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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**
) **LEXINGTON HILLS INC.'S POST-TRIAL**
) **BRIEF**
)

COMES NOW, Lexington Hills Homeowners' Association ("LHOA"), by and through its attorneys of record, Barker Rosholt & Simpson, LLP, and submits its response to Lexington Hills Inc.'s ("INC") *Post-Trial Brief*.

INTRODUCTION

Since the opening submittals, it has been readily apparent that the parties agree that the standard for the decreeing a water right in the SRBA is beneficial use. *See INC Br.* at 1. Here, as pointed out in LHOA's opening brief, beneficial use is not disputed up to an amount of 1.13 inches per acre. While INC now attempts to qualify the cross-examination testimony of Terry Scanlan, LHOA commends Scanlan for being forthright in his testimony by acknowledging this face and concurring with David Shaw's analysis of 1.13 inches as being beneficially used under

dry, hot conditions. Obviously, beneficial use for a water right is not set under wet or cool conditions. Otherwise, the right would be insufficient for the purpose of use. Speaking of the intended use of this water, Roylance acknowledged that Lexington Hills was intended to be a unique setting with lush vegetation. Notwithstanding these recognitions, INC continues to insist that the SRBA Court cut the duty of water authorized under LHOA's water right to as little as 0.66 inches per acre. This request is untenable – especially since INC agrees that “beneficial use” is the standard for determining that amount of water that is available.

INC rests its case on the shifting positions of one of its directors, Roylance, who has been with the development project from the beginning – as a member of the boards of directors for both INC *and* LHOA. In the early stages of development, Roylance, as a board member of INC, assured the Department that all surface water would remain on the development properties and that LHOA would “have sufficient water rights to maintain the aesthetic amenities that make the Subdivision unique.” *INC Br.* at 1. At that time, Roylance was also a board member of LHOA. No longer associated with LHOA, Roylance has now changed his position and seeks to create a *new* source of water for the subdivision: storage. His own testimony acknowledges this recent revelation and the lack of due consideration of whether this 11th hour idea¹ has any real virtue. Amazingly, Roylance now seeks to protect this “valuable water right asset” by limiting the duty of water for LHOA to fatally low levels. As explained in LHOA's opening brief, and further discussed below, INC's arguments are without merit.

¹ Roylance testified that the evening prior to the hearing, the concept of storage was discussed. His previous testimony and the Bean analysis failed to identify storage. Furthermore, Inc. *never* claimed storage as a part of the water right.

ARGUMENT

I. The Total irrigated Acres in the Lexington Hills Subdivision are 182.9 Acres.

In 2001, prior to objections being filed on the above water rights, INC hired David Roylance, of Roylance and Associates, to conduct an acreage analysis on the subdivision (the “Roylance analysis”). *Roylance Direct* at 3. INC used that analysis in deciding how much water should be conveyed to LHOA. At that time, Roylance was a member of INC’s board of directors. The Roylance analysis relied on the “CAD” analysis to determine that the total irrigated acres were at least 176.95 acres. INC did not at the time, and does not now, dispute that the Roylance analysis was very reliable and provided INC with the information it needed.

LHOA agrees that the Roylance analysis was the proper method for determining the total irrigated acreage in the subdivision. *Expert Report of David B. Shaw* at 5, n.3. The Roylance analysis, however, suffered from two failings, as described by Shaw, which necessitate a minor revision to the total acreage determination in the Roylance analysis:

In August 2001 a study was completed by Roylance and Associates, P.A. to determine the number of irrigated acres in the subdivision. Two methods were used to estimate the irrigated acreage of the individual lots, the first method found 135.84 acres and the second found 133.94 acres. The study recommended using only the smaller acreage whereas using the average of the two methods should give a better result. The average of the two methods is 134.89 acres. The study also found 43.01 acres of common area to be irrigated for a total of 177.90 acres. The study did not include the ponds, which the IDWR considers to require the same amount of water per acre as an irrigated acre. and are estimated to be about 5 acres. ***The total equivalent irrigated acreage is 182.9 acres.***

Id. (emphasis added). As to the ponds, INC admits that LHOA is “entitled to water rights to cover evaporative losses from pond surfaces.” *INC Br.* at 3, n.2.

