water rights will pass with the land to which they are appurtenant *unless* the intent to retain water rights is stated in clear and express language in the deed. See I.C. § 42-1402. Of the 16 total deeds between Lexington Hills and Lexington HOA, only six contain reference to water. See *Arrington Aff.* D through I. The remaining ten are silent to the water. *Id.* at Ex. J through S. *Each deed was made subject to the Lexington CC&R's.* *Id.* at Ex. D through R.

Lexington Hills deeded more than half of the Jacobs water to Lexington HOA in the first six deeds. This water was *specifically intended* for the irrigation of specific areas within Lexington Hills Subdivisions one through six. *Id.* at Ex. D-I.² Ten other deeds, however, did not specifically retain any water rights.

Lexington Hills deeded Lexington Hills Subdivisions seven through twelve, *id.* at Ex. J-O, Lexington East Subdivisions one and two, *id.* at Ex. P & Q, and a 216 square foot remainder,

² For example, Exhibit D indicates that "30.60 miners inches of Jacob's water" was deeded "for purposes of irrigating Lexington Hills Subdivision No. 1."

id. at Ex. S, to Lexington HOA. Notably, with the exception of the final deed, none of these deeds mention the water rights – either in relation to transfer or retention. The final deed, for the 216 square-foot remained, expressly indicates that it conveyed to Lexington HOA the lands “together with their appurtenances.” *Id.* at Ex. S. Since these decreed rights are, by law, considered to be appurtenant to the land, this deed also conveyed the water necessary to irrigate 216 square feet. *See* I.C. § 42-1402, *Joyce Livestock Co., supra*.

As to the remaining nine deeds, Lexington Hills failed to expressly retain any of the water rights appurtenant to the lands being transferred. Yet, each of the deeds transferred an easement “for construction, maintenance and repair of a pressurized pipe irrigation system *to be owned and operated by the Association.*” *Arrington Aff.* at Ex. J through R (emphasis added). In addition, *each deed is made subject to the master declaration of CC&R’s* for the developments. *Id.*

Lexington Hill’s intent with relation to the water rights is made clear in the master declaration of CC&R’s to which each phase of the development has been made subject. *Id.* Exs. D through R. These CC&R’s indicate that “surface water for irrigation appurtenant to each phase of development of the Property will be conveyed to the Association.” *Id.* Ex. T. Furthermore, the term “property” includes more than merely the common areas deeded to Lexington HOA. Indeed, the CC&R’s define “property” as “the real property ... and *every part, parcel and Lot thereof.*” *Id.* (emphasis added). Clearly, the CC&R’s express an intent by Lexington Hills to transfer all water rights appurtenant to the developed lands, to be held by Lexington HOA for the benefit of the property owners and for the irrigation of the common areas.

Lexington Hills is mistaken if it believes that it retained any water appurtenant to the lands it no longer owns. Idaho law does not support such a conclusion. On the contrary, Lexington Hill's intent to convey all water rights is evident. Given the fact that the deeds are silent as to water, that the deeds indicate that Lexington HOA will be responsible for the operation and maintenance of an irrigation system, and the fact that the CC&R's require appurtenant water to be transferred to Lexington HOA, Idaho law mandates that the entire Jacobs water right of 4.605 cfs be recommended in the name of Lexington HOA.

To hold otherwise, would leave the lands conveyed by the final ten deeds without water for irrigation. Since the first six deeds transferred water with specific places of use, there would be no water for Lexington HOA to use on the remaining lands within the developments. As discussed above, based on the Director's recommendations, there is no dispute that these lands were being irrigated in 1987. To now revoke any right that Lexington HOA has to the water necessary to irrigate these lands would be contrary to law. It would also work a serious injustice, especially given the fact that Lexington Hills no longer owns any of the lands to which the water is appurtenant.

The Director erred in recommending that Lexington HOA be awarded anything less than the entire 4.605 cfs of Jacobs water appurtenant to the lands within the developments. As a matter of law, Lexington Hills conveyed all of the water rights it held when it deeded the lands to Lexington HOA. No water was retained. As such, the Director should deny claims 63-123D (East Hills Development) and 63-123F (Lexington Hills) and should recommend water right 63-123G (Lexington HOA) as claimed.

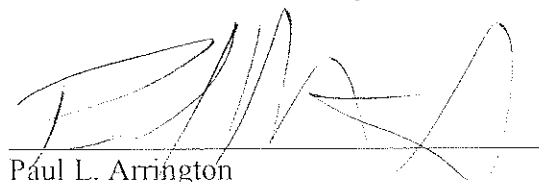
CONCLUSION

The sole issue before this Court is the scope of Lexington HOA's ownership of the Jacobs water appurtenant to the lands within three developments in Ada County. East Hills Development's claim that it is entitled to a portion of the water should be rejected because it effectively deeded all its interest, including the water, to Lexington Hills. Furthermore, after developing the lands, Lexington Hills conveyed the common areas to Lexington HOA and, pursuant to the CC&R's, all the water appurtenant to the lands within the development to be held by Lexington HOA for the benefit of the property owners.

The Department erred in recommending Lexington HOA's water right for 2.15 cfs. Six of the sixteen deeds specifically transfer 2.388 cfs to Lexington HOA. The remaining ten deeds fail to retain any water, and are, in fact, silent as to water. Idaho law is clear on this point. Since Lexington Hills failed to specifically retain any water, it has no claim to the water. This Court should enter an order disallowing claims 63-123D (East Hills Development) and 63-123F (Lexington Hills) and should order that water right 63-123G (Lexington HOA) be decreed as claimed.

DATED this 28th day of February, 2007.

BY: Barker Rosholt & Simpson, LLP

A handwritten signature in black ink, appearing to read 'Paul L. Arrington', is written over a horizontal line.

Paul L. Arrington

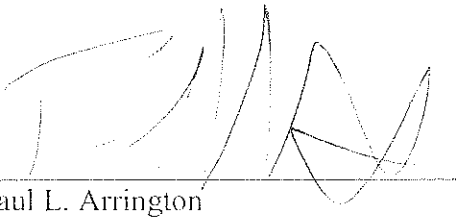
Attorney for Lexington Hills Home Owners' Association

CERTIFICATE OF SERVICES

I, hereby, certify that on the 28th day of February, 2007, I served a true and correct copy of the foregoing 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