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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 POST-
TRIAL BRIEF**

INTRODUCTION

The Lexington Hills Subdivision ("Subdivision") is a distinctive residential neighborhood in Eagle, Idaho, set apart from other communities by its extensive and well landscaped common areas and homes. Lexington Hills, Inc. ("Lexington"), the developer of the Subdivision, is proud of the community it created and has always intended that the Subdivision have sufficient water rights to maintain the aesthetic amenities that make the Subdivision unique. Lexington is unwilling, however, to give away valuable water right assets to the Lexington Hills Homeowners Association ("Homeowners") that cannot be put to beneficial use in the Subdivision.

Lexington has already conveyed water rights and delivery entitlements to the Homeowners that provide for a total diversion rate of 122.56 inches (2.45 cfs). Lexington sought to settle on whether any additional water was necessary to irrigate the Subdivision by measuring

the quantity of water delivered through the irrigation system. Direct Testimony of David H. Roylance (“Roylance Direct”) at 4. The Homeowners never answered Lexington’s proposal to install a measuring device on its system and proceeded instead to file claims, objections and summary judgment in the SRBA seeking the entirety of water rights historically appurtenant to the Subdivision.¹ *Id.*

The Court denied the Homeowners’ motion seeking an order that Lexington had conveyed all the historically appurtenant water rights to the Homeowners, holding instead that Lexington had expressly reserved all the appurtenant water rights. *Memorandum Decision and Order on Cross Motions for Summary Judgment* (April 18, 2007) (“Order”) at 11-12. The Court also held Lexington had obligated itself to convey to the Homeowners a sufficient quantity of water to irrigate the Subdivision, and this posed a question of fact for trial.

This Post-Trial Brief explains why, following the presentation of evidence at trial, the Court should rule there are 170 irrigated acres within the Subdivision, the historic duty of water of 0.78 miners inches per acre is sufficient, and the Homeowners therefore are entitled to receive water rights and entitlements sufficient to authorize delivery of 132.6 inches (2.65 cfs) to the Subdivision.

ARGUMENT

I. There are 170 irrigated acres in the Lexington Hills Subdivision.

The question of whether Lexington has conveyed sufficient irrigation water rights to the Homeowners is answered by determining how many acres are irrigated within the Subdivision and then what diversion rate is necessary to irrigate those acres. Thus, the starting point in the analysis is to determine the total irrigated acreage inside the Subdivision.

¹ Given the Homeowner’s position that Lexington had conveyed all the appurtenant water rights, it is understandable why the Homeowners were reticent to participate in a measurement program to determine the quantity of water actually used for irrigation.

Two analyses of irrigated acreage were presented at trial. The Homeowners relied on a report created by Roylance & Associates in 2001. It determined that there were 176.95 irrigable acres, 43.01 of which were located in common areas and 133.94 in lawns. Roylance Direct at 3, Expert Report of David B. Shaw (“Shaw Direct”) at 5, fn 3. Mr. Shaw slightly altered the 176.95 number and then added his approximation of 5 acres for pond surface to determine that 182.9 acres are irrigated in the Subdivision.²

SPF Water Engineering, LLC (“SPF”) conducted an independent analysis of the irrigated acreage in March 2008 at the request and expense of Lexington to verify and update the 2001 report. Terry Scanlan explains the analysis in detail on pages 4-5 of the Direct Testimony of Terry M. Scanlan, P.E, P.G. (“Scanlan Direct”). He summarizes the conclusions in Exhibit 5 to the Scanlan Direct. SPF determined there are 41.4 irrigated acres in common areas (including the school), 124.6 irrigated acres within residential lots and 3.7 acres of pond surface for a total of 169.7 irrigated acres, which Mr. Scanlan rounds to 170.

The two analyses of total irrigated acres differ by 12.9 acres. Of these, 1.3 acres are attributable to the difference between Mr. Shaw’s approximation of pond surface area and SPF’s actual measurement. Another 1.6 acres are attributable to the difference in measured common area irrigation. The remaining 10 are attributable to the difference in the calculation of the irrigated area for residential lots.

