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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**

	)	
	)	Subcase Nos. 63-00123D, 63-00123F & 63-
	)	00123G
In Re: SRBA	)	
	)	LEXINGTON HILLS HOMEOWNERS'
Case No. 39576	)	ASSOCIATION'S RESPONSE TO
	)	LEXINGTON HILLS, INC.'S MOTION TO
	)	ALTER OR AMEND
	)	

COMES NOW, Lexington Hills Homeowners' Association ("LHOA"), by and through its counsel of record, Barker Rosholt & Simpson, LLP, and submits this response to *Lexington Hills, Inc. 's Motion to Alter or Amend*, filed with the Court on March 30, 2009. As discussed herein, the evidence before the Special Master does not support the changes requested by Lexington Hills, Inc. ("INC"). As such, the motion should be denied.

INTRODUCTION

INC's motion asserts that the Special Master's Report and Recommendation ("SR&R") is in error but fails to provide any factual support for that contention. While INC divides its complaints about the SR&R into three categories, its essential grievance is the fact that the SR&R recognized that LHOA can beneficially use at least 1 inch per acre (or 0.02 cfs per acre).

INC faults the SR&R for placing a “limit” of 1 inch per acre on the 170 irrigated acres. Yet, the SR&R relied on INC’s own expert’s testimony to determined that there are 170 irrigated acres. Furthermore, all parties agree that LHOA can beneficially use at least 1 inch per acre during periods of high crop water demand. This fact alone renders the assertion that the SR&R ignores testimony about conveyance loss moot. The limited evidence presented at trial refutes INC’s claim that the storage ponds can provide LHOA with a safety buffer to provide sufficient water during peak demand – even with a duty of water at less than 1 inch per acre (INC claims 0.78 inches per acre).

Finally, INC asserts that the Court overstepped its authority in increasing LHOA’s share of water right 63-123. Yet, the Court’s determination was correct and consistent with the record. As discussed below, INC’s motion should be denied.

ARGUMENT

INC’s motion fails to provide any justification for its claim that the SR&R should be altered or amended. The evidence presented at trial does not support INC’s claims. Many of these arguments have already been rebutted by LHOA in its *Proposed Findings of Fact & Conclusions of Law* (“LHOA FF/CL”) and *Motion to Alter or Amend* (“LHOA Motion”).

INC claims that the SR&R is in error by (i) limiting “the rights to a combined 0.02 cfs per acre and to 170 acres;” (ii) recommending 3.4 cfs of water right 63-123 to LHOA; and (iii) recognizing that LHOA could beneficially use at least 1 inch per acre. Each of these arguments fails.

I. The SR&R Correctly Recognized that LHOA Can Beneficially Use at Least 1 Inch Per Acre.

INC’s first and third complaints criticize the SR&R for recognizing an inch per acre for irrigation. Yet, the undisputed testimony at trial is that LHOA can beneficially use more than 1

inch per acre. *See LHOA Motion* Part III (explaining why the SR&R should be amended so that it is consistent with the testimony at trial that LHOA can beneficially use more than 1 inch per acre). INC claims that the duty of water should be 0.78 inches per acre. *See INC Motion* at 3. INC's theory is based on the assertion that, since there are more than 230 acres within the place of use (i.e. the subdivision properties) then the duty of water must be 0.78 inches per acre (the total water right divided by the total acres of land area). Ironically, INC's own testimony – which was adopted in the SR&R – is that only 170 of the 230 acres within that place of use are actually irrigated. INC's motion fails to mention this fact – apparently recognizing that it is fatal to INC's new claim that the 170 irrigated acre finding is in error.

To support its argument, INC cites to testimony already considered and rejected by the Court and then claims that the Court ignores the conveyance loss and ponds – each of which, INC claims, demand a reduction in the duty of water from 1 inch to 0.78 inches per acre. INC is wrong. First, the fact that water from a “right held by Farmers Union Canal Company” is used to account for conveyance loss does not mean that the SR&R was wrong in recognizing that LHOA can beneficially use at least 1 inch per acre. *See INC Motion* at 3. INC does not claim that the 1 inch per acre *includes* conveyance loss. The SR&R does not state that the 1 inch per acre *includes* conveyance loss. It is unclear what exactly INC is claiming by asserting that the Court ignored the alleged conveyance loss testimony.¹ Furthermore, the fact that all parties testified that LHOA can beneficially use at least 1 inch per acre during peak demand periods renders INC's assertions about conveyance loss moot. INC cannot change its position now, after the hearing is complete.

¹ In fact, INC fails to provide any information about the alleged testimony regarding conveyance loss. It fails to state who provided the testimony or the extent of that testimony.

INC next claims that the storage ponds provide sufficient capacity to irrigate during peak demand with a duty of water of 0.78 inches per acre. *INC Motion* at 3. Initially, LHOA would note that this storage issue was not raised until very late in the hearing process. As such, there is very little reference to such evidence in the record. The limited evidence at trial, however, confirmed that the ponds do not have sufficient capacity to service all the residents during peak demand. This limited evidence shows that the ponds are filled during the day and used at night for irrigation purposes and that a neighboring subdivision, Echo Creek Subdivision, also diverts out of the ponds. The volume of water in the ponds, therefore, is temporary at best and cannot be relied upon to meet full peak demand – particularly here, where multiple subdivisions divert from the ponds. Furthermore, the Department’s “24 hour” rule has limitations and prevents LHOA from storing adequate water in the ponds without a separate storage right. Since water right 63-123 does not authorize storage, it cannot be relied upon for that purpose.

