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October 17, 2008

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Special Master Booth
Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, ID 83303-2707

John M. Marshall
Givens Pursley, LLP
P.O. Box 2720
Boise, Idaho 83701

RE: Lexington Home Owner's Proposed Findings & Fact & Conclusions of Law

Dear Special Master & Mr. Marshall:

Attached you will find a copy of the Lexington Hills Homeowners' Association's *Proposed Findings of Fact & Conclusions of Law*.

During the hearing, David Shaw discussed excerpts from a department transcript. The following are Mr. Shaw's recollection of the location of that testimony on the IDWR hearing tapes:

- Phil Barber begins his presentation on the first tape at 550 on the tape counter on IDWR's 4 channel recorder.
- Dave Roylance begins his testimony at tape count 1770 on the first tape and the excerpted portion of his testimony came from the range of about 3638 to 3775 still on the first tape.

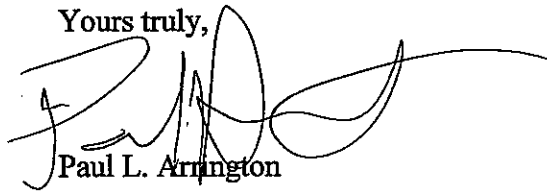
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DEPARTMENT OF
WATER RESOURCES

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Feel free to call if you have any questions.

Yours truly,

Paul L. Arrington

PLA/jf

Encs.

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OCT 20 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 PROPOSED FINDINGS**
) **OF FACT AND CONCLUSIONS OF LAW**
)
)

COMES NOW, Lexington Hills Homeowners' Association ("LHOA"), by and through its attorneys of record, Barker Rosholt & Simpson, LLP, and submits its *Proposed Findings of Fact and Conclusions of Law*.

FINDINGS OF FACT

Snake River Basin Adjudication

1. The Idaho legislature explained the purpose of the SRBA succinctly in I.C. § 42-1406A (uncodified), under which the adjudication was commenced in November, 1987:

Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined.

2. The SRBA statutes were amended in 1994. House Concurrent Resolution No. 70, passed that session, directed the Legislative Council Committee on the SRBA to study and report back to the 1995 Idaho Legislature on several matters related to the adjudication, including

actions the Legislature should take to facilitate the development of a long-term management plan for the administration of surface and ground water supplies in Idaho.

3. In its report, the Committee explained that: “The Legislature authorized the adjudication in 1985 to provide finality and certainty with respect to all water rights and to address the federal government’s impending claims.” After considering testimony by “Chief Justice McDevitt, representing the judiciary, members of the executive branch and, in particular, the detailed comments made by claimants,” the Committee developed the following “statement of substantive goals for the SRBA”:

A. Goals for the Snake River Basin Adjudication

1. All water rights within the Snake River Basin should be defined in accordance with Chapter 14, title 42 so that all users can predict the risks of curtailment in times of shortage. ***It is vital to all water users that they have as high a degree of certainty as possible with respect to their water rights.*** Uncertainty discourages development, undermines the ability of agencies to protect stream systems and fosters further litigation. (Emphasis added).

4. Stated simply, the purpose of the SRBA was to provide the Idaho Department of Water Resources (“IDWR”) and the various watermasters with an accurate list of water rights to distribute water pursuant to the SRBA Court’s decrees.

Procedural History

5. Three SRBA Claims were originally filed for water appurtenant to what is commonly known as the Lexington Hills Subdivision (hereinafter, the “Subdivision lands”). Claims were filed by LHOA (63-123G), Lexington Hills, Inc. (“INC”) (63-123F) and East Hills Development, LLC (“East Hills”) (63-123D). The three water rights were claimed, in part, as follows:

Claimant	LHOA	INC	East Hills
Water Right #	63-123G	63-123F	63-123D
Diversion Rate	4.605 cfs	1.93 cfs	0.5246 cfs
Acres	303	270	50

6. The Subdivision lands include three developments, Lexington Hills (1-12), East Hills (1-2) and Lexington on the Rim.

7. LHOA was created to, among other things, effectuate the delivery of irrigation water to the landowners within the developments and to be responsible for irrigation and maintenance of the common areas in accordance with the Covenants, Conditions and Restrictions (“CCRs”), duly recorded together with the necessary land conveyances.

8. LHOA was the only claimant to claim as the place of use for irrigation, the entire Subdivision lands and the quantity of water historically used to irrigate all of the Subdivision lands.