At trial Mr. Roylance conceded that SPF’s 2008 analysis is more accurate than the Roylance & Associates 2001 analysis used by the Homeowners. Mr. Roylance explained at trial that SPF had better, more modern GIS tools to work with. The Homeowners did not provide any

² Both Lexington and Homeowners properly assume the Homeowners are entitled to water rights to cover evaporative losses from pond surface. IDWR uses a rule of thumb that an acre of pond surface evaporates a quantity of water equivalent to the ET from one acre of crop. Consequently, both Lexington and the Homeowners add the total pond surface to the total number of irrigated acres in the Subdivision.

evidence to rebut this. It simply argued through Mr. Shaw that it found slight discrepancies in the Exhibit 4 to the Scanlan direct that did not account for small island areas that were irrigated. Rebuttal Expert Report of David B. Shaw (“Shaw Rebuttal”) at 1 and Attachment 1R. However, Mr. Roylance pointed out during his trial testimony that the same criticism could be leveled on his company’s 2001 report. It is just the nature of the beast when calculating the irrigated area within a large, diverse area like the Subdivision. Relatively small areas that are not irrigated are counted as irrigated just as small irrigated areas are not counted. Direct evidence of this can be seen in the Attachment 1R to the Shaw Rebuttal. The residential lot immediately north of the “2” identifying an uncounted irrigated area has an attached patio and a non-irrigated pad in the southeast corner that are both counted as irrigated. In the final analysis, these small areas cancel each other out.

In summary, the authors of the two irrigated area studies both agree the SPF conclusion that approximately 170 acres is irrigated within the Subdivision is most accurate. No evidence supports an alternate conclusion.

II. The historic duty of water for the Subdivision is 0.78 inches per acre.

Once the irrigated acreage is determined, the next step in resolving the quantity of water necessary to irrigate the Subdivision is to verify the historic duty of water for the Subdivision. Absent compelling evidence to justify an increase in the historic duty of water, the Court should adhere to the historic duty. Indeed, the best evidence of the diversion rate sufficient water to irrigate the Subdivision is the decades worth of successful agricultural cultivation that took place on the same lands prior to development. *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207, 252 P. 865 (1926) (“It is a cardinal principle established by law and the adjudications of this court

that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it.”).

The historic duty of water for the Subdivision is not disputed. David Roylance, Terry Scanlan and David Shaw all testified that the total historic water supply appurtenant to the Subdivision is 239.34 inches, comprised of 230.23 inches of the “Jacobs” water right (63-123) and 9.11 inches of water delivery entitlements from the Farmers Union Ditch Company referred to as “developed water” and Farmers Union shares. Roylance Direct at 3, Scanlan Direct at 3, Shaw Direct at 2. The Subdivision covers a total of 328 acres, all of which was irrigated historically except probably the 21.2 acres known as Lexington on the Rim. Scanlan Direct at 3 and Exhibit 1. Excluding the Lexington on the Rim acreage, the farm that existed on the Subdivision predevelopment included 306.6 acres. *Id.* Consequently, the historic duty of water applying 239.34 inches of water on 306.6 acres is 0.78 inches per acre.

The table below summarizes the current ownership allocation of the rights to the parties:

Jacobs Right		inches	cfs	Acres at 0.78 inches
Homeowners	63-123G	119.4	2.388	153.08
Lex Hills Inc.	63-123F	84.6	1.692	108.46
East Hills	63-123D	26.23	0.5246	33.63
Total		230.23	4.6046	295.17
Farmers Union				
Homeowners		3.16	0.0632	4.05
Lex Hills Inc.		5.95	0.119	7.63
East Hills				
Total		9.11	0.1822	11.68
Total Jacobs plus Farmers Union				
Homeowners		122.56	2.4512	157.13
Lex Hills Inc.		90.55	1.811	116.09
East Hills		26.23	0.5246	33.63
Total		239.34	4.7868	306.85

III. The Court should allocate Jacobs water rights to the parties using the 295.17 irrigated acres and the duty of water of 0.78 inches per acre.

