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**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

) Subcases 63-00123D, 63-00123F,
) and 63-00123G
)
) **MEMORANDUM DECISION AND**
) **ORDER ON CROSS MOTIONS FOR**
) **SUMMARY JUDGMENT**
)
) **ORDER SETTING SCHEDULING**
) **CONFERENCE**

Summary of Ruling: The Declaration of Covenants, Conditions, Restrictions, and Easements for Lexington Hills effectively reserved water rights from being transferred in the deeds of conveyance from Lexington Hills to Lexington HOA, other than the 2.388 cfs expressly conveyed. East Hills transferred any Jacobs water it may have owned to Lexington Hills in two deeds recorded in 1998 and 1999. A question of fact remains as to whether Lexington Hills has conveyed water rights to Lexington HOA in an amount required under the terms of said Declaration.

I. APPEARANCES

John K. Simpson and Paul Arrington, Barker Rosholt & Simpson LLP, for Lexington Hills Home Owners' Association.

John M. Marshall and Michael P. Lawrence, Givens Pursley LLP, for Lexington Hills, Inc., and East Hills Development, LLC.

II. PROCEDURAL AND FACTUAL BACKGROUND

The above-captioned subcases involve a dispute over the ownership of water rights between the Lexington Hills Home Owners' Association, Inc., (hereinafter "Lexington HOA") and the developer of the subdivision, Lexington Hills, Inc., and East Hills Development, LLC (collectively "Lexington Hills" or individually referred to as

“East Hills” and “Lexington Hills” as the context indicates)¹ The underlying basis of these water right claims is a 4.605 cfs portion of a 20 cfs surface water right previously decreed in the Stewart decree, and historically referred to as “Jacobs water.” The land which comprises the place of use for this 4.605 cfs portion of the Jacobs water is now a residential subdivision comprised of three parts: Lexington Hills Subdivision, Lexington Hills East, and Lexington on the Rim (collectively the “subdivision”). The Lexington HOA is the common homeowners’ association which owns and operates a pressurized irrigation system for use on the subdivision.

Lexington HOA filed claim number 63-00123G in the SRBA for the entire 4.605 cfs. Lexington Hills filed claim number 63-00123F, asserting that it had retained ownership of a 1.93 cfs portion of the right. East Hills filed claim number 63-00123D for a 0.5246 cfs portion of the right.

The *Director’s Report* for Basin 63, Part II recommended these three water right claims with 2.15 cfs being recommended as owned by Lexington HOA; 1.93 cfs as owned by Lexington Hills; and 0.525 cfs as owned by East Hills. Lexington HOA timely filed objections to the *Director’s Report* for each of the claims, asserting that the entire 4.605 cfs should be decreed in the name of Lexington HOA.

On February 27, 2007, Lexington Hills filed its *Motion for Summary Judgment*, together with a memorandum in support thereof, and the *Affidavit of Michael P. Lawrence*. On February 28, 2007, Lexington HOA filed its *Motion for Summary Judgment*, a memorandum in support, and the *Affidavit of Paul L. Arrington*. On March 27, 2007, each party filed responsive briefing. Lexington Hills also filed the *Affidavit of David H. Royslance*.

The record in these subcases contains a copy of the master Declaration of Covenants, Conditions, Restrictions, and Easements for Lexington Hills (hereinafter “Master Declaration”), recorded in the office of the Ada County recorder on February 20, 1992 (*Lawrence Aff., Ex. A*). The Master Declaration was recorded by the developer of

¹ Lexington Hills Inc., and East Hills Development, LLC appear to have interests that are aligned in this matter, and are treated as a single entity for most purposes of this decision.

the property, Lexington Hills, prior to the conveyance of any lots in the subdivision.

Article V(d) of the Master Declaration contains the following provision:

Notwithstanding anything to the contrary contained in this Declaration, Declarant expressly reserves unto . . . itself . . . all water and water rights over, upon or under or appurtenant to the Property, or any portion thereof, and a nonexclusive easement ten (10) feet wide, inside the boundary of each lot and the Common Area adjacent to the right-of-way for construction of a pressurized pipe irrigation system to be conveyed to and operated by the Association. Groundwater appropriated for the domestic water system will be owned by the City of Eagle. Surface water for irrigation appurtenant to each phase of development of the Property will be conveyed to the Association as each plat is recorded.

