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DEPARTMENT OF
WATER RESOURCES

Norman M. Semanko, ISB No. 4761
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
nms@moffatt.com
25218.0000

Attorneys for Two Rivers Subdivision Homeowners Association, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER SUPPLY
BANK LEASE FOR WATER RIGHT
NO. 63-00194

**TWO RIVERS SUBDIVISION HOMEOWNERS
ASSOCIATION, INC.'S EXCEPTIONS TO
PRELIMINARY ORDER DENYING PETITION
TO REVOKE OR MODIFY LEASE**

COMES NOW Two Rivers Subdivision Homeowners Association, Inc. ("Two Rivers HOA"), Petitioner in the above-captioned matter, by and through the undersigned counsel and pursuant to Idaho Code Section 67-5245(3) and Rule 730 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01) and hereby submits the following exceptions to the Director of the Idaho Department of Water Resources, Gary Spackman, regarding the Preliminary Order Denying Petition to Revoke or Modify Lease ("Preliminary Order") issued in this matter by the Chief of the Water Allocation Bureau, Jeff Peppersack.

For the reasons set forth below, the Water Allocation Bureau Chief's Preliminary Order fails to recognize the injury that has occurred to the Two Rivers HOA and its resident homeowners as a result of the water bank lease. The Director should issue a final order revoking

or modifying the lease to correct this injury. If deemed necessary, the Director should hold a hearing to collect additional evidence to make the injury determination. In the event the Director fails to act to correct the existing, ongoing and future injury, the HOA demands a hearing pursuant to Idaho Code Sections 42-1766(2) and 42-1701A(3).

I. STANDARD OF REVIEW

The Preliminary Order was issued by someone other than the agency head and is subject to review by the agency head (IDWR Director) through the filing of an appeal, or exceptions, pursuant to Idaho Code Section 67-5245 and Rule 730 of the Department's Rules of Procedure. The exceptions must be filed within fourteen (14) days of the service date of the denial of the petition for reconsideration of the preliminary order, which, in this case, is no later than September 14, 2012.

In response to the exceptions, the Director shall: (1) issue a final order; (2) remand the matter for additional hearings; or (3) hold additional hearings. IDAHO CODE § 67-5245(6). Pursuant to Idaho Code Section 67-5245(7), the Director "shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing." In other words, the Director reviews the matter "de novo" and is entitled to make his own factual findings and legal conclusions. The Director may also schedule oral argument and/or conduct or remand for an evidentiary hearing before issuing a final order. Rule 730.

In response to a petition seeking to revoke or modify a water bank lease, Idaho Code Section 42-1766 provides that the Director shall cause an investigation to be made and that he may hold hearings or gather information in some other manner. In the event that the Director finds that an interference is occurring, he may revoke or require the lease to be modified to ensure that no injury occurs. Any person feeling aggrieved by a decision or action of the

Director shall be entitled to contest the action of the director pursuant to section 42-1701A(3), Idaho Code. Section 42-1701A(3) provides that, unless the right to a hearing before the Director is otherwise provided by statute, any aggrieved person who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the Director. To date, no hearing has been held regarding this matter.

II. PRIOR PROCEEDINGS

On July 10, 2012, Two Rivers HOA filed its Verified Petition to Revoke or Modify Lease (“Verified Petition”), seeking to revoke or modify the existing Water Supply Bank lease for a portion of Water Right No. 63-00194.

On July 31, 2012, T R Company, LLC filed a Motion to Dismiss.

Prior to the response deadline for the Motion to Dismiss, the Department issued its Preliminary Order, dated August 6, 2012. Two Rivers HOA subsequently filed its Response in Opposition to the Motion to Dismiss on August 14, 2012.

On August 20, 2012, Two Rivers HOA filed its Petition for Reconsideration of Preliminary Order, which was denied on August 31, 2012.

