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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUL 24 2009	
By _____	Clerk
_____	Deputy Clerk

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

) Subcases 63-00123D, 63-00123F,
) and 63-00123G
)
) ORDER GRANTING IN PART AND
) DENYING IN PART LEXINGTON
) HILLS INC.'s MOTION TO ALTER OR
) AMEND
)
) ORDER DENYING LEXINGTON HOA's
) MOTION TO ALTER OR AMEND
)
) AMENDED SPECIAL MASTER'S
) REPORT AND RECOMMENDATION

I. APPEARANCES

John K. Simpson and Paul Arrington, Barker Rosholt & Simpson LLP, for Lexington Hills Home Owners' Association.

John M. Marshall, Givens Pursley LLP, for Lexington Hills, Inc., and East Hills Development, LLC.

II. ISSUE PRESENTED

A Issues Raised by Lexington Hills. Lexington Hills Inc., and East Hills Development, LLC (collectively "Lexington Hills") makes the following assertions in its *Motion to Alter or Amend*:

1) The combined use remark recommended in the *Special Master's Report* should be deleted.

2) The places of use for water rights 63-00123G (Lexington Hills HOA) and 63-00123F (Lexington Hills) should be described so that each right has a separate and distinct place of use.

3) Lexington Hills is the owner of 9.11 miner's inches of water referred to by Lexington Hills as "developed water" which consists of water delivery entitlements from the Farmers Union Ditch Company and shares in the Farmers Union Ditch Company which can be conveyed to the Lexington HOA and therefore the Lexington HOA's portion of water right 63-00123G should be reduced by that amount.

4) The evidence at trial supports a finding that the historic (pre-development) duty of water of 0.78 miner's inches per acre is adequate to irrigate the Subdivision.

B. Issues Raised by Lexington HOA. The Lexington Hills Homeowners Association ("Lexington HOA") make the following assertions in its *Motion to Alter or Amend*:

1) The circumstances surrounding the execution of the Master Declaration and the resolution of protests to groundwater permit 63-11413 demonstrate that Lexington HOA should own all of the Jacobs water right.

2) The total irrigated acres determined in the *Special Master' Report* is inconsistent with the testimony presented at hearing.

3) All parties agree that the Lexington HOA can beneficially use more than one inch per acre.

4) The condition regarding surface and ground water uses is not sufficient to protect the rights and interests guaranteed by Lexington Hills through the permitting process.

5) The Special Master is without authority to decree a water right to a party that failed to make a claim for that water.

III. ANALYSIS

A. Lexington Hills' Motion to Alter or Amend.

1) **Combined Use Remark.** Lexington Hills argues that the combined use remark recommended in the *Special Master's Report* should be deleted. This Special Master agrees. The place of use recommended in the *Special Master's Report* for both Lexington HOA's right and Lexington Hills' right was the same 170 acres within the overall digital boundary of the subdivision. The cumulative total of both these rights if used on that 170 acre place of use exceeds the one inch per acre found to be beneficially useable thereon. The purpose of the combined use remark as originally envisioned was to make the combined use of water from the two rights consistent with the findings regarding this beneficial use. However, as explained in the next section, Lexington Hills also asserts that the place of use for the two rights should not be the same 170 acres, but rather the places of use should be separate and distinct. Because this Special Master agrees with Lexington Hills regarding the places of use, the combined use remark becomes unnecessary and should be deleted. Based upon the foregoing, Lexington Hills' *Motion to Alter or Amend* is **granted** in this regard.