9. Based upon a review of the claims and submissions from the Farmers Union Ditch Company (*see* Testimony of Jan Shurte), IDWR recommended the rights with the following diversion rates:

Claimant	LHOA	INC	East Hills
Water Right #	63-123G	63-123F	63-123D
Diversion Rate	2.15 cfs	1.93 cfs	0.5246 cfs

IDWR recommended these water rights at 1 inch per acre.

10. LHOA filed objections to all three recommendations. LHOA objected to IDWR's failure to recommend water right 63-123G as claimed. LHOA claimed ownership of all water historically diverted to the Subdivision lands and disputed the interests of either East Hills or INC. Neither East Hills nor INC filed any objections or responses to the three water right recommendations. No other parties to the SRBA filed objections or responses to the three water right recommendations.

11. Motions for Summary Judgment were filed by LHOA and INC, addressing the issue of ownership, based solely upon the interpretation of the CCRs and the *Affidavit of David Roylance*. *See generally, Motions for Summary Judgment and Briefs in Support* (filed winter/spring 2007).

12. The Special Master entered an interlocutory order determining that both the LHOA and INC had an ownership interest. *See Memorandum Decision & Order on Cross Motions for Summary Judgment* (April 18, 2007). In the summary judgment order, the Special Master determined that East Hills did not have any interest in the claimed water.

13. In his summary judgment order, the Special Master indicated that "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 ... Master Declaration." In other words, the duty of water associated with the Subdivision lands will dictate the extent, if any, of INC's on-going ownership interest in any portion of the water.

14. Following issuance of the summary judgment order, LHOA discovered information indicating that INC, or its predecessor in interest, had made assurances to IDWR that it would not attempt to transfer any of the surface water appurtenant to the Subdivision lands off of the Subdivision lands. The assurances were made to resolve objections to a new ground water permit (63-11413), acquired in 1991. 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 (emphasis added). 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 (emphasis added). A comment recognizing this agreement was placed on the permit for water right 63-11413.

15. On September 3, 2008, a one-day hearing was held in front of the Special Master to present evidence on the disputed elements of the water rights. Based upon the objections filed by LHOA, the outstanding issues to be decided in the hearing were ownership, duty of water, place of use, and other provisions necessary to effectively administer the right. Pre-filed testimony was submitted by both LHOA and INC regarding the duty of water and water requirements for the Subdivision lands. The testimony David Shaw was presented on behalf of LHOA regarding irrigation requirements, place of use and conditions of the use of the water which affects both ownership and conditions as to the use of the water. *See FF#14*. Inc submitted the testimony of Terry Scanlan and David Roylance.

16. No testimony or evidence was presented on claim #63-123D, as it was denied by the Special Master in the summary judgment order.

Findings of Fact 17 through 34 are submitted to address the outstanding issues or elements of claims #s 63-123F and 63-123G regarding **Ownership**, including the conveyance of land, **Quantity** through the duty of water, **Purpose and Period of Use**, **Place of Use** and **Other Provisions** Language.

Ownership/Conveyance of Water from INC to LHOA

17. As Subdivision lands were developed and conveyed to LHOA or the homeowners, INC conveyed to LHOA water rights appurtenant to *specific* enumerated lands, within Lexington Hills (1-6), for the *specific* purpose of irrigating those enumerate private and community areas within Lexington Hills (1-6).

18. INC has not conveyed water rights specifically appurtenant to all the Subdivision lands that have been developed and conveyed to LHOA or a homeowner. In the first six deeds, attached as Exhibits D through I of the *Affidavit of Paul L. Arrington in Support of Motion for Summary Judgment*, Lexington Hills deeded 119.4 inches (2.388 cfs) of water to LHOA 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

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

19. Ten other deeds were executed to transfer additional tracts of land to LHOA. *Arrington Aff.* Exs. J through S. These deeds were silent as to the quantity of water that was being transferred.

20. LHOA, and the landowners, beneficially use the water historically diverted in the irrigation of individual lots and common areas. LHOA does not waste the water that it uses to irrigate the common areas.

21. Pursuant to claim 63-123G, LHOA claimed water use over the entire Subdivision lands. LHOA is either the user of the water or delivers the water for use by landowners within the Subdivision lands. There is no dispute as to LHOA's ownership interest on behalf of the landowners.

22. Both LHOA and East Hills (63-123D) filed competing claims for water appurtenant to lands commonly known as East Hills. In the summary judgment order, the Special Master found that East Hills did not have any interest in the water. In addition, no Objection was filed as to LHOA's ownership of this water. Therefore, sole ownership of this water appurtenant to the East Hills lands should be decreed in the name of LHOA, under 63-123G.