IDWR explained at trial that it recommended all the portions of the Jacobs water rights at issue in this case, which combine to a total of 4.6 cfs, by reviewing ownership records from the Farmers Union Ditch Company to determine the diversion rate allocated to each party and then applying a one-inch per acre standard to determine the total acreage for each right. This approach did not consider the number of acres historically irrigated or the historic duty and therefore resulted in unnecessarily cutting 64.94 acres of beneficial use from the Jacobs rights. No evidence warrants this reduction or IDWR's one-inch-per-acre methodology. To accurately allocate and decree the Jacobs right splits at issue, the Court should allocate the 295.17 acres historically irrigated in the Subdivision with the Jacobs rights and then apply the historic duty to distribute the appropriate diversion rate for each portion of the right.

A. The Court should decree the Homeowners' right 63-123G with a place of use of 153 acres within the Subdivision and a diversion rate of 2.388 cfs.

As discussed above, the total area irrigated in the Subdivision post-build out is 170 acres. Accordingly, the Homeowners are entitled to water rights that authorize it to irrigate this number of acres. The ownership chart above shows the Homeowners own 119.4 inches (2.388 cfs) of the Jacobs water right. Using the historic 0.78 inch-per-acre standard, this entitles the Homeowners to irrigate 153.08 acres under right 63-123G. This right should therefore be decreed with a place of use of 153.08 acres located within the boundary of the Lexington Hills Subdivision and with a diversion rate of 2.388 cfs. This diversion rate is consistent with the Court's Order finding Lexington has previously conveyed this quantity of water to the Homeowners (Order at 10). IDWR has already recommended the right as appurtenant to the entire Subdivision, so defining

the permissible place of use for the 153.08 acres as the Subdivision is consistent with the existing recommendation and appropriate.

The Court can determine the allocation for Lexington's portions of the Jacobs water right using the same methodology. Lexington Hills owns 1.69 cfs of the Jacobs right under split 63-123D and 0.5246 cfs under split 63-123F. Applying the historic duty to these rights yields acreage totals of 108.46 and 33.63 acres respectively.

B. The Court should order Lexington to convey water rights or entitlements to the Homeowners sufficient to irrigate 12.87 acres.

The ownership table above confirms the Homeowners own entitlements to delivery of 3.16 inches by Farmers Union pursuant to water rights other than the Jacobs water right. Applying the 0.78 inch duty, this provides for the irrigation of 4.05 acres. Adding these 4.05 acres to the 153.08 acres authorized under right 63-123G, the Homeowners currently own water rights and entitlements sufficient to irrigate 157.13 acres. Because 170 acres are irrigated in the Subdivision, Lexington is obligated to provide water rights or entitlements sufficient to irrigate an additional 12.87 acres. The Court should so rule, and Lexington will comply.³

IV. The Homeowners do not need more than 0.78 inches per acre to irrigate the Subdivision.

The final consideration in resolving whether Lexington has transferred sufficient water rights to the Homeowners is to assess whether evidence presented by the Homeowners justifies a higher duty of water than the historic 0.78-inch duty. The Homeowners attempt to do so by

³ The Court in this case is playing two different roles. On the one hand, the Court is performing its typical SRBA function and decreeing the elements of contested water rights. On the other, the Court is being asked to interpret the Subdivision CC&Rs. The result of the CC&R interpretation is separate from the task of decreeing the elements of the portions of the Jacobs water right at issue. A decision that Lexington is required under the CC&Rs to transfer additional water to the Homeowners does not give rise to adjusting the decrees for the Jacobs rights. Lexington will choose which of the water rights it has (or that it could acquire) to satisfy its obligations, which will occur post-decree. In other words, even if the Court determines Lexington needs to convey additional water, it would not be appropriate for the Court to in effect decree a conveyance of the Jacobs water right that has not yet taken place.

using a theoretical calculation by their expert witnesses. As explained below, this calculation fails to consider several on-the-ground realities and therefore does not justify an increased duty.

A. The Subdivision irrigation system was designed to operate at less than 0.78 inches per acre.

As noted above, the best evidence of the appropriate duty of water is the historic practice of using 0.78 inches per acre to grow productive crops. Not coincidentally, standard design parameters for irrigation systems use this same duty.