2) **Place of Use.** Lexington Hills argues that the place of use for its water right 63-00123F should be separate and distinct from the place of use for Lexington HOA's right 63-00123G. This Special Master agrees. The place of use for Lexington HOA's water right 63-00123G is the land within the subdivision that is susceptible to irrigation. Based upon the testimony at hearing, this Special Master found the quantity of that land to be 170 acres within the Subdivision. The place of use for the Jacobs water right prior to development generally consisted of the agricultural land that now comprises the Subdivision, approximately 328 acres less the 21.2 acres that comprises Lexington on the Rim for a total of approximately 307 acres.¹ Post-development, much of those 328 acres of farm ground now lie beneath roads, sidewalks, and building footprints. Because the Lexington HOA's right is used upon the 170 landscaped and irrigated acres within the

subdivision, Lexington Hills' portion of the Jacob's water right is not needed on the irrigated land, but rather the place of use consists of the remaining land that cannot now be irrigated. Accordingly, the proposed partial decree attached hereto includes the following remark on both 63-00123G and 63-00123F: "The place of use for this right does not overlap with the place of use for right No. 63-00123G [or 63-00123F]." Also, the number of acres for Lexington Hills' right has been changed to 136.8 (328-21.2-170=136.8). Based upon the foregoing, Lexington Hills' *Motion to Alter or Amend* is **granted** in this regard.

3) Developed Water. Lexington Hills argues that the portion of water right 63-00123 that should be decreed to Lexington HOA should be reduced by 9.11 miner's inches because Lexington Hills can convey shares in the Farmer's Union Ditch and/or the "developed water" to the Lexington HOA (or has already conveyed portions thereof) in satisfaction of its obligation to convey irrigation water under the terms of the Master Declaration. This Special Master agrees. The Master Declaration does not specifically identify that water right 63-00123 is the only water right that can be used by Lexington Hills to satisfy its obligations thereunder. Rather, the Master Declaration states: "Surface water for irrigation appurtenant to each phase of development of the Property will be conveyed to the Association as each plat is recorded." *Affidavit of Michael P. Lawrence*, Ex. A. The record in these subcases reflects that Lexington Hills is the owner of 9.11 miner's inches (rounded to 0.18 cfs) of water that is within the scope of the water identified in the above-quoted sentence from the Master Declaration. Therefore, the quantity of water right 63-00123G should be reduced by 0.18 cfs for a total of 3.22 cfs; the quantity of water right 63-00123F should be increased by 0.18 cfs for a total of 1.385 cfs; and Lexington Hills should be required to convey the above-referenced 9.11 miner's inches of water to the Lexington HOA.

¹ This Special Master made no specific finding as to how many of these 307 acres were irrigated with the Jacobs water prior to development, except to find that the land that comprises the Lexington on the Rim phase of the Subdivision had not historically been irrigated. *See Special Master's Report* Finding of Fact No. 3.

4) **Duty of Water.** Lexington Hills argues that this Special Master erred in finding that irrigated lands in the Subdivision requires one miner's inch per acre, and that the evidence at trial supports a finding that the historic (pre-development) duty of water of 0.78 miner's inches per acre is adequate to irrigate the Subdivision. Lexington Hills asserts that the *Director's Report* recommendation of one miner's inch per acre was based upon the generally applicable one miner's inch per acre decreed for irrigation rights in the Stewart Decree, but that the particular water right at issue is different for the following three reasons.

First, Lexington Hills asserts that the subject water right was not decreed in the Stewart Decree as an irrigation right, and therefore the inch-per-acre standard decreed in the Stewart Decree is inapplicable. Lexington Hills reasons that therefore the court should look to the duty of water for the right after it was transferred to agricultural uses. Lexington Hills asserts that the post-transfer duty of water for the farm land that became the Subdivision was 0.78 inches per acre. In the *Special Master's Report*, this Special Master stated that the pre-development duty of water was likely 0.78 inches per acre. The word "likely" was specifically used because the record is sparse as to the exact number of irrigated acres that comprised the pre-development farm land. Moreover, as discussed in the *Special Master Report* this Special Master is not convinced that the historic duty of water for the irrigation of farmland translates to that same duty of water contemplated in the Master Declaration for the irrigation of the Subdivision landscaping. See *Special Master Report*, ¶ 4.