III. FACTUAL BACKGROUND

A. Two Rivers Water Rights

Water right no. 63-00194¹ was decreed in the Snake River Basin Adjudication (“SRBA”) on May 29, 2009. The right has a priority date of June 1, 1877, from the Boise River, in the amount of 5.2 cfs. Of this amount, 4.37 cfs is for irrigation of 200 acres, while 0.83 cfs is

¹ All water right and water bank lease documents referred to or quoted from herein are available on IDWR’s Water Right and Adjudication Search page at <http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp>.

for aesthetic storage and diversion to storage. The SRBA decree states: “Property is also known as ***Two Rivers Subdivision.***” (emphasis added). It is beyond dispute that 63-00194 is appurtenant to and has been used in the Two Rivers Subdivision.

Two Rivers HOA is also the owner of water right no. 63-32139, a year-round ground water right for aesthetic storage, in the amount of 304 AFA. The permit was approved on July 7, 2006, and proof was made on June 26, 2007. This right was assigned to Two Rivers HOA by the developer, T R Company, LLC on April 2, 2008. The water right includes the following condition:

The right holder shall mitigate for the evaporation losses from the ponds established under this right by delivering 112.1 af of water to the ponds from the Boise River each irrigation season pursuant to Right 63-00194 and Transfer 72104. ***If the specified mitigation right, or portions thereof, are sold, transferred, leased, used on any place of use, or are not deliverable due to a shortage of water or a priority call, then the right holder shall provide substitute mitigation.***

(Emphasis added).

A similar provision is contained in the SRBA decree for water right no. 63-00194:

Right 63-00194 authorizes the diversion of an annual total of 112.1 af for Aesthetic Storage to be used for the replacement of losses caused by evaporation from the 38.0 acres total surface area of sixteen (16) ponds established under Right 63-32139.

B. Water Bank Lease

After assigning water right no. 63-32139 and turning operation of the subdivision’s water system to Two Rivers HOA, the developer submitted a water bank application for a portion of 63-00194, in the amount of 1.86 cfs, on or about April 22, 2008. The right was accepted into the water bank by letter dated January 24, 2011, accompanied by a

“Water Supply Bank Lease Acceptance” document, dated January 21, 2011. The lease expires on December 31, 2013.

IDWR’s analysis of the water bank application included a January 21, 2011 memo which stated that “no injury is apparent.” However, it did note the watermaster’s comments of the same date as follows: “Rex Barrie expressed some curiosity why they would be leasing this water to the Bank when they have rented from the rental pool last year.” The January 21, 2011 email from Watermaster Rex Barrie to IDWR, attached to the IDWR memo, reads as follows:

Last year the homeowners had to rent water from the rental pool in order to meet their demand for the subdivision. My concern is reducing the natural flow by 1.86 cfs will leave them with 2.51 cfs of natural flow at 100% of the Stewart Decree then reducing down with each cut to 75%, 60% and so on. I guess if they can live with it, so can I. If this is granted, please inform Liz Cresto so she can adjust the accounting program to reflect the reduced amounts.

As a result of the water bank lease, the amount of water available to the Two Rivers Subdivision under water right no. 63-00194 was reduced from 5.2 cfs to 3.34 cfs.

C. Historical Use

Existing water right accounting and historical records on IDWR’s website (http://maps.idwr.idaho.gov/qWRAccounting/WRA_Select.aspx) indicate that more than 3.34 cfs has been diverted under water right no. 63-00194 (Thomas Aiken Canal) and delivered to the Two Rivers Subdivision during the previous four irrigation seasons (2008-2011). In 2011, the maximum diversion rate was 4.59 cfs and more than 3.34 cfs was diverted for 49 straight days, from July 18 through September 4. In 2010, the maximum diversion rate was 6.0 cfs and the diversion rate exceeded 3.34 cfs on 91 different days, from June 20 through July 30 and August 11 through October 4. In 2009, the maximum diversion rate was 4.0 cfs and diversions

of more than 3.34 cfs occurred from May 16 through June 5, and again from October 4 through 6. In 2008, the maximum diversion rate was 4.0 cfs, with diversions in excess of 3.34 cfs from May 18 through 20. Amounts in excess of 3.34 cfs were diverted in previous years, as well.