Now that LHOA has filed Objections, Roylance has decided that his own analysis can no longer be relied upon. *See INC Br.* at 3. Rather, Roylance asserts that a new 2008 analysis,

performed by SPF Water Engineering, LLC, is “more accurate” than his own analysis. *Id.* This SPF analysis reduced the total irrigated acreage to 169.7 acres. *Scanlan Direct*, Ex. 5. As a member of INC’s board of directors, Roylance’s sudden dismissal of his own analysis – in favor of an analysis that, if adopted, would provide INC with more water – is not surprising.

The analysis performed by SPF (as testified to by Terry Scanlan), however, does not support the acreage reduction now promoted by Roylance. Indeed, unlike the Roylance analysis, all parties recognize that the SPF analysis fails to account for all irrigated acres. In his *Rebuttal Expert Report*, Shaw explained how Scanlan’s report failed to properly account for the actual irrigated acreage. *Shaw Rebuttal* at 1. INC admits this fatal flaw, but attempts to pass it off as “just the nature of the beast.” *INC Br.* at 4. INC even attempts to dismiss this failing by asserting that such discrepancies are “relatively small areas” and that discrepancies “cancel each other out.” *Id.* This assertion is baseless. INC cannot point to any evidence or testimony to support this assertion. Indeed, there is no indication in the testimony that the total **unaccounted irrigated** acreage is equal to the total **counted non-irrigated** acreage. Without such an analysis, INC cannot assert that the discrepancies will “cancel each other out.” Rather, the undisputed testimony is that the SPF analysis fails to account for all irrigated acres.

In light of this fatal flaw, Roylance’s assertion that the SPF analysis is “more accurate” due to its reliance on “more modern GIS tools” cannot be supported. *INC Br.* at 3. Such a claim is remarkable in light of the fact that neither party challenged the Roylance analysis as failing to include irrigated acreage. *See Shaw Expert Report, supra* (addressing the Roylance analysis).² It is inappropriate to utilize a method for determining acreage where, as here, the proponent of that

² If Roylance was going to offer an opinion as to the accuracy of CAD vs. GIS, it was the obligation of INC to offer such testimony as a part of Roylance’s written testimony. Failure to do so, impaired the LHOA’s ability to inquire, rebut, etc. in violation of procedural mechanisms in place in the SRBA and Civil Rules. Such testimony is further without foundation sufficient to be considered.

method readily admits that all irrigated acreage is not counted in the analysis. Rather, the Court should adopt the Roylance analysis, as modified by Shaw to include evaporation from the ponds. Accordingly, the total irrigated acreage is 182.9 acres.

II. INC's "Historical Duty of Water" Analysis is Flawed

Accordingly to INC, the duty of water for the Subdivision should be 0.78 inches per acre. *INC Br.* at 4-5. INC reaches this number by dividing the gross acreage of the parcels prior to development by the total of water. *Id.* ***INC does not base its calculation on the actual number of irrigated acres prior to development*** – the only true determination of the predevelopment duty of water. In fact, the record is devoid of any evidence as to the number of acres historically irrigated. Scanlan failed to provide any such analysis. Calculating a duty of water based upon gross land area rather than irrigated area is simply irrelevant. The only historical irrigation acreage figure associated the lands is the IDWR recommendation of 230 acres.

Furthermore, there is no evidence that the historic duty of water³, even if it had been properly determined, would be adequate for the irrigation of a “distinctive residential neighborhood in Eagle, Idaho, set apart from other communities by its extensive and well landscaped common areas and homes.” *INC Br.* at 1. Indeed, this is a subdivision with “high expectations”⁴ In addition, there is no evidence of historical crop mix or rotation. It is pure speculation to assume any prior duty of water for an unknown crop rotation on an unknown number of irrigated acres is sufficient for the intensely managed landscaping within the Subdivision. As such, INC's argument that the historic duty of water is 0.78 inches per acre is without basis in the facts.

³ See Stewart Decree findings.

⁴ Mr. Dale Conder's testimony described the home owner's "high expectations" for the landscaping of the common areas and individual lots within Lexington Hills Subdivision. The testimony was corroborated by Roylance.

