

**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, and 63-00123G

**LEXINGTON HILLS INC.'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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. ("Lexington HOA" or "HOA") and the developer of the subdivision, Lexington Hills, Inc., and East Hills Development, LLC (collectively, "Lexington Hills").¹ The underlying basis of these water right claims is a 4.605 cubic feet per second ("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 (the "Subdivision"). The Lexington HOA owns and operates the pressurized irrigation system used to irrigate the Subdivision.

¹ East Hills Development, LLC conveyed its water right to Lexington Hills, Inc. Consequently, the two are treated as a single entity for purposes of this decision.

Lexington HOA filed claim number 63-00123G in the SRBA for the entire 4.605 cfs of the Jacobs water right. 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.

Each party moved for summary judgment, and on April 18, 2007, this Court issued a *Memorandum Decision and Order on Cross Motions for Summary Judgment* (“*Summary Judgment Order*”) holding 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.” *Summary Judgment Order* at 8. This Court further found that Lexington Hills had conveyed 2.388 cfs to the Lexington HOA. *Id.* at 11. Following the summary judgment proceedings, this Court identified a single remaining issue left for trial: “Has [Lexington] transferred water rights to [Homeowners] in an amount that it obligated itself to transfer in the Master Declaration?” (*Id.* at 12.)

The parties agreed to address this factual question by exchanging expert testimony in advance of trial addressing two precise questions: (1) the number of irrigated acres within the subdivision; and (2) the quantity of water necessary to irrigate those acres.

Lexington HOA’s expert report, however, raised the issue of whether, and how, conditions placed on the approval of water right permit number 63-11413 (a municipal ground water permit issued to Lexington Hills and subsequently transferred to the City of Eagle) might affect the elements of Lexington HOA’s and Lexington Hills’s water rights. Specifically, the HOA asserted that Lexington Hills is barred from moving any portion of water right 63-123 away from the Subdivision because it obligated itself in the approval proceeding for permit 63-11413 to leave all appurtenant surface water rights with the Subdivision.

Lexington Hills filed a Motion in Limine requesting this Court issue an order precluding the Lexington HOA from offering evidence regarding water right permit number 63-11413 at trial. A hearing was held and this Court denied Lexington Hills's Motion for the reason that the conditions placed on water permit number 63-11413 might be relevant to determine how much water is sufficient to irrigate the Subdivision.

This Court granted the parties' request to file post-trial briefs. Those briefs have been filed and this matter is deemed fully submitted for decision.

ISSUES PRESENTED AT TRIAL

As stated in the *Summary Judgment Order*, there was one factual issue remaining after the Court ruled in Lexington Hills's favor on summary judgment: Has Lexington Hills transferred water rights to Lexington HOA in an amount that it obligated itself to transfer in the Master Declaration? More precisely, has Lexington Hills conveyed "sufficient water rights" to the Lexington Hills HOA?

FINDINGS OF FACT

1. Determining sufficient water rights. Lexington Hills obligated itself to transfer "sufficient water rights" to Lexington HOA. *Summary Judgment Order* at 8. This requires a determination of (1) the number of irrigated acres within the Subdivision; and (2) the quantity of water necessary to irrigate those acres.

2. The Subdivision contains 170 irrigable acres. Lexington HOA's expert testified that the Subdivision contains 182.9 irrigable acres, including ponds. Lexington HOA's expert arrived at this figure by taking the Subdivision developer's 2001 estimate of 176.95 irrigable acres and adding approximately 5 acres (as estimated by the HOA's expert) to account for pond surface area. Lexington Hills's expert testified that the Subdivision contains approximately 170

irrigable acres, including ponds. Lexington Hills's expert arrived at this figure by analyzing aerial imagery with Geographic Information System (GIS) software. At trial, the Subdivision developer conceded that Lexington Hills's expert's figure was more accurate because the expert's GIS tools were more accurate than the developer's. Lexington HOA did not provide any evidence to rebut this. There being no evidence contradicting the analysis of irrigable acres conducted by Lexington Hills's expert, this Court finds that the Subdivision contains 170 irrigable acres.

3. The historic duty of water was 0.78 miner's inches per acre. The "duty of water" is that amount of water actually necessary to achieve the purpose for which the water was appropriated, and no more. The duty of water for a particular water right is typically stated in terms of how many miners inches may be applied to a single irrigated acre under the water right.

All of the expert witnesses at trial agreed that 239.34 miner's inches of water rights were historically appurtenant to the Subdivision. This total is comprised of 230.23 miner's inches of the "Jacobs Water Right" (right number 63-123) and 9.11 miner's inches of water delivery entitlements from the Farmers Union Ditch Company (referred to as "developed water") and Farmers Union shares. The total area covered by the Subdivision is 328 acres, 306.6 acres of which was historically irrigated for agricultural purposes using the aforementioned 239.34 miner's inches of appurtenant water rights. Based on these figures, the duty of water for the water rights historically appurtenant to the Subdivision lands was 0.78 miner's inches (0.0156 cfs) per irrigable acre.