INC’s second claim, that the water right should not be limited to 1 inch per acre on the irrigated acres, also fails. INC complains that the 1 inch per acre combined use limitation for 170 acres is inappropriate. This claim is confusing since it was INC’s own expert that provided the testimony relied upon for the conclusions in the SR&R. *See SR&R* at 5, ¶ 12. As has become the pattern in these proceedings, however, INC is now denigrating its own analysis in an attempt to get more value for INC. *See LHOA Motion* at 8-9 (discussing Mr. Roylance’s sudden decision to belittle his own irrigated acreage analysis and adopt an analysis that would provide more water to INC); *LHOA Motion* at 3-8 (comparing Mr. Roylance’s and INC’s prior representations to IDWR and LHOA that INC would leave all surface water on the subdivision property with their new assertion that they should not be prevented from transferring the water). INC does not explain why its prior analysis was wrong or why INC’s own experts apparently

failed to include the 65 acres in the irrigated acre analysis.² It merely cites to arguments already considered by the Court and faults the SR&R for “unnecessarily cut[ting] 65 acres of beneficial use from the Jacobs right.” *INC Motion* at 1. Such naked assertions cannot form the basis of a demand to alter the SR&R.

INC then asserts that the acreage limitation “effectively make[s] Lexington’s right(s) non-transferable.” *Id.* LHOA explained the limitations on transferring any portion of the surface water right in its motion. *See LHOA Motion* Part IV. The Court recognized that there are limitations on the transferability of the water right due to representations made by INC (including Mr. Roylance) and its predecessors in interest during the permitting process for ground water right 63-11143. *See SR&R* at 12-13. This claim validates LHOA’s concern that INC will attempt to transfer some portion of the surface water right and that that transfer would force the Department to limit the use of ground water right 63-11143. LHOA’s motion emphasizes the need for more restrictive language, consistent with the remark on water right 63-11143 in order to protect the interests of the homeowners – interests defended and guaranteed by Mr. Roylance and INC during the permitting process.

The SR&R properly recognizes that LHOA can beneficially use at least 1 inch per acre.³ The SR&R properly recognized that irrigation should be limited to a specific duty of water on the irrigated acres.⁴ INC’s naked assertions fail to rebut these findings and should be denied.

² INC fails to explain how it determined that 65 acres would be excluded. There is nothing in the record to support that number.

³ As explained in the *LHOA Motion* at Part III, this determination is inconsistent with the testimony at hearing and leaves LHOA with insufficient water to meet peak demand.

⁴ The SR&R found the irrigated acres to be 170 acres. As explained in the *LHOA Motion* at Part II, this determination is incorrect and should be revised to 182.9.

II. The Court Properly Ordered that LHOA Receive a Greater Portion of Water Right 63-123.

INC's final complaint is that the Court erred in recommending to LHOA a larger portion of water right 63-123. *INC Motion* at 2. According to INC, the Court should have ordered INC to provide LHOA with additional water from a so-called "portfolio" of "rights and entitlements." *Id.* Yet, none of these other "rights and entitlements" within the "portfolio" were before the Court. Rather, the Court was asked to determine whether the Department correctly recommended the 63-123 water right and, as it relates to this issue, whether the Department correctly recommended the place of use and duty of water. The Court was not asked to determine whether INC had other water rights to fulfill its obligations under the CC&R's. Furthermore, the record is devoid of any evidence of INC's so-called "portfolio." IDWR's recommendations for these water rights identified the source. No objection to the source was filed and the source was not made an issue during the hearing. Following the hearing, the Court determined, based in large part on INC's expert's testimony, that the irrigated acres was 170 acres and that the duty of water is 1 inch per acre. The water right recommendations were amended accordingly.

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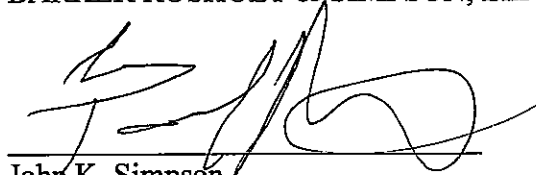
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CONCLUSION

INC's motion fails to justify the demanded amendments to the SR&R. The undisputed testimony at hearing is that LHOA can beneficially use more than 1 inch per acre. INC's own experts testified that the irrigated acres are 170. Finally, the Court properly considered the elements of water right 63-123 since that water right was pending before the Court. Accordingly, INC's motion should be denied.

Dated this 5th day of May, 2009.

BARKER RSHOLT & 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 5th day of May, 2009, I caused to be served a true and correct copy of the foregoing **LEXINGTON HILLS HOMEOWNERS' ASSOCIATION'S RESPONSE TO LEXINGTON HILLS, INC.'S MOTION TO ALTER OR AMEND** 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

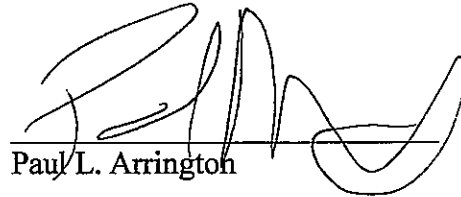
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