It follows, therefore, that INC's recognition that it should be ordered to convey an additional 12.87 acres of water to LHOA, *INC Br.* at 7, is inadequate. This analysis is based solely on the baseless assumptions of historical use and crop mix. These assumptions, however, fly in the face of the testimony at trial indicating that there are 182.9 irrigated acres and that as much as 1.13 inches per acre are required to properly irrigate the lawns and common areas.⁵

Finally, INC's analysis fails to consider the places of use for these water rights – an element to which no objections were filed. It is undisputed that LHOA has been forced to use its water rights to irrigate the East 1 and East 2 subdivisions, even though these lands are not within the recommended place of use for its water right. Apparently, INC assumes that the place of use for LHOA's water right includes the entire subdivision and that LHOA can simply deliver its water rights to any lot or common area without repercussion. INC is wrong. The recommended place of use for both LHOA's and INC's recommended water rights cover the portions of the subdivision known as Lexington Hills 1 through 12 and Lexington on the Rim. These rights do not include East 1 or East 2 – which was recommended as part of 63-123D in the name of East Hills. INC has never claimed the water under 63-123D. On the other hand, LHOA has claimed ***both*** the water and place of use and has been, and is, responsible for delivering water to those lands.

INC's analysis is based on faulty assumptions as to historic irrigation practices and recommended places of use. Such baseless assumptions cannot be the basis for a partial decree.

⁵ INC's table, on page 5 of its brief, is inconsistent with the Department's record of ownership for the water rights. As to the Jacobs water right, INC has deeded 119.4 inches (2.388 cfs) to LHOA. However, the Department's recommendation and Farmers Union Ditch Company, Ltd. show LHOA owns 107.6 inches (2.152 cfs). While INC and LHOA agree INC has not deeded 84.6 inches (1.692 cfs) of the Jacobs right to LHOA, the Department and Farmers Union show that INC has retained 96.4 inches (1.928 cfs). Finally, since this Court has not determined the duty of water, the acreage computation by INC is inappropriate.

The Farmers Union water numbers are also inconsistent with the records. INC has deeded to LHOA 3.16 inches (0.063 cfs) of developed water. However, Farmers Union records show LHOA is only entitled to 2.85 inches (0.057 cfs). The remainder of the Farmers Union water, 6.268 inches (0.125 cfs), is shown to belong to INC.

III. LHOA Can Beneficially Use 1.13 Inches Per Acre.

Moving away from its recognition that “beneficial use” is the determining factor in considering the duty of water, *see INC Br.* at 1, INC asserts that the duty of water cannot be more than 0.78 inches per acre because no more water is “needed,” *id.* at 7-16. INC’s subjective determination of what LHOA may “need” is irrelevant based on the undisputed testimony that LHOA could beneficially use as much as 1.13 inches per acre. *See Shaw Expert Report* at 5 (LHOA can beneficially use 1.13 inches per acre); *see also INC Br.* at 14 (indicating that Scanlan’s analysis showed that LHOA could beneficially use 1.08 inches per acre). Again, Mr. Scanlan acknowledged that beneficial use occurs with the delivery of 1.13 inches per acre. Furthermore, “public policy demands that” a water right is “dependent upon” the “necessities” of the water user. *Glavin v. Salmon River Canal Co. Ltd.*, 44 Idaho 583, 589, 258 P. 532, 534 (1927).

INC attempts to bolster its arguments by asserting that the irrigation system was “designed” to use less than 0.78 inches per acres and that the system design incorporated certain “conservative elements.” *INC Br.* at 8-16. This assertion, however, completely ignores the current status of the system and fails to account for the fact that the pumping horsepower had to be increased above that specified in the system “design.” Indeed, Roylance, who designed the system, did not dispute that the horse power had to be increased. Accordingly, Roylance’s *design* of the system sheds no light on the current needs and beneficial uses of the water.

Roylance testified that his system *design* relied upon the design of E. Lee Bean. However, Bean’s analysis uses average water requirements based upon 1966 data from the Toro Company. *Roylance Rebuttal* (Attachment). As is clear from the use of the term “average,” whenever an average water requirement is made available, the water requirement of the crop (i.e. landscaping) will be more than the average requirement approximately half the time. Yet, Bean

and Roylance ignore this fact. Rather, they point the Court to the ponds which, by their own recognition could only provide water for a very brief period of time.

In an attempt to lift its own expert analysis over LHOA's, INC denigrates Shaw's analysis as "theoretical." *INC Br.* at 10-11. In doing so, INC completely ignores the extensive citations of professional literature supporting Shaw's analysis, as well as Shaw's personal experience as owner and operator of an irrigated farm.

A. LHOA Did not Ignore Soil Moisture

INC asserts that LHOA's analysis ignores soil moisture. *INC Br.* at 11. INC is wrong! In fact, Shaw's analysis specifically addressed soil moisture. Shaw's analysis is based on the irrigation requirement for a crop that is irrigated every other day – as recommended in the Bean report. *Shaw Rebuttal* at 3. Soil moisture is considered in Mr. Shaw's analysis based upon his experience with turf grass within the subdivision and the extensive literature cited in both his direct and rebuttal testimony. *See Id.* On the contrary, Scanlan's report merely speculates about rooting depth of turf grass and uses a soils study that was completed predevelopment. In fact, Scanlan provides no indication that he has any experience observing rooting depths within the Subdivision.⁶ The un-refuted testimony of both Shaw and Conder indicate the turf within the subdivision is short rooted and deep water in the soil would not be available to meet the irrigation water needs of those plants.

B. The Ponds Cannot Be used To Make Up For Insufficient Water Supplies

INC blithely asserts that the ponds could be used to make up any water shortages. INC is wrong again. Contrary to these assertions, the ponds cannot be used as a backup measure or

⁶ INC alleges that Scanlan's analysis of irrigation water requirement is more comprehensive than the analysis of Shaw. However, there are no facts to support this assertion. *See Shaw Rebuttal* at 2. For example, it is a matter of professional judgment as to whether averaging the precipitation deficit from four sites is a better indicator of the precipitation deficit within the Lexington Hills Subdivision than the use of the Boise site alone. *Id.* Indeed, the difference "does not result in a major change." *Id.*

insurance policy. There has been no claim for storage water here. As such, any use of the pond must comply with the Department's 24-hour rule – requiring that the pond contain no more water than can be filled by the right in a 24-hour period. These ponds cannot be relied upon to provide water in times of shortage – especially where the shortage lasts for an extended time and there is insufficient water to refill the pond after it has been drawn down.

This allegation was further refuted by Shaw who confirmed that the ponds are fully utilized on a daily basis during the peak irrigation period. In 2008, the smaller of the irrigation ponds was emptied during the night when the irrigation pump was shut off.⁷

C. Scanlan's "Conservative" Analysis Does Not Necessitate a Lower Duty of Water

INC next attempts to use the "conservative" elements of Mr. Scanlan's analysis to support its conclusion that the duty of water should be 0.78 inches per acre. This argument must fail.

In essence, this argument is another attack at Mr. Shaw's analysis and the determination that LHOA could beneficially use 1.13 inches per acre in the peak demand season.⁸ INC's arguments are somewhat perplexing given the fact that INC's own engineer readily recognized that LHOA could beneficially use at least 1.08 inches during peak demand. INC fails to explain how LHOA is supposed to make up for the water shortage and casually dismisses Mr. Scanlan's recognition that the landscapes will be "stressed" due to the inability to receive "its optimum level of water." *INC Br.* at 15. Such disregard for the water needs of the home owners and LHOA, fails to meet the "high expectations" that come with living in "a distinctive residential

⁷ This is presumably by a safety switch to protect the pump from running dry and being damaged.

⁸ INC misstates LHOA's analysis. The analysis to determine an irrigation requirement of 1.13 inches per acre is the 20% exceedance demand (that is, the demand that can be satisfied with the recommended water supply in all but 20 of 100 years). Shaw did not use Scanlan's crop mix but rather assumed turf irrigation throughout. From the crop mix alone, Shaw's precipitation deficit is slightly smaller than the amount used by Scanlan. *Shaw Rebuttal* at 2.

neighborhood ... set apart from other communities by its extensive and well landscaped common areas and homes.”

Scanlan testifies that “a 7-day 20% exceedance provides adequate supply to prevent *excessive stress*.” *Scanlan Rebuttal* at 5 (emphasis added). INC fails to acknowledge that Scanlan’s 7-day 20% exceedance irrigation water requirement is *1 inch per acre*. *Id.* In fact, Scanlan testified, using his analysis (including consideration of 1 inch per acre), that the grass “may look slightly wilted for a few days.” *Id.* The Court and LHOA are left to wonder how wilted the grass would be if LHOA is limited to 0.78 inches per acre, as demanded by INC.