Second, Lexington Hills argues that the evidence in the record regarding the storage ponds favors an ultimate finding that 0.78 miner's inches per acre is adequate to irrigate the Subdivision. In rejecting Engineer Scanlan's analysis that 0.78 miner's inches per acre is adequate for irrigation of the Subdivision in accordance with the Master Declaration, this Special Master's analysis considered the evidence regarding the ponds. For example, the pre-filed written direct *Testimony of Terry M. Scanlan* states: "The pond system in the Subdivision also could serve as a storage reservoir to potentially provide some additional water to supplement through the peak demand." *Id.*, p. 8. Engineer Shaw states in his pre-filed written *Rebuttal Expert Report* that: "During the

peak irrigation season, the available storage in the ponds is depleted each night by the irrigation system and must be refilled the next day from Farmers Union so irrigation can occur during the following night.” *Id.*, fn. 2 In other words, both experts agree that the available water in the ponds can be (or is actually) used during times of peak demand. Despite this similarity in the opinions of the experts, the two experts reached different conclusions as to the theoretical irrigation demand for the Subdivision landscaping. As stated in the *Special Master Report*, it is this Special Master’s opinion that 0.78 inches per acre, including any benefit provided by pond storage, is inadequate to irrigate the Subdivision in accordance with intent of the developer and the expectations of the homeowners that arise from the covenants set forth in the Master Declaration.

Third, Lexington Hills argues that this Special Master erred in the findings of fact regarding conveyance losses from the point of diversion on the Boise River to the point of rediversion where the water is taken from the Farmer’s Union Canal. It is undisputed that the analysis of both Engineer Scanlan and Engineer Shaw as to the quantity of water necessary for irrigation of the Subdivision were based upon the quantity of water to be diverted from the Farmer’s Union Canal and into the Subdivision ponds, not the amount of water that would be required to be diverted from the Boise River. In other words, neither expert attempted to calculate the conveyance loss in the Farmer’s Union Canal.

In the *Special Master Report* this Special Master concluded that: “[F]or purposes of determining the amount of water necessary to irrigate the Subdivision, this Special Master finds that such amount needs to be calculated from the point of diversion on the Boise River rather than at the point of rediversion at headgate No. 39.” *Id.*, p. 9. Based upon the comments of counsel and of IDWR at the hearing on the motions to alter or amend, this Special Master now concludes that the above quoted finding is in error. This Special Master misinterpreted the testimony of IDWR agent Jan Shurte at trial regarding a contract dated July 17, 1916, between the Farmer’s Union Ditch Company and W. A. Keyt. At oral argument, it was clarified that the contract provided that carriage-loss water was to be held by the Farmer’s Union Ditch Company. It is the understanding of this Special Master that the carriage losses associated with water rights 63-00123G and 63-00123F are accounted for under water right 63-00123C, which has been decreed in the

SRBA to the Farmer's Union Ditch Company. Therefore, the full quantities of water rights 63-00123F and 63-00123G are measurable and deliverable at the point of rediversion from the Farmer's Union Canal (headgate No. 39), not at the point of diversion from the Boise River. For purposes of clarifying this fact the partial decrees for water rights 63-00123F and 63-00123G should contain the following remark: "The right holder is entitled to the quantity of water decreed herein at the point of rediversion from the Farmer's Union Canal."

Although this Special Master has reversed the previous finding of fact regarding conveyance losses, this does not translate into amending the finding that 0.78 miner's inches per acre (or anything less than one miner's inch per acre) is adequate to irrigate the Subdivision and fulfill the obligations set forth in the Master Declaration. Engineer Scanlan did not account for any conveyance losses in the Farmer's Union Canal in reaching his conclusion that 0.78 miner's inches per acre is the amount of water necessary to make up for the estimated precipitation deficits. Presumably had Engineer Scanlan estimated conveyance losses while the water is being transported in the Farmer's Union Canal, the amount of such losses would have to be added to the 0.78 inches per acre so that the amount of water deliverable through the Subdivision pressurized irrigation system would be 0.78 inches per acre. In the *Special Master's Report*, this Special Master concluded that 0.78 miner's inches per acre propounded by Engineer Scanlan to meet the estimated precipitation deficit is insufficient for purposes of meeting the obligations set forth in the Master Declaration.