4. The duty of water necessary for the Subdivision. The Lexington HOA seeks to increase this historic duty of water for irrigating the Subdivision from 0.78 miners inches per acre to 1.13 miner inches (0.0226 cfs) per acre. The Homeowners base their proposed increased

duty on a reported daily peak water demand for lawn turf of 9.58 mm,² which assuming a 70% irrigation system efficiency, requires a flow rate of 1.13 miners inches. The Lexington HOA's argument does not account for water stored in the soil that is available to the plant or for water that can be stored in the Subdivision ponds.

When soil and pond storage are accounted for, the Lexington HOA can meet the peak lawn water demand of 9.58 mm using the historic delivery rate of 0.78 inches per acre for a period of over 7 days. The Lexington HOA likely can meet peak demand for even longer than this because at peak demand times, the Subdivision irrigation system is most likely operating at more than 70% efficiency and because the peak daily crop demand is likely lower than 9.58 mm.

5. Water right 63-11413. Water right permit number 63-11413 contains a condition of approval that states:

Farmers Union Canal Company water shall be utilized for the irrigation of the lots in Lexington Hills and Trail Creek Ranch parcels equal to or greater in size than one-half acre in size during periods when water is being delivered in the canal. This water right may be used for irrigation purposes only if the entire amount of water from Farmers Union Canal Co. remains with the lands in Lexington Hills and Trail Creek Ranch. Sale or transfer of surface water from any portion of these properties will be cause for the Department to further limit the use of this right.

This condition was placed in the water right permit as the result of a negotiated settlement between the Subdivision developer (i.e. Lexington Hills) and protestants to the permit application.

CONCLUSIONS OF LAW

² Lexington HOA pulled this number from the ET Idaho website (<http://www.kimberly.uidaho.edu/ETIdaho/>), a website that catalogs a variety of statistical categories. The HOA used the precipitation deficit ("Pdef") for the 3-day 20% exceedance for lawn turf using weather data from the Boise WSFO Airport weather station. Pdef is synonymous with the net irrigation water requirement during the growing season for an irrigated crop and represents the amount of additional water that the crop would evaporate or transpire beyond the precipitation infiltrating into and residing in the crop's root zone if the additional water were made available at the right time during the growing season.

1. The historic duty of water is sufficient for the Subdivision. The historic duty of water for the water rights appurtenant to the Subdivision lands was 0.78 miner's inches (0.0156 cfs) per acre. As stated in *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 Lexington HOA did not present evidence sufficient to prove that the historic duty of water of 0.75 miner's inches is not sufficient to irrigate the Subdivision lands. A continuous flow diversion rate for the Subdivision of 1.13 miners inches would be excessive and wasteful.

2. A diversion rate of 132.6 miner's inches of water is sufficient to irrigate the Subdivision. The Subdivision contains 170 acres of irrigable land. Using the historic duty of water of 0.78 inches per acre, the Subdivision requires diversions of 132.6 miner's inches (2.652 cfs) of water. This amount represents "sufficient water rights" that, in accordance with the *Summary Judgment Order*, Lexington Hills obligated itself to convey to Lexington HOA in the Master Declaration.

3. Lexington HOA's Jacob's water right. As found by this Court in its *Summary Judgment Order*, Lexington HOA currently owns 119.4 miner's inches (2.388 cfs) of the Jacobs water right. This is enough to irrigate 153.08 acres with a duty of water of 0.78 miner's inches per acre. The HOA's water right 63-123G should therefore be decreed for irrigation of 153.08 acres within a permissible place of use of 170 acres within the boundary of the Lexington Hills Subdivision, and with a diversion rate of 2.388 cfs.

4. Lexington Hills's Jacob's water rights. 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. Lexington Hills' water rights should be decreed accordingly.

5. Lexington Hills must convey additional water rights. Lexington HOA owns entitlements to delivery of 3.16 inches by Farmers Union Canal Company pursuant to water rights other than water right number 63-123G. Applying the 0.78 miner's inch duty of water, these other water rights provide for irrigation of 4.05 acres. Adding these 4.05 acres to the 153.08 acres authorized under right 63-123G, the HOA holds 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.

6. A remark should be placed in the Jacobs water rights referencing permit number 63-11413. The meaning, scope and effect of the conditions in permit number 63-11413 are not appropriate for adjudication in these subcases. This proceeding is an ownership dispute over portions of the Jacob's water right. What the parties can or cannot do in an administrative proceeding with their respective portions of the right is beyond the scope of this proceeding. When and if a party submits an administrative application to transfer any its portion of the right away from the Subdivision, conditions in permit number 63-11413 might come into play in the administrative proceeding. For this reason, this Special Master finds and concludes that the following remark is necessary for the administration of the rights in these subcases and should be included in the respective partial decrees: "Administration of this right is subject to the conditions of permit number 63-11413."

RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the water rights in the above-captioned subcases be decreed as set forth in the attached *Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b)* with the following elements:

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 place of use for 63-123G should state, consistent with IDWR's recommendation, that the 153.08 acres may be irrigated within the boundaries of the Subdivision.

Dated _____

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication