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AUG 28 2008

DEPARTMENT OF
WATER RESOURCES

Attorneys for Lexington Hills Homeowners' 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
)
) **LEXINGTON HILLS HOMEOWNERS'**
) **ASSOCIATION'S RESPONSE TO**
) **MOTION IN LIMINE**
)
)

COMES NOW, Lexington Hills Homeowners' Association ("Homeowners"), by and through its attorneys of record, Barker Rosholt & Simpson, LLP, and submits this *Response to Motion in Limine*, filed by Lexington Hills, Inc. ("Lexington"). Through its motion, Lexington seeks to limit the Homeowners' presentation of evidence at the September 5, 2008, trial. For the following reasons, Lexington's motion should be denied.

INTRODUCTION

This motion comes before the Court approximately three weeks prior to hearing. The Special Master previously ruled on the issue of ownership based in part upon the Affidavit of David H. Roylance, an engineer, an original and former board member of the Lexington Hills Homeowners Association and a board member of Lexington Hills, Inc. *See* Briefing &

Memorandum Decision & Order on Cross Motions for Summary Judgment (Apr. 18, 2008).

That affidavit made certain references regarding the intent of the ownership and use of water that is now the subject of the hearing. In its order on summary judgment, the Court held that Lexington had retained some water, but that a question of fact remained as to the quantity of water retained.

Investigation of water need and use for the Lexington Hills subdivision included a review of groundwater permit no. 63-11413 and the use of water under that permit. While reviewing permit no. 63-11413, the Homeowners discovered that certain facts, statements and conditions of use attached to the water permit affect the use of the surface water currently appurtenant to the lands commonly known as Lexington Hills (i.e. the above water rights). This information was disclosed to Lexington nearly 4 months ago. Notwithstanding the fact that Mr. Roylance was a board member for the Homeowners' at or near the time that permit no. 63-11413 was issued, it is apparent that neither Lexington nor its representatives had this information prior to that disclosure.

Lexington now seeks to prevent the Court from hearing this evidence, even though it may have a significant impact on the adjudication of the above water rights. As discussed below, Lexington's motion should be denied.

STANDARD OF REVIEW

Courts have broad discretion when ruling on a Motion in Limine. *Gunter v. Murphy' Lounge, LLC*, 141 Idaho 16, 25 (2005). "The trial court may deny the motion and wait until trial to determine if the evidence should be admitted or excluded." *Id.* A court's decision on such a motion is reviewed "under an abuse of discretion standard." *Id.* "When reviewing an exercise of discretion on appeal this Court inquires as to:

- (1) whether the lower court correctly perceived the issue as one of discretion;
- (2) whether the court acted within the outer bounds of such discretion and consistently with legal standards applicable to specific choices; and (3)
- whether the court reached its decision by an exercise of reason.

Appel v. LaPage, 135 Idaho 133, 135-36 (2000). As discussed below, Lexington's motion should be denied.

RESPONSE TO MOTION IN LIMINE

I. The Purposes of the SRBA Demand that Lexington's Motion be Denied

The SRBA was commenced in order to provide a "comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from the system." I.C. § 42-1406A(1) (uncodified); *see also Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 156 (1995). Idaho Code requires that all decrees contain "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(j). These water rights, once decreed, govern the administration of the waters of the state by the Director, through the watermaster. *See* I.C. §§ 42-602 & -607.

Through their motion, Lexington seeks to prevent the Homeowners from addressing relevant, valuable information regarding the need for a comment on the above-captioned water rights. During the permitting process for water right 63-11413, numerous objections were filed by various individuals. These objections were resolved only after the "applicants agreed to not sell or transfer to another location any of the surface water rights that are presently associated with the property." *Proposed Memorandum Decision & Order Approving Application for Permit No. 63-11413* (Aug. 7, 1991) at 5-6, ¶ 22 ("1991 Order") (attached to the Expert Report

of David B. Shaw).¹ Furthermore, the “sale or transfer of” the above captioned water rights “*from any portion of the property* will void the department’s approval to use [water right 63-11413] for irrigation purposes.” *Id.* at 11-12, ¶ 5. A comment recognizing this agreement was placed on the permit for water right 63-11413. Such a specific limitation placed on the above-captioned water rights is necessary for purposes of defining the rights, and for future administration of the right by the Director and watermaster.