Likewise, as stated by IDWR Agent Jan Shurte at the oral argument on the motions to alter or amend, IDWR always understood that the 63-00123 water right did not include conveyance losses because such losses are accounted for under water right 63-00123C. Accordingly, no adjustments need to be made regarding the duty of water because each of the expert witnesses and IDWR all arrived at a duty of water with the understanding that these water rights are measurable and deliverable in their full quantities at the field headgate (headgate No. 39).

Based upon the foregoing, Lexington Hills' *Motion to Alter or Amend* is **denied** with respect to its assertion that a duty of water of 0.78 miner's inches per acre is adequate to satisfy said obligations.

B. Lexington HOA's Motion to Alter of Amend.

1) **Issues Regarding Groundwater Permit 63-11413.** Lexington HOA argues that the Master Declaration must be interpreted to mean that Lexington Hills intended to leave all surface water for use by Lexington HOA on the Subdivision lands. The Master Declaration states: "Surface water for irrigation appurtenant to each phase of development of the Property will be conveyed to the Association as each plat is recorded." *Affidavit of Michael P. Lawrence*, Ex A. In the *Special Master's Report*, this Special Master concluded that "the Master Declaration is uncertain regarding the quantity of water required to be conveyed from Lexington Hills to Lexington HOA. *Id.*, p.10. A question of fact as to the intent of Lexington Hills arises out of this uncertainty. *Id.*

Lexington HOA's bases its argument on statements by Lexington Hills (and/or its attorney) made during the hearings held before IDWR in the permitting process for groundwater right No. 63-11413. Specifically, Lexington HOA cites to this statement of attorney Phil Barber: "This applicant will agree therefore not to sell or transfer the Farmers Union irrigation water right off of the property . . ." *Lexington HOA's Motion to Alter or Amend*, Ex. A. Mr. Barber further stated: "The bottom line is we will not strip the surface water, irrigation water, from these lands and we are willing to make a commitment that can be a condition that we will not transfer those surface rights away from these lands . . ." *Id.* Lexington HOA also cites to the following colloquy between Mr. Barber and Mr. Roylance:

MR. BARBER: You heard my prior commitment that you would not transfer or sell surface irrigation water off the project?

MR. ROYLANCE: That's right. We have no desire or need to sell the water, we want to use as much of the water as we feasibly can on the project both to recharge the aquifer and to keep it green.

Id. Lexington HOA reasons that the intention of Lexington Hills as to the amount of surface water that it intended to transfer to Lexington HOA under the Master Declaration

can be ascertained from these statements, i.e. that Lexington Hills intended to assign all such surface water rights. This Special Master disagrees with Lexington HOA, and reconfirms the finding that Lexington Hills intended to convey sufficient water to meet the actual irrigation requirements of the Subdivision in an amount necessary to maintain the distinctive residential character of the Subdivision, and in an amount that allows homeowners in the Subdivision to comply with his/her obligations regarding landscaping as set forth in the Master Declaration. *Special Master's Report* p. 6. Lexington Hills never intended to convey water rights to Lexington HOA that would exceed this actual irrigation requirement. *Id.* The statements set forth above in support of Lexington HOA's argument were presented at trial and considered by this Special Master. Although Mr. Barber's statements quoted above appear to be unequivocal, Mr. Barber also discussed, in the same statement, that the developer had not at that time made a determination as to whether all of the lots in the subdivision would be serviced by the pressurized irrigation system. Also, Mr. Roylance states that the developer wants to use as much water as can be *feasibly* used. This Special Master found that the irrigation requirement of the Subdivision is one miner's inch per irrigated acre. It is not inconsistent with the above-quoted statements for the developer (Lexington Hills) to attempt to transfer the place of use of any water that exceeds this irrigation requirement. Accordingly, Lexington HOA's *Motion to Alter or Amend* is **denied** with respect to the assertion that Lexington Hills intended to convey to Lexington HOA an amount of water in excess of the irrigation requirement of the Subdivision.