Testimony provided by David Roylance, the principal engineer for the Subdivision, confirms that the Subdivision irrigation system is designed to effectively irrigate the Subdivision landscaping with a duty of water right of less than 0.78 miners inches. Mr. Roylance testified that he has designed a number of irrigation systems for several residential subdivisions over the last 30 years and that his basic flow rate design parameter is consistent with a Department of Environmental Quality standard of 0.25 linear inches per day for peak residential irrigation.⁴ Accounting for a 70% irrigation system efficiency, the baseline water supply necessary is 0.37 linear inches per day. This equates to a flow rate of 0.75 miners inches. Mr. Roylance testified that in his experience, the irrigation systems he designed and built based on the 0.75 miners inch-per-acre flow have worked effectively.

Mr. Roylance also explained that given the large scale of the proposed Subdivision, he contracted an outside expert to independently verify the irrigation system design parameters and to estimate water demand and necessary flow rate. The product is the report prepared by E. Lee Bean that is included as part of the Feasibility Report attached to the Rebuttal Testimony of

⁴ This is a requirement to ensure developers design adequate capacity into their ground water systems to ensure well capacity is sufficient to supply water for domestic and fire protection purposes in addition to irrigation.

David H. Roylance (“Roylance Rebuttal”).⁵ Page 2 of the Bean report includes a table that shows his system design keys off a peak demand of 0.32 linear inches at a 70% irrigation system efficiency. This equates to a flow rate of 0.66 miners inches of water necessary to meet peak demand. Mr. Roylance testified that he oversized Mr. Bean’s design, but the point here is that the engineering assumptions for the necessary flow rate that engineers use to design irrigation systems is equal to or less than the historic duty of water of 0.78 inches associated with the Subdivision.

Mr. Roylance also testified that when possible, he designs storage ponds as part of his irrigation systems because they allow homeowners to be less rigorous with their rotation and provides additional capacity for hot periods. Mr. Roylance testified that he typically did not independently factor in the volume of the storage pond into his designs for system with a 0.75 miners inch diversion rate because a system with this water supply will operate effectively without the pond, and if a pond is available, it simply provides an extra cushion. For the Subdivision’s ponds that supply the irrigation system, Mr. Roylance roughed out a calculation at trial that figures they could have as much as 9 AF of available storage.⁶

In summary, the system design employed by the engineers for the Subdivision assumed a water supply rate that is equal to or less than the 0.78 historic duty of water. This provides

⁵ At the time Mr. Bean prepared his report, not all of the ground that ultimately was included in the Subdivision was planned for development. Thus, he designed a system for 272 acres starting with water rights totaling 209.4 inches, or 0.77 inches per acre. Bean Report at 1.

⁶ The Special Master inquired about the water rights for the ponds and IDWR’s “24-Hour Rule.” As noted above, in footnote 2, water rights to cover evaporative losses from the ponds have been accounted for. The 24-Hour Rule referenced by the Court is an IDWR rule of thumb that a storage water right is not necessary for a pond system associated with an irrigation system if the ponds can be filled using the authorized diversion rate over a period of 24 hours. In this case, where we argue that the Homeowners should have a total diversion rate of 2.65 cfs, and with the diversion rate of 0.68 cfs for the adjacent Echo Creek Subdivision, which also diverts out of the ponds (Shaw Report at 2), the total allowable AF under the 24-hour rule is approximately 7 AF. This is in the range of the rough estimates calculated by Dave Roylance. If ever IDWR determined that a water right was necessary for pond storage, Lexington would supply additional water. At a flow rate of 4.5 AF per acre, 2 additional acres would provide a storage water right for 9 AF.

confirmation that the historic duty of water is appropriate for the proper irrigation of the Subdivision.

B. The Homeowners' theoretical crop water demand does not justify an increased duty of water for the Subdivisions.

To justify its proposed increased duty of water, the Homeowners presented David Shaw's opinion that peak water demand for the lawn turf in the Subdivision is 1.13 miners inches. The Homeowners conclude that this peak water demand for turf translates directly to the diversion rate they are entitled to. This is not a supportable conclusion.