Master Declaration at pp. 4-5 (emphasis added). The term “Property” is a defined term which includes “every part, parcel, and Lot” of the land that is subject to the Master Declaration. *Master Declaration* at p. 1

The record in these subcases also contains copies of sixteen deeds conveying land (common area) from Lexington Hills to the Lexington HOA. *Arrington Aff.*, Ex. D through S. The first six of these deeds specifically convey water in the following amounts:

Arrington Aff. Ex	Miner’s Inches Deeded	Cfs Equivalent
D	30.6	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

The remaining ten deeds (*Arrington Aff.* Ex. J through S) are silent as to the conveyance of water (hereinafter referred to as “silent deeds”). With the exception of the

deed in *Arrington Aff.* Ex. S, which conveyed only 216 square feet of land, all of these deeds are specifically made subject to the Master Declaration².

III. ISSUES PRESENTED

(1) Were any water rights conveyed from Lexington Hills to Lexington HOA as an appurtenance to the land which was conveyed in the “silent” deeds?

(2) What is the quantity of water that has been expressly conveyed to Lexington HOA in the first six deeds?

(3) Did East Hills reserve any portion of the Jacobs water when it conveyed land to Lexington Hills?

IV. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on April 10, 2007. The parties have not requested an opportunity to submit additional briefing, nor does this Special Master require any additional briefing. Therefore, this matter is deemed fully submitted for decision the next business day, or April 11, 2007.

V. STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure, allows for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In order to make that determination, a court must look to “the pleadings, depositions, and admissions on file, together with the affidavits, if any . . .” I.R.C.P. 56(c).

On cross motions for summary judgment, the court “must examine each motion separately, reviewing the record and the reasonable inferences that can be drawn from it

² Deeds 1 through 6 (*Arrington Aff.* Ex. D through J) specifically refer to and are made “subject to” the Master Declaration, including the instrument number (92097147) assigned by the Ada County recorder’s Office. Deeds 7 through 15 (*Arrington Aff.* Ex. J through R) each refer to and are made “subject to” a separate “Notice of Addition of Territory and Supplemental Declaration of Covenants, Conditions and Restrictions,” including the instrument number assigned to each such instrument, which in turn refers to the Master Declaration. These Supplemental Declarations are part of the record in the *Lawrence Aff.* Ex. B. Deed number 16 (*Arrington Aff.* Ex. S) does not specifically reference the Master Declaration, but it conveys only 216 square feet of land, which is insignificant for purposes of this decision.

in favor of each party's opposition to the motions for summary judgment." *First Security Bank of Idaho v. Murphy*, 131 Idaho 787, 780, 964 P.2d 654, 657 (1998). Summary judgment is to be granted with caution and if the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment motion will be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991).

The party moving for summary judgment always has the burden of proving the absence of a material fact even though this burden may be met by circumstantial evidence. *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). Once the moving party has presented evidence and properly supported the motion for summary judgment, the nonmoving party must present evidence and must not rest on mere speculation. *Id.* The Idaho Rules of Civil Procedure provide:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

I.R.C.P. 56(e). If there are no material facts in dispute, the court may enter a judgment in favor of the party entitled to prevail as a matter of law. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 312, 647 P.2d 766, 768 (Ct. App. 1982).

On cross motions for summary judgment, where both parties "rely[] on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment." *Eastern Idaho Agricultural Credit Ass'n v. Neibaur*, 130 Idaho 623, 626, 944 P.2d 1386, 1389 (1997). "[W]here the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). However, where cross motions for summary judgment are made based upon different theories, the court should not consider the cross motions to be a stipulation that there are no genuine issues of material fact. *Eastern Idaho Agricultural Credit Ass'n*, 130 Idaho at 626.