Importantly, the permit was issued to Floating Feather Hills, Inc., the predecessor to Lexington. At the time, Mr. Roylance was a board member for *both* Floating Feather/Lexington and the Homeowners. Indeed, Mr. Roylance, as a member of the board for Floating Feather, likely assisted in the preparation, filing, defending and settlement of the application for permit. Furthermore, Lexington is bound by the terms and conditions in the permit – including the condition preventing the transfer of *any* surface water from the lands.

Lexington claims that carrying these limitations into the above-captioned water rights would require the Court to entertain Department witnesses who will “prejudge the effect of the language without the context of request for any specific administrative action.” *Lexington Br.* at 5. Lexington is wrong. The condition on the permit prohibits, in unambiguous, the use water right 63-11413 for any irrigation (during the shoulder seasons) unless “the *entire amount* of water from Farmers Union Canal Co. *remains with the lands* in Lexington Hills and Trail Creek Ranch.” (Emphasis added).² This clear language requires no speculation on the part of the

¹ The 1991 Order was submitted to the Director of the Idaho Department of Water Resources for review and consideration. In an August 9, 1991, Order, the Director approved the 1991 Order and provided each party, including Lexington, the opportunity to review and submit exceptions. (Attached to Expert Report of David B. Shaw). On September 11, 1991, the Director issued a *Final Order Adopting Proposed Memorandum Decision & Order Approving Application for Permit No. 63-11413*. (Attached to Expert Report of David B. Shaw). No exceptions, specifically as related to the agreement to keep *all* of the surface water on the lands, were filed by any party, including Floating Feather/Lexington.

² Indeed, according to the permit, any attempt to remove “water from *any portion* of these properties will be cause for the Department to further limit the use of this right [i.e. 63-11413].” (emphasis added).

Department or any of the parties as to the intended meaning. *Cf. Howard v. Perry*, 141 Idaho 139, 141 (2005) (“If a written contract is complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract”); *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667 (1993) (Courts “have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature”).

Lexington does not dispute that the “Farmers Union Canal Co.” water referenced in this condition is the very water at issue in these proceedings. Nor does Lexington dispute that this condition impacts the exercise of the above-captioned water right. That notwithstanding, Lexington would have the Court ignore this condition and issue a partial decree without any reference to or consideration of the limitations specifically placed on these water rights or how said conditions would effect consideration of the elements of the water right. *See Lexington Br.* at 3-4 (calling the issue of the condition on water right 63-11413 “irrelevant” “speculative” and “not ripe for adjudication in the SRBA”).

Finally, Lexington wrongly asserts that the issue of conditioning this water right, consistent with the 1991 Order and permit no. 63-11413, is not “ripe for decision” and that any thought of conditioning the water rights by this Court is “speculative and irrelevant.” *Lexington Br.* at 3-4. Lexington misunderstands the purpose of the SRBA. This Court was established to provide a vehicle for considering what comments are necessary for the future definition and administration of the water rights. As such, now is the time to consider the express limitation placed on the above water rights and statements or representations made by developers of the

Lexington Hills subdivision, including Floating Feather/Lexington, through the permitting process for water right 63-11413.

II. The Homeowners' Claims, Relative to the Condition on Water Right 63-11413, Are Relevant to the Homeowners' Claims and Objections Throughout These Proceedings.

Lexington oversimplifies the pending issues before the SRBA Court when it classifies the upcoming trial as intended “solely for the purpose of determining what portion, in any, of rights 63-123D and F Lexington Hills is obligated to convey to the Homeowners pursuant to the Master Declaration.” *Lexington Br.* at 3. The issues before this Court cannot be summed up in such a terse fashion.

The Homeowners have claimed all of the water in the above water rights. They have a duty to protect the interests of the association membership in irrigating the lawns and common areas within the development. Anything that could impair this interest should be considered by the Court. Therefore, if acquiring the permit for water right 63-11413 resulted in an agreement to leave all of the water rights on the associated property – the removal of which would eliminate the right to irrigate during the shoulder seasons – then the Homeowners must be permitted to defend their interests by addressing that agreement.

Lexington has never claimed that it owns all of the water in the above water rights. It has no interest in ensuring that the water rights remain on the property as required by the agreement in the permitting process for water right 63-11413. Indeed, Lexington has indicated that transferring water right 63-123D following these proceedings is a possible option for consideration by Lexington. *See Lexington Br.* at 3 (“When and if submits an administrative application to transfer its portion of right 63-123 away from the Subdivision ...”).

It is also worth noting, Mr. Roylance's involvement in acquiring water for the development and his inconsistent interests. Mr. Roylance was an original board member of the Homeowners at that time representing the Homeowners to ensure that there would be adequate water for the development. At the same time he had an interest, financial or otherwise, as a board member of Lexington. The record clearly reveals competing interests for the water.