23. By summary judgment order, the Special Master found that the LHOA (63-123G) and INC (63-123F) each held an ownership interest, subject to the Special Master hearing evidence as to the duty of water for the Subdivision lands. Testimony of David Shaw and documents in support of said testimony identify a clear intent on behalf of INC to leave all water historically diverted on the Subdivision lands. Very pertinent to this issue are the statements and testimony attributed to counsel for INC and Mr. Roylance as a part of the administrative process in acquiring groundwater for the early and late season irrigation requirements of the development. *See also, infra*, "Other Provisions."

Duty of Water

24. IDWR's recommendations under 63-123D, 123F and 123G were premised upon two facts. First, water appurtenant to the Subdivision lands was originally decreed in the Stewart Decree, at a decreed amount of one inch per acre. Second, a review of the Farmers Union Ditch Company's records revealed a history of assessments being paid by the three claimants, East Hills, INC and LHOA.

25. At hearing, LHOA expert, David Shaw identified an irrigation demand of 1.13 inches per acre during periods of high water demand. INC's engineer, Terry Scanlan, in written testimony agreed with Mr. Shaw in his method of analysis, but recommended the crop (landscaping) be water stressed during high water demand periods rather than providing the crop water needs from available irrigation water. On cross-examination, Mr. Scanlan acknowledged that the irrigation demand was in excess of one inch per acre and that the water could be put to beneficial use. In fact, Mr. Scanlan's written testimony showed that under high water demand conditions, LHOA could put to beneficial use 1.08 inches per acre and stress would still occur.

Purpose & Period of Use

26. IDWR's recommendations identified only irrigation as a use of the water. While there was some limited testimony at hearing that the various ponds utilized for irrigation deliveries do have some temporary storage capabilities, the record is incomplete as to determine whether such storage would contribute to a multiple day water supply or be attributable to a storage claim. Further, the testimony identified a practice of filling the aesthetic ponds during the day and then pumping the ponds during the evening to facilitate irrigation deliveries. Any retention of water in the ponds is temporary and the record is incomplete as to whether or not this practice would contribute additional water for irrigation purposes.

27. INC failed to either make a storage claim or provide notice of such an assertion. As such, no finding shall be made.

Place of Use

28. IDWR's recommendations for the three claims identified all lands being irrigated for a total of 230.3 acres. No party, East Hills, LHOA or INC objected to either the individual recommended acres or the total acres. There appears, based upon the clear record, to be no dispute as to the place of use description and the acreage figures provided. The only reconciliation necessary is to include the East Hills acreage duty of water and place of use within the LHOA water right.

29. With a duty of water of 1.13 inches per acre, only 204 acres may be irrigated within the 230.3 acre place of use.

30. At hearing, Mr. Shaw testified that the LHOA irrigated acre requirement, including the common areas, individual lots and mitigation for the ponds, equaled approximately 183 acres. Given a duty of water of 1.13 inches per acre, 4.136 cfs would be required to irrigate these acres.

Other Provisions Necessary for Definition or Administration

31. Irrespective of resolution of ownership, the record is clear that as a condition of irrigation of the Subdivision lands, INC or its predecessor in interest, Floating Feather, agreed to leave all surface water appurtenant to the lands. Such statements made in the context of the administrative hearing amounted to a condition of future use on said water. To find otherwise, might jeopardize the on-going delivery of water to the development

32. It is not necessary for the Special Master to interpret the intent of the statements. Rather, accepting that the statements were made is foundation enough for requiring a condition be placed upon the use of the water.

33. In addition, IDWR testimony at hearing supports such a condition, linking the various sources and uses of water. *See testimony of Jan Shurte*. Further, the only testimony offered by INC to address early understandings of the water use, was that of Mr. Roylance, who simply stated that early on INC did not fully understand the amount of water that was available or needed. *See Testimony of Roylance*.

34. The record reveals that no dispute exists as to the “Source of Water”, “Priority” or “Point of Diversion.”

CONCLUSIONS OF LAW

1. “Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined.” I.C. § 42-1406A (uncodified).