Beginning in 2012, the amount of water diverted under water right no. 63-00194 was limited to 3.34 cfs because of the water bank lease, rather than the full 5.2 cfs that has been available in the past. As a result of the water bank lease, it has been necessary for the Two Rivers HOA to rent water from the Water District 63 Rental Pool to make up for the shortages. This situation will recur in 2013, as well, since the water bank lease is effective through December 31, 2013.

IV. STATEMENT OF EXCEPTIONS TO PRELIMINARY ORDER

As set forth in the Preliminary Order, the Two Rivers HOA's Verified Petition was denied by the Chief of the Water Allocation Bureau because:

1. The Association has not demonstrated that it owns or controls the portion of water right no. 63-00194 leased to the Water Supply Bank; and
2. Because the Association does not own the portion of water right no. 63-00194 that is in the water bank, the lease is not causing the Association to be deprived of water to which it may otherwise be entitled.

Preliminary Order at 4.

An order must include a reasoned statement in support of the decision and the findings of fact shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings. IDAHO CODE § 67-5248(1)(a). Therefore, the Preliminary Order is required to contain a reasoned evaluation of the facts presented in the Verified Petition

and any other facts properly before the Department, as well as a reasoned explanation of the decision itself.

With regard to the injury issue, the Water Allocation Bureau Chief failed to provide a reasoned evaluation of the facts presented by the Two Rivers HOA, particularly regarding the reduction in water available to the HOA as a result of the water bank lease. Rather than focusing on the deprivation of water to the HOA and addressing the specific facts presented by the HOA, the Bureau Chief focused almost exclusively on ownership. Two Rivers HOA takes exception to this basic analytical failure. It is clear that Two Rivers HOA has suffered a reduction in the amount of water available to the subdivision as a result of the water bank lease. The Preliminary Order utterly fails to acknowledge this fact, let alone take steps to correct it.

Two Rivers HOA takes further exception to the Bureau Chief's failure to hold an evidentiary hearing, as requested by Two Rivers HOA. Even if it were appropriate for the Bureau Chief to deny this request, the HOA has a right to be heard and provide evidence at a hearing before the Director, pursuant to Idaho Code Sections 42-1766(2) and 42-1701A(3).

By making an injury determination based upon the facts before the Department, including holding any hearing that may be necessary to make such a finding, the Director will satisfy the requirements of Idaho Code Section 42-1766 and provide due process to Two Rivers HOA in addressing the interference that has occurred as a result of the water bank lease.

V. ARGUMENT

A. The Water Bank Lease Has Resulted In The Reduction Of Water To Which Two Rivers HOA And The Subdivision Would Otherwise Be Entitled

Water right no. 63-00194 is appurtenant to the Two Rivers Subdivision; that is the place of use. The historic water delivery records verify that the full amount—5.2 cfs—has been

diverted at the point of diversion over the past several years. Only this year, with the water bank lease in effect, has that amount been reduced to 3.34 cfs. But for the lease, the subdivision would still be diverting the full amount. This set of facts clearly falls within the protections provided under Idaho Code Section 42-1766, since the HOA is being “deprived of water to which it may be otherwise entitled.”

When the Idaho State Legislature enacted Idaho Code Section 42-1766 in 1979, it included an after-the-fact protest process to enable injured water users to bring their case before the Director. As the statement accompanying the legislation in the House of Representatives (House Bill 165) provided: “The bill, however, provides that the water bank shall not operate so as to injure the rights of those who do not participate nor threaten the rights of those who do participate.” Minutes of the House Resources and Conservation Committee (Feb. 15, 1979) (available at the Legislative Library in the Idaho State Capitol Building). In fact, so serious were these concerns that the bill originally failed in the Senate on a 17-18 vote before being reconsidered and approved by a vote of 21-14. Idaho Legislature Daily Data, March 21, 1979 (available at the Legislative Library in the Idaho State Capitol).

The Legislature added additional protection to the statute by amending it in 1980 and specifying that the provisions of Idaho Code Section 42-1701A(3), providing the right to a hearing before the Director for anyone aggrieved by a water bank lease. Idaho Session Laws, Ch 238, Sec. 18, p. 526 (1980).

These provisions took the place of the more conventional notice and opportunity for protest and hearing afforded by the water right permit and transfer statutes, Idaho Code Sections 42-203A and 42-222. While the protections come after the water bank lease is already approved, not beforehand as with permits and transfers, they are no less important. To give full

effect to the provisions of Section 42-1766 and the “no injury” rule that serves as a bedrock principle of the prior appropriation doctrine, and Idaho water law in particular, more serious consideration must be given to the facts in this case than was provided in the Preliminary Order. It is obvious, based upon the facts before the Department, that the amount of water available under water right no. 63-00194 has been reduced from 5.2 cfs to 3.34 cfs. What is not so obvious is why the Bureau Chief refused to acknowledge this fact in the Preliminary Order and take steps to correct the shortages that continue to impact Two Rivers HOA and its homeowners at the Two Rivers Subdivision place of use.

As spelled out in detail in the Verified Petition and the Petition for Reconsideration, incorporated fully herein by reference, the water bank lease has also had an adverse impact on water right no. 63-32139, which contains a substitute mitigation requirement that is triggered in the event that 63-00194, or any portion thereof, is leased. The Bureau Chief failed to recognize this injury, despite the obvious fact that a portion of 63-00194 has been leased, thereby triggering the substitute mitigation condition.

Two Rivers HOA urges the Director to do what the Bureau Chief failed to do and issue a final order recognizing the injury that has occurred and revoking or modifying the water bank lease. If the Director determines that additional fact finding is necessary before issuing a final order, Two Rivers HOA stands ready to participate in such further evidentiary proceedings.

B. The Preliminary Order Fails To Fully Consider Two Rivers HOA’s Claim Of Ownership Of Water Right No. 63-00194

It is obvious that the amount of water used by Two Rivers HOA has been reduced because of the lease of a portion (1.86 cfs) of water right no. 63-00194. What is not as obvious is who owns the water right. Unfortunately, the Preliminary Order makes assumptions and

conclusions about the ownership of water right no. 63-00194, which are either incorrect or without sufficient evidence in the record.

For example, in its findings of fact, the Preliminary Order notes that T R Company, LLC argues that “the Association does not own the portion of the water right no. 63-00194 that is in the water bank.” Preliminary Order at 3 (Finding No. 10). This statement is a mere allegation by T R Company, LLC. However, the Preliminary Order accepts it as true in its conclusions of law, stating that “the Association does not own the portion of water right no. 63-00194 that is in the water bank.” Preliminary Order at 4 (Conclusion No. 4).

The Bureau Chief acknowledges that “Two Rivers Subdivision is the beneficiary of at least some portion of water right no. 63-00194. . . .” Preliminary Order at 3. This seems to run counter to T R Company, LLC’s assertion that it reserved all water rights prior to the sale of lots to the individual homeowners, as recognized in the Preliminary Order’s findings. Preliminary Order at 2 (Finding No. 6). However, these alleged reservations, identified in the July 5, 2005 memo by Lori Graves regarding Transfer No. 72104, involved individual homeowners only, not the HOA. The relationship between the developer, T R Company, LLC, and the HOA is a different matter altogether. The January 21, 2011 memo regarding Review of Application to Lease a Water Right to the State Water Supply Bank stated: “This lease represents the remainder of 63-00194 after the splits via change in ownership that are to be processed. . . .” However, no “splits” have been processed, nor is there any evidence in the record of any “remainder.” At a minimum, the record of ownership before the Department is blurred and indefinite. However, rather than conducting additional investigations on the question to determine how much of the water right Two Rivers HOA (or T R Company LLC) actually owns, the Department summarily concludes: “The Association has not demonstrated that it owns

or controls the portion of water right no. 63-00194 leased to the Water Supply Bank.”

