

RECEIVED

AUG 20 2012

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 PETITION FOR
RECONSIDERATION OF PRELIMINARY
ORDER

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 67-5243(3) and Rule 730 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01) and hereby petitions the Department to reconsider its Preliminary Order Denying Petition to Revoke or Modify Lease ("Preliminary Order"), issued and served on August 6, 2012.

I. INTRODUCTION

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, 2012.¹ Two Rivers HOA subsequently filed its Response in Opposition to the Motion to Dismiss on August 14, 2012.

For the reasons set forth below, Two Rivers HOA respectfully requests that the Department reconsider its Preliminary Order in this matter.

II. APPLICABLE AUTHORITY

The Department is authorized to reconsider preliminary orders issued by the agency, pursuant to Idaho Code Section 67-5243(3) and Rule 730 of the Department’s Rules of Procedure.

III. GROUNDS FOR RECONSIDERATION

The Department should reconsider its Preliminary Order in this matter to correct factual and legal errors regarding the injury analysis for water right no. 63-32139 and the

¹ Two Rivers HOA appreciates the Department’s expedited consideration of the Verified Petition. However, by issuing its Preliminary Order without the benefit of a response by the HOA, the Department inappropriately accepted unsubstantiated assertions included in the Memorandum in Support of T R Company LLC’s Motion to Dismiss (“Memorandum”), as described further herein.

ownership of water right no. 63-00194. These grounds for reconsideration are discussed in more detail below.

A. The Preliminary Order Fails To Recognize The Obvious Injury That Has Occurred To Water Right No. 63-32139 Because Of The Lease

It is undisputed that Two Rivers HOA owns water right no. 63-32139. The water right includes the following condition (emphasis added):

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* acceptable to the Department.

Two Rivers HOA is “the right holder” required to provide this mitigation and any “substitute mitigation.” The condition makes clear that if any portion of the “mitigation right” (water right no. 63-00194) is leased, then Two Rivers HOA “shall” provide substitute mitigation. A portion (1.86 cfs) of water right no. 63-00194 has in fact been “leased” to the Water Supply Bank by T R Company LLC. As a result, “substitute mitigation” is required. There is no other way to read the condition. This constitutes injury to water right no. 63-32139 owned by Two Rivers HOA.

In an attempt to explain away this obvious injury, T R Company LLC asserts in a footnote to its Memorandum that the mitigation requirement has been fully delivered for this year and that the portion of water right no. 63-00194 approved for lease to the water bank has not deprived Two Rivers HOA. Memorandum, p. 4, n. 1. This is a very convenient way for T R Company LLC to attempt to segregate a portion of water right 63-00194 from the mandatory mitigation condition. However, the condition does not include any such distinction. T R

Company LLC is attempting to leave Two Rivers HOA holding the bag for “substitute mitigation” that is required because of the partial lease of the “mitigation right,” which is water right no. 63-00194.

In its Preliminary Order, the Department’s findings of fact state: “T.R. Co. LLC also points out that the amount of water needed for the mitigation required under permit no. 63-32139 has been held out of the lease to the Board and is available for use.” Preliminary Order, p. 3 (Finding No. 10). In its analysis, the Department also states: “The portion of water right no. 63-194 associated with aesthetic use for mitigation of permit no. 63-32139 is not part of the lease acceptance and is available for use in the subdivision.” Preliminary Order, p. 3. The Preliminary Order does not include any conclusion of law regarding Two Rivers HOA’s claim of injury to water right no. 63-32139.

The conditions of the lease for water right no. 63-00194, as approved by the Department, do not include any provision that this portion of the right is somehow exempt or separate from the express conditions contained in both water right no. 63-32139 and 63-00194. As a result, there is no basis for T R Company LLC’s non-injury explanation, the Department’s finding that the required mitigation “has been held out of the lease to the Board,” or the analysis that the mitigation “is not part of the lease acceptance.” There is no such language in either the lease application or the conditions of the lease acceptance.