Lexington does not quarrel with the basic premise presented by Mr. Shaw that the peak water demand for turf in the Subdivision is approximately 1 inch per acre. However, as discussed in Section IV.B. 3 below, Lexington disagrees that this peak turf water demand equals the continuous diversion rate.⁷ In general terms, a peak turf irrigation demand around 1 miners inch per acre is supportable; however this is not the same as the continuous diversion rate because there are several on-the-ground realities that allow peak plant demand to be met with a lower continuous diversion rate. Indeed, as explained in detail below, these practical realities are the reason why system design standards such as the 0.75 miners-inch DEQ number discussed above provide for adequate irrigation systems even though peak daily crop evapotranspiration ("ET") demands are higher.

Mr. Shaw's 1.13 inch number is derived by analyzing the precipitation deficit ("Pdef") for turf. Mr. Scanlan, Lexington's irrigation expert, explains in his testimony that the Pdef is difference between the amount of water available to a plant's root zone and the amount of water the plant will evaporate or transpire over a given amount of time. Scanlan Direct at 6. Data for Pdef is obtained from the ET Idaho website (<http://www.kimberly.uidaho.edu/ETIdaho/>), which

⁷ Terry Scanlan used a more comprehensive approach and calculated a peak demand of 1.08 miners inches.

catalogs the Pdef for a number of crops using data from weather stations across the State into a variety of statistical categories.⁸ Dave Shaw chose the Pdef for turf grass from one Boise weather station using the 3-day average 20% exceedance category to come up with the 1.13 miners inch number. Shaw Direct at 4-5. The discussion below explains why this number does not translate into the required diversion rate.

1. The Homeowners' analysis does not account for moisture stored in the soil profile.

Recall that Pdef is the amount of water a plant will evapotranspire less the amount of water stored in the soil profile and available to the plant. Scanlan Direct at 6. According to Mr. Shaw's analysis, which simply takes the peak Pdef and concludes this should be the water right diversion rate, the soil profile is completely devoid of any available moisture going into the peak day. Under this theory, all of the water demanded by the plant must be provided by the irrigation system. This does not occur in reality because ongoing irrigation leading up to the peak demand period leaves water stored in the soil profile.

As explained by Mr. Scanlan, according to the USDA Soil Conservation Service's Soil Survey for Ada County,⁹ the Subdivision soils are primarily Purdam and Purdam-Power silt loams with moderate to slow permeability and high to very high water capacity. Scanlan Rebuttal at 6. These soil types are capable of holding 0.6 linear inches of soil water in the upper six inches of the soil that is available for uptake by the plant. *Id.* Mr. Scanlan explains that this amount of moisture stored in the soil can make up the 0.35 miners inch difference between Shaw's theoretical 1.13 miners inch peak plant demand and the historic 0.78 miners inch

⁸ Terry Scanlan summarized several of the most commonly used statistical categories in Exhibit 7 of his Direct Testimony. When accessing the ET Idaho website, the first step is to choose a weather station. The second step is to select the crop being investigated. Third, one chooses among categories for analyzing ET, including Pdef. This selection generates a chart for Pdef that displays data based on a number of different statistical permutations.

⁹ Mr. Scanlan testified at trial that this survey is reliable and widely used by irrigation engineering experts.

diversion rate for 5 continuous days. *Id.*¹⁰ As Mr. Scanlan explained at trial, when an irrigator is applying water to his crop, he is really irrigating the soil, not the crop.¹¹ Again, this is why the DEQ standard of 0.75 miners inches, and even Bean's standard of 0.66 miners inches acre for peak demands at 70% irrigation system efficiencies are adequate on the practical level—because at this diversion rate the soil can store enough water to provide the crop the additional water it needs above the diversion rate to get through the peak days.

At trial the Homeowners countered only by providing the testimony of one homeowner who experienced a situation where he explained his turf had not rooted very deeply and essentially peeled back when he went to remove it. This evidence does not justify an inflated diversion rate. While the Homeowners certainly are not expected to have the skill of a commercial turf farmer, they should at least be expected to take care enough to prepare landscape areas to a degree sufficient to allow for reasonable irrigation practices. *See Munn*, 43 Idaho at 207 (“The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it.”) As Mr. Scanlan testified, this particular homeowner's landscaper let him down. Moreover, the single example at trial was not shown to be representative for the Subdivision, and Mr. Scanlan's testimony about the soils demonstrates significant water holding capacity is available in the Subdivision soils.