Preliminary Order at 4 (Conclusion No. 3). While ownership may not have been demonstrated to the Bureau Chief’s satisfaction, Two Rivers HOA nonetheless has maintained that it has ownership of the right. In addition, the Department certainly has authority under Idaho Code Section 42-1766(1) to gather additional information.

In its Verified Petition,² Two Rivers HOA stated that it has been “deprived . . . of water . . . to which it is otherwise entitled . . . under both water nos. 63-00194 and 63-32139.” Verified Petition at 5 (emphasis added). The Verified Petition acknowledges that “IDWR’s records still list” T R Company, LLC as the owner of water right no. 63-00194. Verified Petition at 2. However, this is not an admission that T R Company, LLC is the actual owner; it is just an acknowledgment of what IDWR’s records say. The Verified Petition goes on to state that a change of ownership form still needs to be filed. *Id.* Obviously, that wouldn’t be the case if Two Rivers HOA believed that T R Company, LLC was still the owner; there would be no need for a change of ownership form to be filed. The Verified Petition asserts that “Two Rivers HOA is also the owner of water right no. 63-32139, obviously referring back to its ownership of water right no. 63-00194.” *Id.* Pleadings, such as the Verified Petition, are to be liberally construed by the Department. Rule 305, Rules of Procedure.

² The President of Two Rivers HOA, W. Clark Benson, attested, witnessed by a notary, that the contents of the petition “are true to the best of my knowledge, information, and belief.” Verified Petition at 7. Like an affidavit or a deposition, a verified petition is a sworn statement. *McCoy v. Lyons*, 120 Idaho 765, 769-770 (1991). Unlike the sworn statements contained in the Verified Petition, none of the assertions contained in T R Company, LLC’s Memorandum have been attested to; they are just bare allegations, improper to rely upon. *See Camp v. Jiminez*, 107 Idaho 878 (Ct. App. 1984).

In addition, Two Rivers HOA's ownership claim was made readily apparent to the Department in the March 1, 2012 letter from President W. Clark Benson,³ requesting that the previously submitted change of ownership form (prepared by T R Company, LLC's consultant) be withdrawn. In that letter, President Benson stated:

[T]he Two Rivers HOA believes that the Change of Ownership form inappropriately and inaccurately limits the quantity of water for the development contrary to the amount of water appurtenant to the subject property (Two Rivers Subdivision), as decreed in the Snake River Basin Adjudication, *and conveyed by the seller/grantor*. In short, we do not believe that 3.34 cfs is the correct amount of water appurtenant to the development; *5.2 cfs is*. Of course, this also raises questions about the appropriateness of the current water supply bank lease involving 1.86 cfs of *the Two Rivers water right*.

(emphasis added). The Two Rivers HOA and the residential homeowners should not be penalized for the developer's failure and unwillingness to cooperate in the formal change of ownership for water right no. 63-00194. Unfortunately, that is precisely what the Bureau Chief has proposed to do in the Preliminary Order.

The relevant inquiry under Idaho Section 42-1766(1) is injury, which Two Rivers HOA believes it has adequately demonstrated. If it were not for the water bank rental application for water right no. 63-00194 and its acceptance, Two Rivers HOA would not be suffering the shortages that it is currently experiencing, nor would it be renting as much water from the Water District 63 Rental Pool. Two Rivers HOA maintains that this set of facts, as

³ As in the Verified Petition and the Petition for Reconsideration, all water right and water bank lease documents referred to or quoted from herein are available on the Department's Water Right and Adjudication Search page (<http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp>). These documents are all "evidence received or considered" by the Department and are therefore part of the agency record in this matter. IDAHO CODE § 67-5249 and Rule 650, Rules of Procedure.

contained in the Verified Petition, should be sufficient for the Director to revoke or modify the lease, as requested.