VI. ANALYSIS

A. Relevant law and Legal Standards.

The rules of construction for deeds and other instruments were recently summed up by the Idaho Supreme Court as follows:

The legal effect of an unambiguous written document must be decided by the trial court as a question of law. If, however, the instrument of conveyance is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact. In interpreting and construing deeds of conveyance, the primary goal is to seek and give effect to the real intention of the parties. 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. Uncertainties should be treated as ambiguities; such ambiguities are subject to be cleared up by resort to the intention of the parties as gathered from the deed, from the circumstances attending and leading up to its execution, from the subject matter, and from the situation of the parties at the time.

Benninger v. Derifield, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (internal citations omitted). Where a deed definitely refers and is subject to the terms of some other instrument, which is readily accessible to all interested parties, there is no legal impediment to giving those terms their full force and effect. *Roos v. Belcher*, 79 Idaho 473, 482 (1958)

A water right is legally treated in the same manner as an interest in real property and accordingly can only be conveyed in the same manner as real property. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 488, 244 P.2d 151 (1952). Title to real property may be transferred by contract or deed of the owners, adverse possession, or operation of law. *Id.* (citations omitted). However, in the situation where a water right is an appurtenance to real property, it can be conveyed without expressly mentioning the water right in the deed which conveys the real property to which the right is appurtenant. Recently, in *Joyce Livestock Company v. United States*, ___ P.3d ___, 2007 WL 428947, *12-13, (Feb 9, 2007), the Idaho Supreme Court stated:

Unless [water rights] 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." 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.

Id. (internal citations omitted).

B. The "Silent" Deeds Conveyed No Water Rights.

The primary issue presented in these subcases involves a determination of whether the "silent" deeds that conveyed land from Lexington Hills to Lexington HOA -- which are silent on their faces as to the conveyance of water, but make a reference to the Master Declaration -- also conveyed water to the Lexington HOA? In other words, did the Master Declaration effectively reserve the water rights to Lexington Hills and thereby prevent the same from being transferred to Lexington HOA? For the reasons set forth herein, this Special Master concludes that the subject "silent" deeds conveyed no water rights to Lexington HOA.

At the outset, this Special Master finds that neither the subject "silent" deeds nor the relevant terms of the Master Declaration are ambiguous or uncertain. The intent of the developer, Lexington Hills, with respect to the transfer of water rights, is made clear by the express terms of the Master Declaration. All water rights were reserved unto itself. Each of the "silent" deeds clearly refers to and is subject to the terms of the Master Declaration. Because there is neither uncertainty nor ambiguity in the terms of the subject instruments, extrinsic evidence as to the intention of the parties can not be considered, and the determination of the legal effect of the instruments is decided as a matter of law.

Lexington HOA argues that uncertainty and ambiguity is the result of Lexington Hills' interpretation of the Master Declaration wherein Lexington Hills expressed intent to retain all water rights, but also expressed intent to transfer such rights to Lexington HOA. Lexington HOA argues that Lexington Hills could not have intended an unlimited reservation of all water rights, when such an intention is juxtaposed with stated intent to

transfer surface water for irrigation. This Special Master does not find the stated intent to be ambiguous, uncertain, or inconsistent.

However, assuming *arguendo* that Lexington Hills' stated intent is contradictory or uncertain, an application of the above-stated rules of construction resolves the issue. The intention of the parties can be ascertained through an analysis of the instrument itself, from the circumstances attending and leading up to its execution, from the subject matter, and from the situation of the parties at the time. *Benninger*, 142 Idaho at 489.

The Master Declaration was executed and recorded in anticipation of the development of irrigated farm ground into a residential subdivision. At the time of its execution, Lexington Hills was the only party to the instrument. The Master Declaration reveals that it was the intent of Lexington Hills that a homeowners' association would ultimately own and operate a common irrigation delivery system, as well as the water rights to be used for irrigation. The reservation of water rights in the Master Declaration was clearly necessary to prevent water rights from being unintentionally conveyed to the individual homeowners upon conveyance of each building lot.³ Additionally, it is clear from the Master Declaration that Lexington Hills did not know how much water might ultimately be required for irrigation of the subdivision – under section 13.2 of the Master Declaration, Lexington Hills did not obligate itself to extend the water delivery system to all future phases of the development. Accordingly, it would not have made sense for Lexington Hills to simply convey the entire Jacobs water right to the Lexington HOA upon its inception. To the contrary, the scheme of the Master Declaration, and the circumstances leading up to its execution, indicate that 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. Further, the reasonable inference, consistent with Lexington Hill's prior conveyances, is that Lexington Hills intended to make these conveyances of water rights expressly via written instruments, as opposed to silently transferring the water rights as an appurtenance to the common areas.