IV. The Court Should Not Disregard INC’s Prior Commitment to Leave the Surface Water on the Development Property.

Unsurprisingly, INC attempts to downplay its prior commitment to leave the surface water on the land during the permitting process for permit 63-11413. *See INC Br.* at 17-18. However, INC does not dispute that the ground water permit and surface water rights are related or that INC agreed to leave surface water on the land. *Id.* However, apparently now realizing that the agreement it made would impact its ability to transfer the surface water, INC seeks to diminish its obligations under the settlement it reached with the Protestants in the permit case and incorporated into the Department order.

INC now asserts that the settlement agreement was merely to ensure that there is sufficient surface water available for irrigation. *INC Br.* at 17. Such a guarantee is meaningless, however, if there was no certainty that the surface water would *remain* with the land. Further, review of the record shows that the Protestants were concerned that groundwater levels from incidental recharge due to surface water irrigation would be impaired. Moving surface water off the land certainly cannot be viewed as a positive influence on groundwater levels.

INC asserts that the condition memorializing the agreement is “moot” because it has since “determined that it would irrigate the entire Subdivision with surface water and [that] more than enough surface water was available for this purpose.” *Id.* This argument fails for at least three reasons: First, as stated above, such a “guarantee” is futile unless there is a certainty that the surface water will remain with the land.

Furthermore, in light of the historical use of this surface water to irrigate the farmland that became the subdivision lands, INC’s after the fact “determination” that there was “sufficient” surface water is of no meaning. The fact that some of these lands were historically irrigated is not in dispute. *See INC Br.* at 4-17. While INC’s analysis is flawed, *see supra*, it demonstrates that INC has an understanding that the land historically irrigated was irrigated with surface water. This historical water use formed the basis for the resolution of the permitting disputes. As such, the timing of INC’s “realization” that the surface water could be used for irrigation, or that there was sufficient surface water, is irrelevant.

Finally, the Department recognizes that a condition should be placed on the surface water rights, in order to ensure that the interests of the homeowners and the groundwater permit Protestants are protected. Jan Shurte testified at the hearing that a comment that recognizes the link between them and permit 63-11413 should be placed on the surface water rights. The following comment, proposed in LHOA’s *Findings of Fact & Conclusions of Law*, appropriately recognizes this link, while giving deference to the unique setting:

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.

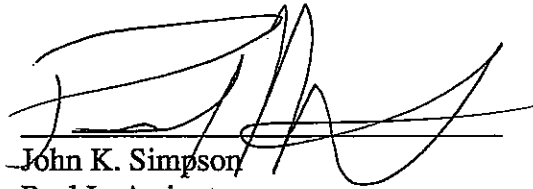
In light of INC's prior representations to the Department and homeowners, this comment should be placed on water right 63-123F and 63-123G – as well as 63-123D, if that right is ultimately decreed.

Conclusion

Based upon the reasoning provided above, and in LHOA's *Proposed Findings of Fact and Conclusions of Law*, and the evidence before this Special Master, LHOA respectfully requests that its initial Proposed Findings and Conclusions be adopted.

Dated this 7th day of November, 2008.

BARKER ROSHOLT & SIMPSON, LLP



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 7th day of November, 2008, I caused to be served a true and correct copy of the foregoing **LEXINGTON HILLS HOMEOWNERS' ASSOCIATION'S RESPONSE TO LEXINGTON HILLS INC.'S POST-TRIAL BRIEF** by the method indicated below, and addressed to each of the following:

Clerk of the District Court
Snake River Basin Adjudication
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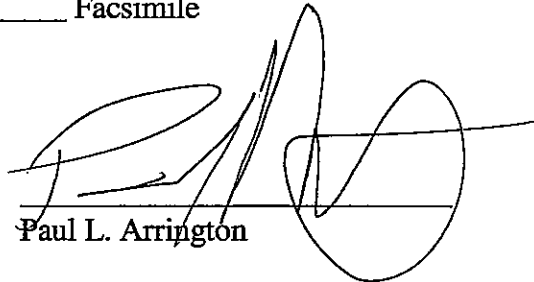
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