If the Director believes that proof of ownership of water right no. 63-00194 or other evidence is a necessary consideration in the injury determination, the Director should remand this matter for additional investigation, including a hearing and/or other means of gathering information, pursuant to Idaho Code Sections 67-5245(6) and 42-1766(1) or hold his own hearing. This would allow the Director to determine whether sufficient evidence of ownership exists.⁴ This would also be in furtherance of Rule 52 of the Department's Rules of Procedure, providing that the Rules "will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency." The Bureau Chief's failure to allow such a hearing on reconsideration is curious at best. On the one hand, he complains that the Two Rivers HOA has not provided evidence of ownership, but he refuses to hold an evidentiary hearing. Order Denying Petition for Reconsideration at 2. This makes no sense, and it is patently unfair.

VI. REQUEST FOR ORAL ARGUMENT

The Petitioner HOA hereby requests that the Director schedule oral argument on these exceptions, pursuant to Rule 730.

⁴ Note that Two Rivers HOA is not asking the Director to conduct a "quiet title" proceeding. Rather, it is suggesting, in the alternative, that the Department conduct an additional investigation of any and all existing evidence of ownership, similar to the Department's review of change of ownership forms and "evidence showing the basis for the change in ownership" filed pursuant to Idaho Code Section 42-248. Such reviews and determinations fall squarely within the Department's authority and do not constitute a quiet title action. It would also address the Bureau Chief's concern that evidence of ownership has not been provided.

**VII.
DEMAND FOR HEARING**

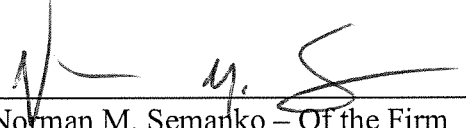
In the event that the Director decides not to issue an order recognizing the current, ongoing and future injury to the Petitioner HOA and its resident homeowners as a result of the water bank lease, the Petitioner hereby demands that a hearing be held before the Director, pursuant to Idaho Code Sections 42-1766(2) and 42-1701A(3), as is the Petitioner's right.

**VIII.
CONCLUSION**

For the reasons set forth above, Petitioner Two Rivers HOA respectfully requests that the Director issue a final order: (1) recognizing the injury that has occurred to Two Rivers HOA and its resident water users; and (2) revoking or modifying the water bank lease. Two Rivers HOA stands ready to participate in any evidentiary hearing that the Director deems necessary to make these findings. In the event the Director fails to act to correct the existing, ongoing and future injury, Two Rivers HOA demands a hearing pursuant to Idaho Code Sections 42-1766(2) and 42-1701A(3). Oral argument is respectfully requested before the Director regarding these exceptions to the Preliminary Order.

DATED this _____ day of September, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

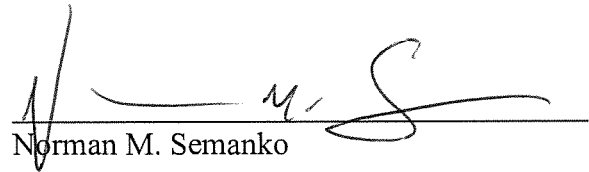
By 
Norman M. Semanko – Of the Firm
Attorneys for Two Rivers Subdivision
Homeowners Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of September, 2012, I caused a true and correct copy of the foregoing **TWO RIVERS SUBDIVISION HOMEOWNERS ASSOCIATION, INC.'S EXCEPTIONS TO PRELIMINARY ORDER DENYING PETITION TO REVOKE OR MODIFY LEASE** to be served by the method indicated below, and addressed to the following:

Richard H. Greener
Tara Martens Miller
GREENER BURKE SHOEMAKER, PA
950 W. Bannock Street, Suite 950
Boise, ID 83702

() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
(X) Facsimile


Norman M. Semanko