2) **Number of Irrigated Acres.** Lexington HOA asserts that this Special Master erred in finding that the analysis of the number of irrigated acres in the Subdivision conducted by Engineer Scanlan (who determined the number of acres to be 170) to be reliable and accurate. In the *Special Master's Report*, this Special Master found the analysis conducted by Engineer Scanlan to be more reliable and accurate than the analysis conducted by Engineer Roylance as revised by Engineer Shaw. *Id.* p. 5 At trial, Engineer Roylance stated that the GIS mapping tools used by Engineer Scanlan were superior to the tools used by Roylance in conducting the 2001 analysis of irrigated

acreage. Lexington HOA argues that Engineer Roylance's testimony cannot be relied upon because it frequently changes. This Special Master found Engineer Roylance's testimony to be truthful and not subject to frequent changes. While it is true that Engineer Roylance had in 2001 conducted an analysis and found there to be 176.95 irrigated acres in the Subdivision, at trial he simply and truthfully recognized that the analysis conducted by Engineer Scanlan was likely to be more accurate for the reason that Engineer Scanlan used better tools.

Lexington HOA also argues that Engineer Scanlan's analysis cannot be relied upon because it left out some relatively small areas of irrigated land. This Special Master does not find this defect to warrant a finding of unreliability as to the entire analysis. Indeed, if the standard was that any slight defect in such an analysis would make the entire analysis unreliable, then Engineer Roylance's analysis would be deemed unreliable as well based upon Engineer Shaw's testimony that the Roylance analysis left out some irrigated acreage. What is to be observed here is that both of the irrigated acreage studies used statistical sampling methodology whereby some representative lots and common areas were actually measured, and the results of such measurement were extrapolated to the entire Subdivision. A sampling methodology such as this is subject to a margin of error. Recognizing that some errors are expected to occur in the type of analysis conducted by both Scanlan and Roylance, it does not make sense to discount the entire analysis just because a few of the errors are actually found and identified.

Based upon the foregoing, this Special Master reconfirms the finding that the Subdivision consists of 170 irrigable acres. Lexington HOA's *Motion to Alter or Amend* is denied in this regard.

3) Duty of Water. Lexington HOA argues that this Special Master erred in finding that the duty of water for the Subdivision to be one miner's inch per acre. Specifically, Lexington HOA asserts that both experts, Engineer Shaw and Engineer Scanlan, recognized and opined that the Subdivision could beneficially use more than one miner's inch per acre. This Special Master disagrees with Lexington HOA's characterization of Engineer Scanlan's testimony.

Lexington HOA asserts that Engineer Scanlan found a precipitation deficit of 1.08 inches per acre. *Lexington Hills Inc.'s Post Trial Brief*, p. 14; *Testimony of Terry M. Scanlan*, p. 7. Mr. Scanlan opined that the Subdivision irrigation delivery requirement using the 20% exceedance 3-day moving average is 1.08 miner's inches per acre. This number is at the top end of a range expressed by Engineer Scanlan, with lesser irrigation delivery requirements yielded by using a 20% exceedance 7-day (0.95 inches), 15-day (0.89 inches), and monthly averages (0.82 inches). *Id.*, Ex. 8. Engineer Scanlan actually testified that in his opinion the 7-day 20% exceedance was the proper calculation, not the 3-day 20% exceedance preferred by Engineer Shaw.