2. The Homeowners fail to account for physical storage available to meet peak water demand.

Mr. Shaw's analysis also fails to account for the fact that the Subdivision irrigation system has considerable storage in three ponds that can be used to further mitigate the peaks. As noted above, the ponds can store perhaps as much as 9 AF. However, assume for sake of

¹⁰ The Scanlan Rebuttal inadvertently uses a 0.77 rather than a 0.78 historic duty of water, so it recites a 0.36 miners inch difference rather than a 0.35. This does not alter the calculation that soil storage is adequate for 5 days.

¹¹ An irrigation pivot is a good example of this. As the pivot passes over the crop, it supplies sufficient water to satisfy the plant's ET until the pivot comes back around. The water the plant needs is stored in the soil.

argument that only 5 AF are available for storage. Five acre feet of storage can make up the 0.36 miners inch difference between 0.78 miners inches and 1.13 for a period of 3 days.

At trial the Homeowners presented hearsay testimony through Dave Shaw that the ponds draw down at nights, suggesting storage is not available. No witness at trial had observed or measured this. Nor was there any actual testimony as to the frequency of the purported draw downs. But even assuming the ponds are drafted significantly during nights on a routine basis, it does not follow that storage water is not available. It could be that the Homeowners have elected to forego a distributed rotation schedule and instead consolidate all of their daily irrigation into a compact period of time at night that causes pond draw downs while outflows to the irrigation system exceed the replacement flow rate from the Farmers Union Canal. Even if this were occurring, the pond storage still exists, the Homeowners would simply be choosing to draft their storage on a more short term basis and allowing it to refill each day. In any event, the physical storage in the ponds exists. How the Homeowners choose to use it is a matter of system operations, but fact is, there is sufficient physical storage built into the irrigation system to level the peak demand to the 1.13 miners inch duty of water for several days.

Thus, all told, between soil storage and pond storage, the Subdivision could make up the difference between a 0.78 miners inch diversion rate and peak demand for over one week. To accept the Homeowner's 1.13 number as the appropriate continuous diversion rate, the Court would have to conclude there is no available physical storage in the irrigation system and the Subdivision soils hold essentially no moisture. The testimony does not support such a conclusion.¹²

¹² For further confirmation, the Court can review the ET Idaho website and view the Pdef for other crops. Lawn turf has a typical ET. Water rights in Idaho are routinely decreed with less than one inch per acre, particularly in situations like this with sprinkler irrigation and no conveyance loss. For example, both alfalfa and potatoes have a

3. Mr. Scanlan's analysis has several conservative elements built in.

The storage factors described above form the basis of Terry Scanlan's opinion that a continuous diversion rate of 0.78 inches per acre is adequate to properly irrigate the Subdivision even though peak Pdef for turf is in the 1-inch per acre range. Nevertheless, in addition to the soil and pond storage factors discussed above, there are several additional mitigating factors behind Mr. Scanlan's conclusion that further support the sufficiency of a continuous 0.78 miners inch per acre.

For one, the 70% average irrigation system efficiency is probably too low when calculating peak demand. Scanlan Direct at 5. This is because less water is lost to deep percolation and runoff in hotter periods and is instead taken up by the crop. The 70% efficiency number is an average. In the wetter spring conditions, more water may be applied than necessary, and the system efficiency is less than 70%. Likewise, in the peak season more than 70% of the applied water is likely used by the crop, and the efficiency is greater than 70%. Consequently, using a 70% average irrigation system efficiency (which is what Dave Roylance, E. Lee Bean, Dave Shaw and Terry Scanlan all used) is conservative.

