

**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)**

**ORDER DENYING PETITION
FOR RECONSIDERATION**

_____)

This matter comes before the Idaho Department of Water Resources (“Department” or “IDWR”) as *Two Rivers Subdivision Homeowners Association, Inc.’s Petition for Reconsideration of Preliminary Order* (“petition”), filed on August 20, 2012. The Department issued its *Preliminary Order Denying Petition to Revoke or Modify Lease* (“preliminary order”) on August 6, 2012.

In its petition, Two Rivers Subdivision Homeowners Association, Inc. (“petitioner”) argues that: A) The preliminary order fails to recognize the injury that has occurred to Water Right No. 63-32139 because of the lease; and B) The preliminary order fails to fully consider Two Rivers HOA’s claim of ownership of Water Right No. 63-00194.

In its first argument, petitioner states that because Water Right No. 63-194 is leased to the Water Supply Bank, substitute mitigation must be provided for its use of Water Permit No. 63-32139. Petitioner states that “there is no other way to read the condition” contained in Water Permit No. 63-32139. Petitioner argues that requiring it to provide substitute mitigation for its use of Water Permit No. 63-32139 constitutes injury under Idaho Code § 42-1766(1).

What petitioner misses, however, is that it only needs *part* of Water Right No. 63-194 to meet its mitigation requirement. Water Permit No. 63-32139 requires only 112.1 af of water under Water Right No. 63-194 as mitigation or replacement water for evaporation losses from ponds established under Water Permit No. 63-32139. The Department will not require substitute mitigation if the portion of Water Right No. 63-194 that is specifically identified for mitigation use (i.e. the amount currently described as diversion to storage and aesthetic storage) is available for mitigation. In this case, the specified mitigation portion of Water Right No. 63-194 has not been leased to the Water Supply Bank and is available for mitigation by the petitioners in association with Water Permit No. 63-32139. The remaining portion of Water Right No. 63-194 is for irrigation use by the water right holder and is not required for mitigation.

Furthermore, the condition contained in Water Permit No. 63-32139 lists a number of actions that may render the mitigation water unavailable for its intended purpose. For example, the condition requires substitute mitigation for use of Water Permit No. 63-32139 “if the specified mitigation right...[is] **used on any place of use...**” (emphasis added). If the Department were to follow petitioner’s reasoning, then petitioner would not be able to use Permit

No. 63-32139 at all without substitute mitigation if they would also be using Water Right No. 63-194 on a place of use for irrigation in the subdivision. Should petitioner be found to be the owner of Water Right No. 63-194, the Department strongly doubts that this is how petitioner would want this condition interpreted.

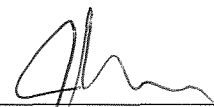
In its second argument, petitioner alleges that the preliminary order makes assumptions and conclusions about the ownership of Water Right No. 63-194 that are either incorrect or without sufficient evidence in the record. Petitioner states that “while ownership may not yet have been demonstrated to the Department’s satisfaction, Two Rivers HOA nonetheless has maintained that it has ownership of the right.” Petitioner goes on to say that its verified petition asserts ownership of Water Right No. 63-194 and such pleadings are to be liberally construed by the Department. Petitioner is essentially saying that a claim of ownership should be enough for the Department to decide that petitioner is injured if the leased portion of the water right is not available to them. That is not correct. Water Right No. 63-194 was decreed to T.R. Co. LLC. For the Department to recognize a claim of ownership to the leased portion of the water right by petitioner, the Department needs evidence in the form of a deed or other conveyance document, or a court decree. Petitioner has not provided any such evidence.¹

Petitioner also suggests that the Department should hold a hearing or use other means to gather additional information pursuant to Idaho Code §42-1766 to determine whether petitioner or T.R. Co. LLC owns Water Right No. 63-194. There is no other way to view this request but as a request to quiet title of real property. Despite petitioner’s suggestion to the contrary, ownership disputes are properly resolved in a quiet title proceeding in district court pursuant to Idaho Code § 6-401, not before the Department.

ORDER

Based upon the foregoing, it is hereby ORDERED that the petition for reconsideration filed in this matter on August 20, 2012 is **DENIED**.

DATED this 31 day of August, 2012.



Jeff Peppersack
Chief, Water Allocation Bureau

¹ Petitioner filed a notice of change of ownership for Water Right No. 63-194 on December 31, 2009. Petitioner subsequently withdrew the notice. Letter from W. Clark Benson, President, Two Rivers HOA, to Jeff Peppersack, Idaho Department of Water Resources, (March 1, 2012).

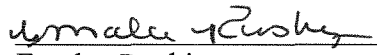
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31ST day of August, 2012, I mailed a true and correct copy of the foregoing document to the person(s) listed below:

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