Additionally, Engineer Scanlan testified as to several reasons why in his opinion a continuous diversion rate of 0.78 miner's inches per acre is sufficient to supply a precipitation deficit that is greater than 0.78 miner's inches per acre. For example, Engineer Scanlan testified that available storage in the pond system could be used to satisfy some of the irrigation requirements during times of peak demand. Simply put, it is not this Special Master's understanding from the testimony of Engineer Scanlan that he is of the opinion that the Subdivision irrigation water requirements necessitates a diversion from the Farmer's Union Canal of 1.08 miner's inches per acre.

Based upon the foregoing, this Special Master reconfirms the finding that the duty of water for the subdivision is one miner's inch per acre. Lexington HOA's *Motion to Alter or Amend* is **denied** in this regard

4) Adequacy of Remark Concerning 63-11413. Lexington HOA argues that the remark recommended in the *Special Master's Report* is inadequate to protect Lexington HOA in the event that Lexington Hills attempts to transfer the place of use of its portion of the Jacobs water right. The remark recommended in the *Special Master's Report* is:

The ability to transfer this water right pursuant to Idaho Code § 42-222 is contingent upon a finding by the Department that such transfer will not be cause for the Department to further limit the use of water right 63-11413.

Lexington HOA suggests the following remark:

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.

Lexington HOA argues that this remark is necessary because of the condition in the permit for 63-11413, which states: “Sale of transfer of surface water from any portion of these properties *will* be cause for the Department to *further limit* the use of this right.” Lexington HOA’s *Motion to Alter or Amend*, p. 12 (emphasis added by Lexington HOA). Lexington HOA argues under this language that “[w]hile the extent of any limitation is left to be determined by the Department, there is no question that any transfer ‘*will*’ create further limitations on the permit.” *Id.*

This Special Master disagrees with Lexington HOA as to whether, under the above-quoted condition in permit 63-11413, there is a possibility that Lexington HOA could transfer a portion of its water right without resulting in any limitations being imposed upon the use of water under permit 63-11413. Certainly in an administrative transfer proceeding IDWR will examine whether any limitations would be warranted, but the permit condition states that transfer of the surface water *will be cause* to further limit the use of the right. In this Special Master’s opinion, in any administrative transfer proceeding IDWR will examine the hydraulic relationship between these rights, consider the potential for injury, and ultimately determine whether there *is cause* to limit the use of water right 63-11413.

Under the remark proposed in the *Special Master’s Report*, Lexington HOA’s interests in the use of water under permit 63-11413 are protected because any administrative determination that the use of that right should be further limited will result in the non-transferability of Lexington Hills’ surface water right. Under Lexington HOA’s proposed remark, on the other hand, Lexington Hills’ surface water right, which has a place of use of the non-irrigable lands within the Subdivision, could not be transferred and would be forfeited for non-use after the five-year statutory period beginning on the date of the SRBA partial decree. This would be contrary to the policy of the State of Idaho, which is to secure the maximum use and benefit and least wasteful use of the waters of the State. *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

This Special Master is not willing to recommend a remark that would make it futile for Lexington Hills to even attempt to transfer a water right from place of use where the water cannot be used to a place of use where it could be put to beneficial use.

Accordingly, Lexington HOA's *Motion to Alter or Amend* is **denied** in this regard.

5) Authority to Decree Water right to Party that did not Claim the Right.

Lexington HOA argues that the portion of the subject Jacobs water right claimed by East Hills Development LLC (water right No. 63-00123D), which was recommended for disallowance in the *Special Master's Report*, cannot be decreed to Lexington Hills because Lexington Hills did not file a claim for that water right. Lexington HOA reasons that therefore the water right claimed by East Hills should be decreed to Lexington HOA. Lexington HOA cites to Idaho Code § 42-1408, which requires that notice of order to be prepared by the Director upon a district court's order commencing an adjudication shall notify claimants that "failure to file a required notice of claim will result in a court determination that no water right exists for the use of water for which the required notice of claim was not filed." I.C. § 42-1408(1)(c). As explained below, this Special Master disagrees with the Lexington HOA.