The bottom-line is that the lease of a portion of water right no. 63-00194 triggered the “substitute mitigation” condition of water right no. 63-32139; but for the lease, this would not be a concern. As the water right holder, Two Rivers HOA is the one responsible for satisfying the condition, even though T R Company LLC is the one that triggered the requirement.

Any water provided as mitigation (or substitute mitigation) is water that is not available for other uses by the HOA in Two Rivers subdivision. This has and will continue to deprive Two Rivers HOA of water to which it is otherwise entitled. As a result, the Preliminary Order should be reconsidered to recognize the obvious injury to water right no. 63-32139. This, by itself, is sufficient grounds for the Department to revoke or modify the existing lease for water right no. 63-00194.

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

Based upon existing water delivery records, 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. 63-194 that is in the water bank." Preliminary Order, p. 3 (Finding No. 10) (*citing* Memorandum at 4). 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. 63-194 that is in the water bank." Preliminary Order, p. 4 (Conclusion No. 4).

The Department acknowledges that "Two Rivers Subdivision is the beneficiary of at least some portion of water right no. 63-194. . . ." Preliminary Order, p. 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 Department's findings. Preliminary Order,

p. 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 63-194 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. 63-194 leased to the Water Supply Bank.” Preliminary Order, p. 4 (Conclusion No. 3). 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. 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 right nos. 63-194 and 63-32139.”

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, p. 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).

Verified Petition, p. 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, p. 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 the 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. 63-194.” *Id.* Pleadings, such as the Verified Petition, are to be liberally construed by the Department. Rule 305, Rules of Procedure. Certainly, the Verified Petition asserts ownership of water right no. 63-00194 by the HOA.

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 Benson³ requesting that the previously submitted change of ownership form (prepared by T R Company LLC’s consultant) be withdrawn. In that letter (emphasis added), 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

³ As in the Verified Petition, 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 Section 67-5249 and Rule 650, Rules of Procedure.

the current water supply bank lease involving 1.86 cfs of *the Two Rivers water right*.

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

In the alternative, if the Department continues to believe that the precise ownership of water right no. 63-00194 is a necessary consideration in the injury determination, the Department should reconsider this matter with the benefit of additional investigation, including a hearing and/or other means of gathering information, pursuant to Idaho Code Section 42-1766(1). This would allow the Department 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."

⁴ Note that Two Rivers HOA is not asking the Department 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.

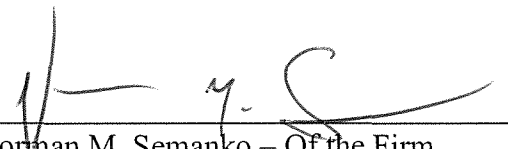
**IV.
CONCLUSION**

For the reasons set forth above, Petitioner Two Rivers HOA respectfully requests that the Department reconsider its Preliminary Order to recognize the injury that has occurred to Two Rivers HOA's water rights and grant the Verified Petition to Revoke or Modify Lease. Alternatively, Two Rivers HOA requests that the Department reconsider this matter by gathering additional information through a hearing or other means of investigation to determine the evidence of ownership of water right no. 63-00194.

DATED this 20 day of August, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By



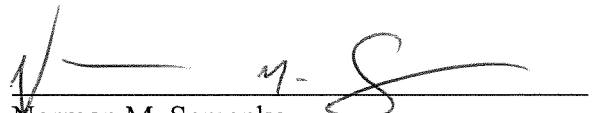
Norman M. Semanko – Of the Firm
Attorneys for Two Rivers Subdivision
Homeowners Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of August, 2012, I caused a true and correct copy of the foregoing **TWO RIVERS SUBDIVISION HOMEOWNERS ASSOCIATION, INC.'S PETITION FOR RECONSIDERATION OF PRELIMINARY ORDER** 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
☐ Facsimile


Norman M. Semanko