Second, the analysis above discussing how storage is available to make up the difference between the historic duty of water of 0.78 miners inches and the proposed peak of 1.13 is also conservative. This is because the analysis assumes that 1.13 miners inches actually is the peak crop demand. Mr. Scanlan's analysis of the ET Idaho data appropriately averaged the data from four Treasure Valley weather stations surrounding the Subdivision and used the Pdef for turf, trees and open pond surface rather than just turf. His analysis shows a 3-day 20% exceedance Pdef of 1.08, or about 5% lower than Mr. Shaw's number. And this number is very conservative

higher Pdef than lawn turf. Recall that IDWR confirmed at trial that Farmers Union Ditch Company holds a portion of the Jacobs right held for the purpose of conveyance losses in the canal.

as well. Mr. Scanlan explains that for the landscaped areas that are not turf, he chose a highly consumptive category “orchard with ground cover,” which assumes tightly spaced trees with consumptive ground cover. Scanlan Direct at 6-7. In reality, significant portions of the landscaped areas in the Subdivision include open beds and bushes with relatively low consumption. *Id.* Consequently, even the 1.08 peak Pdef calculated by Mr. Scanlan is overly conservative by design.

Finally, Mr. Scanlan points out that the peak Pdef, whether you use 1.13 or 1.08 miners inches, assumes a uniformly thriving crop that has ideal nutrient levels and growing conditions. Scanlan Direct at 7, Scanlan Rebuttal at 5. In a diverse irrigated area like a residential subdivision, not all landscaping will have proper fertilization and some will experience less than ideal growing conditions such as excessive shade. Landscape vegetation in these situations will not have the same water uptake requirements as the theoretical thriving crop used for the ET Idaho website numbers. Scanlan Direct at 7.

Mr. Scanlan also points out that landscape vegetation, turf in particular, has the ability to endure some stress even if it is not receiving enough water to meet its peak Pdef demand. Scanlan Direct at 7, Scanlan Rebuttal at 5. The crop is still being irrigated, it just may experience some stress. Mr. Scanlan provided an example at trial that for turf, it may not pop back up as quickly when stepped on as it would if growing conditions were ideal. The Homeowners made much of this concept of stress at trial, testifying that they would not accept dying vegetation or brown spots on lawns. This overstates Mr. Scanlan’s point, which is that a couple of days of heat stress in the peak of summer is normal and not detrimental to landscape vegetation. Mr. Scanlan never indicated that the Homeowners should be expected to live with

dying or damaged-looking vegetation. He merely points out that a landscape crop that is not receiving its optimum level of water on the hottest days is actually getting along just fine.

In sum, Mr. Scanlan's conclusion that 0.78 miners inches per acre continuous flow is adequate even though peak daily crop demand is higher is not an aggressive position. Even beyond the soil and pond storage elements, there are several conservative factors built into the conclusion that the historic duty of water is adequate for the Subdivision.

4. Data does not support an increasing ET Trend.

At trial Dave Shaw presented testimony and an exhibit (Homeowners 101) that purports to show an upward trending ET for the Boise area using data obtained from Agrimet. The testimony was introduced to support Mr. Shaw's opinion that the Homeowners need a continuous 1.13 miners inches. Mr. Shaw explained that this upward trend could be based on climate change trending to warmer irrigation seasons. Mr. Scanlan countered at trial that the 12-year period of record and data from a single weather station was not adequate to establish a definitive trend.

Following trial Mr. Scanlan reviewed summaries of ET and rainfall trends for stations throughout Idaho printed from the ET Idaho website. Affidavit of Terry Scanlan at ¶ 3. His review shows the average of the trend for all 118 stations reviewed is nearly flat, with 68 stations having decreasing ET slopes, 49 stations having increasing ET slopes, and one station with zero slope. *Id.* at ¶ 4. The ET Idaho trend for the Boise Airport station shows an increasing trend in ET over a 64 year period of record (as did the Boise Agrimet trend presented by Mr. Shaw for a 12-year period). *Id.* at ¶ 5. Increasing ET trends are also indicated by data for two other Boise area stations. However, trends for seven other Treasure Valley weather stations all showed a downward trend. In sum, the data does not support an increasing or decreasing ET trend at the

Subdivision. Boise or anywhere else in the State. Mr. Shaw is incorrect in suggesting an upward ET trend exists.

V. The permit conditions for permit 63-11413 do not affect the outcome of this SRBA proceeding.

The Homeowners devoted a significant portion of their trial testimony to the administrative proceedings and conditions concerning permit 63-11413. This issue was briefed and argued pre-trial on a motion in limine, and little more needs to be said post-trial.