East Hills Development, LLC has also claimed some of above captioned water rights and they also have no interest in protecting the rights of the Homeowners. They have no interest in ensuring that the obligations arising out of the permitting process for water right 63-11413 are met. However, Court has rightfully determined that East Hills does not have any interest in water right 63-123F.

Lexington attempts to downplay the clarity of the Order and Permit by arguing that the intent of the parties could only be determined if the parties "parse through [the 1,111 page back file] at trial, examine the protests, related correspondence, department memoranda, etc."

Lexington Br. at 4. Such actions are not necessary here, however, given that the order and permit are clear and unambiguous. *See Howard, supra; City of Sun Valley, supra.* Indeed, the 1991 Order and Permit specifically require that all water remain with the lands.

The Homeowners have made claims to all water recommended in the above water rights, filed objections where the recommendations were inconsistent with the Homeowners' claims and have pursued this matter in Court in order to ensure that its interests are adequately protected. These interests will only be protected in the Court considers all the material facts – including the clear and specific limitations placed on the above water rights through the permitting process for water right 63-11413.

III. Information Regarding the Permitting Process for Water Right 63-11413 is Necessary to Rebut Testimony Provided by Mr. Roylance.

Lexington has called David H. Roylance as a witness. Mr. Roylance is a current board member for Lexington and was a board member of Floating Feather/Lexington at the time of the permitting process for water right 63-11413. Importantly, Mr. Roylance was also a board member for the Homeowners at that time. As such, he was involved in the process that led to the agreement to leave all surface water on property. *See, supra*. Now, however, nearly than 18-years later, Lexington has attempted to evade the unambiguous requirements of the Permit and 1991 Order by offering the testimony of Mr. Roylance who argues that the clear language should be ignored and that the Court should only consider the unwritten “intent” of Mr. Roylance in negotiating the settlement. Mr. Roylance’s inconsistent positions cannot go without notice to the Court.

Furthermore, Lexington now indicates that it may consider transferring water right 63-123D from the property. *See, supra*. This position is inconsistent with the prior statements and representations to the protestants and Department during the permitting process.

Information about the permitting process for water right 63-11413 has only recently come to light. In researching the duty of water matter before this Court, the Homeowners discovered the 1991 Order and the potential impact that water right 63-11413 would have on the exercise of the above water rights. The Homeowners undertook an investigation as to the duty of water issue and the interface with the Permit – as associated with late season irrigation/pond usage.³ This information affects the credibility of the information submitted on summary judgment, the duty

³ This investigation was undertaken by Dave Shaw, an expert hired by the Homeowners. Mr. Shaw, a former SRBA bureau chief for the Department, has attached this information as part of his expert testimony, for which Mr. Shaw believes it is relevant for the issues presented to this Court regarding ownership and duty of water.

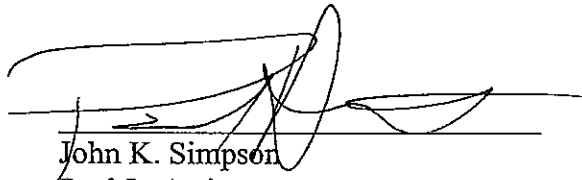
of water issue and other matters necessary for the delivery of water. As such, Lexington's motion should be denied.

CONCLUSION

The SRBA Court is charged with assuring that decrees accurately reflect the water right and provide sufficient information for future definition and administration. Information related to the permitting process for water right 63-11413 is necessary for this process, as well as to ensure that the Court is provided all material information. For these reasons, Lexington's motion should be denied.

Dated this 26th day of August, 2008.

BARKER ROSHOLT & SIMPSON, LLP



John K. Simpson
Paul L. Arrington
Attorneys for Lexington HOA

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 26th day of August, 2008, I caused to be served a true and correct copy of the foregoing **LEXINGTON HILLS HOMEOWNERS' ASSOCIATION'S RESPONSE TO MOTION IN LIMINE** by the method indicated below, and addressed to each of the following:

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Twin Falls, ID 83303-2707

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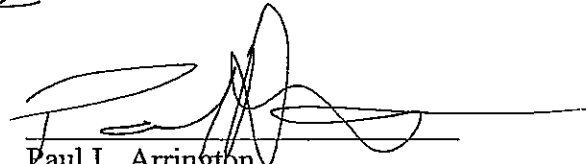
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