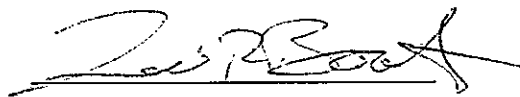
The above-quoted language from Idaho Code § 42-1408 does not prevent the SRBA District Court from resolving ownership issues among parties to a subcase. In these subcases, there has been no dispute or conflict as to ownership of the subject water rights as between East Hills Development LLC and Lexington Hills. Both entities have been represented by the same legal counsel. In the *Summary Judgment Order*, this Special Master agreed with Lexington HOA that East Hills Development LLC conveyed its water right to Lexington Hills as an appurtenance to the land conveyed in two deeds in 1998 and 1999. *Summary Judgment Order*, P. 10-11. Neither Lexington Hills nor East Hills Development LLC have objected to this conclusion. This conclusion did not affect the underlying issue in these subcases – a dispute over ownership of the surface water right between the developers of the Subdivision and the homeowners association. For purposes of determining ownership, it matters not whether Lexington Hills replaces East Hills Development LLC as the party asserting ownership.

Additionally, this Special Master has ruled in other subcases that a party may claim ownership of a water right through an objection rather than through a notice of claim. In the *Memorandum Decision and Order on Cross Motions for Summary Judgment*, Subcases 63-00132 *et al.* (June 4, 2008), this Special Master stated that “addressing ownership through an objection is equally valid to addressing the issue through competing notices of claim.” *Id.*, p. 13. This Special Master rejects the rigid reading of Idaho Code § 42-1408 advanced by Lexington HOA. The language of the statute clearly applies to the situation where no claim is filed at all for a particular water use; it does not apply to the situation where parties to a subcase either through claims or objections are disputing the ownership of a water right. Based upon the foregoing, Lexington HOA’s *Motion to Alter or Amend* is **denied** in this regard.

IV. AMENDED RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that water rights 63-00123F, and 63-00123G be **decreed** with the elements as set forth in the attached *Amended Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*. IT IS FURTHER RECOMMENDED that the SRBA District Court enter a final order **disallowing** water right claim 63-00123D. Finally, IT IS RECOMMENDED that the SRBA District Court enter a judgment against Lexington Hills and in favor of Lexington HOA compelling Lexington Hills to convey all right, title, and interest in the 9.11 miner’s inches of Farmer’s Union Shares and/or “developed water” as identified herein.

Dated July 24, 2009



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JUL 24 2009

By _____ Clerk

Deputy Clerk

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OTHER PROVISIONS (continued)

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

RECOMMENDATION

JUL 24 2009

Red Booth

SPECIAL MASTER

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JUL 24 2009
By _____ Clerk

Deputy Clerk

By _____ Clerk

Deputy Clerk

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SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

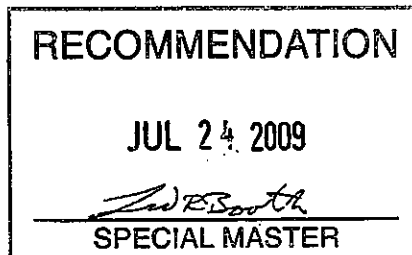
OTHER PROVISIONS (continued)

NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication



CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDERS ON MOTION TO ALTER OR AMEND; AMENDED SPECIAL MASTER REPORT AND RECOMMENDATION was mailed on July 24, 2009, with sufficient first-class postage to the following:

LEXINGTON HILLS HOMEOWNERS

Represented by:

JOHN K SIMPSON
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Phone: 208-336-0700

EAST HILLS DEVELOPMENT LLC
LEXINGTON HILLS INC

Represented by:

JOHN M MARSHALL
601 W BANNOCK ST
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Phone: 208-388-1200

DIRECTOR OF IDWR

PO BOX 83720
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