Mr. Roylance explained in his written testimony and numerous times at trial on cross-examination that, at the time of the administrative hearing for permit 63-11413, it was not clear whether all the lots in the Subdivision would be irrigated with surface water in a pressurized irrigation system. Updated Rebuttal Testimony of David H. Roylance at 2. However, Lexington committed to the protestants in the administrative case that it would not use ground water for irrigation in lieu of surface water if sufficient surface water was available. This agreement and the condition memorializing it in the permit (the legality of its inclusion is questionable) became moot as soon as Lexington determined that it would irrigate the entire Subdivision with surface water and more than enough surface water was available for this purpose.

Moreover the meaning, scope and effect of any conditions for permit 63-11413 are not ripe for adjudication before this Court. According to the Homeowner's theory of the conditions, Lexington is barred from ever transferring any of its Jacobs water right away from the Subdivision regardless of the fact that it cannot be beneficially used on the Subdivision. Lexington disagrees. But again, who is right is beside the point in this SRBA proceeding. If the Homeowners are right, Lexington could obtain decrees from this Court for water rights it cannot later transfer. That is a risk Lexington is willing to take. In any event, it does not follow that the

possible non-transferability of Lexington's portion of the Jacobs right in any way enhances the Homeowner's rights.

Additionally we note again that the conditions at issue are part of a permit that is by its nature subject to change. If IDWR were to agree with the Homeowners' interpretation of the conditions and find that they meant Lexington could not transfer its Jacobs water rights off of the Subdivision (or that doing so would cut off the Homeowners ability to use ground water in the shoulder seasons), then Lexington will initiate administrative proceedings to change the conditions such that they do not force wasting and possible forfeiture of water rights that cannot otherwise be put to beneficial use.

Finally, Lexington reiterates the concession it has made before that a condition on the Jacobs water rights that makes reference to the conditions in permit 63-11413 is acceptable. Lexington proposes the following condition: "Administration of this right is subject to the conditions of permit number 63-11413." This language will recognize the relationship of the Jacobs water rights to 63-11413 and ensure the Jacobs water rights cannot be transferred from the Subdivision without consideration of the permit 63-11413 conditions.

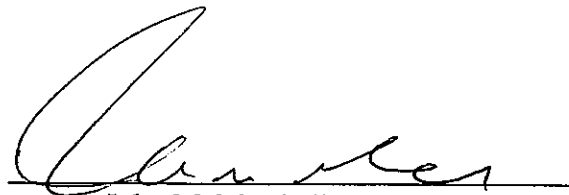
CONCLUSION

For all the above reasons, the Court should decree the water rights at issue as follows:

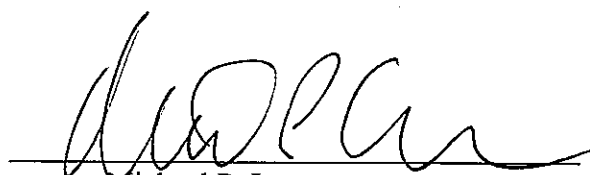
Water Right	Owner	Diversion rate		Place of Use
		inches	cfs	
63-123G	Lexington Hills Homeowners Association, Inc.	119.4	2.388	153.08 acres
63-123F	Lexington Hills, Inc.	84.6	1.692	108.46 acres
63-123D	Lexington Hills, Inc.	26.23	0.5246	33.63 acres

The Court should also rule that Lexington is obligated to convey to the Homeowners water rights or entitlements sufficient to irrigate an additional 12.87 acres to the Homeowners without specifying which water right Lexington uses for this purpose.

DATED this 17th day of October, 2008.



John M. Marshall



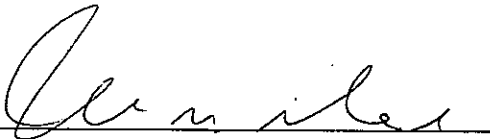
Michael P. Lawrence

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed on October 17, 2008, with sufficient first-class postage to the following:

Lexington Hills Homeowners
John K. Simpson
1010 W. Jefferson Street, Ste. 102
PO Box 2139
Boise, Idaho 83701-2139
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Director of IDWR
PO Box 83720
Boise, Idaho 83720-0098

By: 
John M. Marshall