2. In order for a water right to be adjudicated in the SRBA, a claim must be filed, unless the water right is specifically exempted from the filing requirements. I.C. § 42-1409. No exemption applies in this case. *See* I.C. § 42-1420(1). Unless a water right is claimed in the SRBA, no decree will be entered for that water right and it will be “lost by failure to file a notice of claim.” *Id.*

3. A party may file a late *Notice of Claim* or amend its *Notice of Claim* pursuant to the procedures in AO1 4(d)(2). “A claimant may not amend a claim by filing an objection or a response.” AO1 4(d)(1)(b). The party must follow the procedural mechanisms established for seeking leave to amend a notice of claim pursuant to Idaho Code § 42-1409A, which provides that “no amendments to a notice of claim or late notices of claim shall be allowed except as authorized” by section 42-1409A. *See also Second Amended Order on Summary Judgment* (36-00003A, *et al.*), 1 SRBA 60, 60.16-60.17 (1996).

4. A party may file an *Objection* on any element of a recommended water right pursuant to AO1 4(d)(1). *Responses* to the *Objection* may also be filed. *Id.*

5. Absent any *Objection* or *Response* to a recommendation for a water right, the water rights will be decreed as recommended. I.C. § 42-1412(7).

6. “The notice of claim, objections, and responses to objections, shall identify the issues to be heard for water rights acquired under state law.” I.C. § 42-1412(3). As such, in light of section 42-1412(7), any element of a water right that is not objected to, will not be at “issue to be heard” at hearing.

7. In recommending a water right, IDWR will include “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).

8. When the SRBA Court issues a partial decree, IDWR is bound to accept the court’s findings as to the quantity element that a right holder is entitled to divert and beneficially use. I.C. §§ 42-1401A(5); 1420(1); *Crow v. Carlson*, 107 Idaho 461, 465 (1984) (“The [] decree is conclusive proof of diversion of the water, and of application of the water to a beneficial use.”).

9. The duty of water represents the amount of water necessary for beneficial use:

Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed.

Head v. Merrick, 69 Idaho 106, 108 (1949).

A water right is the right, in due order of priority and within the maximum appropriated, to use that amount of water which reasonably suffices for the owner's needs at any particular time.

U.S. v. American Ditch Assoc., 2 F. Supp. 867, 869 (D. Idaho 1933)

10. Until an order is final, the Court may revise the order:

[A]ny order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the actions as to any of the claims or parties, and ***the order or other form of decision is subject to revision at any time before the entry of judgment*** adjudicating all the claims and the rights and liabilities of all the parties.

I.R.C.P. 54(b) (emphasis added).

CONCLUSION

Based on the testimony at hearing, and the Findings of Fact and Conclusion of Law, set forth above, the water rights should be recommended as follows:

- 63-123D: Should be disallowed in accordance with the Special Master's summary judgment order
- 63-123F: Should be recommended in the name of Lexington Hills, Inc., with a diversion rate of 0.469 cfs, for the irrigation of 21 acres within a 47.3 acre permissible place of use, for irrigation consistent with a duty of water of 1.13 inches per acre.
- 63-123G: Should be recommended in the name of Lexington Hills Homeowners' Association with a place of use consisting of 183 acres and a diversion rate of 4.136 cfs for irrigation purposes, consistent with a duty of water of 1.13 inches per acre.

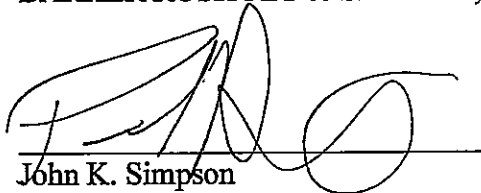
In addition, in accordance with the settlement agreement entered in relation to permit 63-11413, the following comment should be placed on water rights 63-123F and 63-123G:

Pursuant to a settlement reached in the permitting process for permit 63-11413, no surface water may be sold or transferred from any portion of the place of use identified within the lands commonly known as Lexington Hills Subdivision.

The undisputed testimony at hearing supports a recommendation of the water rights as described above. The Special Master should issue a report and recommendation in accordance with these findings.

Dated this 17th day of October, 2008.

BARKER ROSHOLT & SIMPSON, LLP

A handwritten signature in black ink, appearing to be 'John K. Simpson', written over a horizontal line.

John K. Simpson

Paul L. Arrington

Attorneys for Lexington HOA

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 17th day of October, 2008, I caused to be served a true and correct copy of the foregoing **LEXINGTON HILLS HOMEOWNERS' ASSOCIATION'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW** by the method indicated below, and addressed to each of the following:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, ID 83303-2707

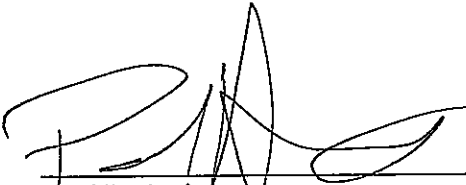
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