³ Lexington HOA does not argue that the reservation of water in the Master Declaration was ineffective in preventing the transfer of water rights to the individual lot owners in the subdivision.

Another reason that militates in favor of Lexington Hills' interpretation of the Master Declaration is the issue of quantification of the amount of water that would have passed under Lexington HOA's theory of the case. In *Crow v Carlson*, 107 Idaho 461, 690 P.2d 916 (1984), the Idaho Supreme Court stated that where a portion of a parcel of real property is conveyed, in the absence of an expression to the contrary, any appurtenant water rights would pass in the same proportion as the land. *Id.* at 467, 690 P.2d 922.

In the instant case, however, the subject "silent" deeds only conveyed parcels of common area to the association. Lexington HOA argues that the conveyance silently carried with it a fraction of the water right in proportion to the "plat" that is referenced in the Master Declaration. ("Surface water for irrigation appurtenant to each phase of development of the Property will be conveyed to the Association as each **plat** is recorded"). Under Lexington HOA's theory, the water right would be appurtenant only to the deeded common areas, but the place of use would include both the common areas and the individual building lots.⁴ In other words, the place of use for the water right would be larger than the parcel of property to which it is claimed to be appurtenant.⁵

This Special Master disagrees with Lexington HOA's theory of the case. It cannot be inferred from the above-quoted statement in the Master Declaration that Lexington Hills intended to fractionalize the irrigation water right among the various phases of the development, with each recorded "plat" having its own discernable portion of the right. To the contrary, the reasonable inference is that the statement constitutes 1) an assurance to purchasers of lots in the subdivision that sufficient irrigation water would

⁴ At a minimum, an analysis of this theory would present questions of fact that cannot be resolved on the information contained in the record on summary judgment. For example, the record does not contain undisputed information showing the amount of irrigable land in each "plat." Such information would be necessary for purposes of quantifying the amount of water that would have been conveyed in the "silent" deeds under Lexington HOA's theory.

⁵ The Idaho Supreme Court recently recognized that the place of use for a water right does not necessarily need to directly correspond to the land to which it is appurtenant, by holding that there need not be a "physical relationship" between the water right and the land to which the right is appurtenant. *Joyce Livestock*, 2007 WL 428947 at *14-16 (holding that water rights for stockwater with a place of use on federal public land can be appurtenant to, and pass with a conveyance of, privately-owned base ranch property). However, because this Special Master finds that the Master Declaration unambiguously reserved all water rights, subject to an obligation to convey to the Association sufficient irrigation water for the

be provided for their lots, and 2) a statement of timing as to when Lexington Hills would fulfill this obligation.

Lexington HOA also argues that because the first six deeds expressly conveyed water rights to the Lexington HOA for use on particular phases of the subdivision, the remaining areas of the subdivision could potentially be left without irrigation water. Lexington Hills counters this argument by pointing out that the *Director's Report* for water right 63-00123G includes the entire subdivision as the place of use, meaning that the Lexington HOA can distribute its entire 2.388 cfs throughout the entire subdivision.⁶ At oral argument, counsel for Lexington HOA stated that having a place of use of the entire subdivision does not resolve the potential problem of disputes that may arise between homeowners in different phases of the subdivision concerning whether some phases of the development have not been deeded water rights. These concerns are merely speculative, there is no such dispute presented in these subcases, individual homeowners have not filed objections and are not parties to these subcases and, therefore, the potential issue raised by Lexington HOA does not bear upon a determination of the elements of the subject water rights in the SRBA.

C. The Six Deeds Which Expressly Conveyed Water Conveyed 2.388 CFS.

The *Director's Report* in subcase 63-00123G recommended a quantity of 2.15 cfs in the name of Lexington HOA. There is no disagreement among the parties that this amount is in error. In its briefing, Lexington Hills concedes that an adjustment should be made increasing Lexington HOA's quantity to 2.388 cfs, and a corresponding reduction of Lexington Hill's quantity to 1.692 cfs.

D. East Hills Development Conveyed the Jacobs Water to Lexington Hills.

In its briefing, Lexington HOA argues that East Hills' claim to 0.5426 cfs of the Jacobs water should be rejected because East Hills transferred all of its interest therein to

subdivision, the applicability and attendant complexities of the "no physical relationship" holding in *Joyce Livestock* need not be addressed.

⁶ Whether or not 2.388 cfs is a sufficient quantity to achieve its intended purpose is beyond the scope of these proceedings on summary judgment.

Lexington Hills via two deeds in 1998 and 1999. *Arrington Aff.* Ex B and C. This Special Master agrees. The subject deeds are silent as to water rights and, accordingly, any appurtenant water rights would pass with the conveyances. *Crow v. Carlson*, 107 Idaho at 467. The relevant portion of the Jacobs water is appurtenant to the land conveyed in these two deeds pursuant to Idaho Code § 42-220 ([A]ll rights to water confirmed . . . by any decree of court, shall become appurtenant to, and pass with a conveyance of, the land for which the right of use is granted). There is no indication on the face of these two deeds that the grantor intended to reserve any water rights or to sever this appurtenancy relationship between the land and the water right. Furthermore, these two deeds are neither ambiguous nor uncertain in their terms and, accordingly, the rules of construction set forth above would prevent the two parties to these deeds (Lexington Hills and East Hills Development) from introducing extrinsic evidence which would show a contrary intent of the parties.

This Special Master notes that the issue of whether East Hills Development transferred the Jacobs water to Lexington Hills is only potentially material at this stage of the proceedings. However, given the rulings set forth in the next section of this decision, Lexington HOA will be provided an opportunity at trial to show whether Lexington Hills has, in fact, transferred the amount of water that it is obligated to transfer under the sentence of the Master Declaration which states: "Surface water for irrigation appurtenant to each phase of development of the Property will be conveyed to the Association as each plat is recorded." Accordingly, it is proper to rule on this issue given the possibility that Lexington Hills is found to be obligated, following a trial on the matter, to transfer any water rights that would otherwise be held by East Hills.

VII. CONCLUSION AND ORDER

Lexington HOA's motion for summary judgment is **denied** relative to the conveyance of water rights in the "silent" deeds; **granted** with respect to the first six deeds transferring 2.388 cfs; and **granted** with respect to East Hills having transferred all of its claimed Jacobs water to Lexington Hills.

Lexington Hills' motion for summary judgment is **granted** relative to the conveyance of water rights in the "silent" deeds.

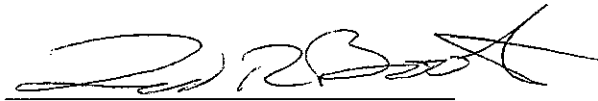
VIII. ORDER SETTING SCHEDULING CONFERENCE

In this Special Master's opinion, there remains a factual question to be resolved in these subcases: Has Lexington Hills transferred water rights to Lexington HOA in an amount that it obligated itself to transfer in the Master Declaration? In its responsive briefing on summary judgment, Lexington Hills filed the *Affidavit of David H. Roylance*, which sets forth that Lexington Hills has satisfied its obligations. However, for purposes of summary judgment, where the subject instruments of conveyance are certain and unambiguous, the information contained in the *Affidavit of David Roylance* is inadmissible for purposes of showing what the grantor intended in these instruments. A factual issue remains to be resolved.

At oral argument on summary judgment, counsel for Lexington Hills briefly indicated that resolution of this factual issue would not be proper in the SRBA, and should be resolved in the district court of the fourth judicial district. Lexington Hills will be provided an opportunity to fully develop and brief its argument in this regard in pre-trial motion practice.

A trial scheduling conference will be held on **May 1, 2007 at 1:30 PM Mountain Time** at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing 225-383-1099 and when prompted entering the code 675342.

Dated April 18, 2007



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION & ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND ORDER SETTING SCHEDULING CONFERENCE was mailed on April 18, 2007, with sufficient first-class postage to the following:

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