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DEPARTMENT OF
WATER RESOURCES

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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 RESPONSE IN
OPPOSITION TO T R COMPANY LLC'S TO
MOTION TO DISMISS**

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 Rules 270.02 and 565 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), and hereby respectfully requests that the Department deny T R Company LLC's Motion to Dismiss ("Motion to Dismiss") Two Rivers HOA's Verified Petition to Revoke or Modify Lease ("Petition").

**I.
INTRODUCTION**

On July 10, 2012, Two Rivers HOA filed its Petition, requesting that the Director 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 its Motion to Dismiss, arguing that Two Rivers HOA has no standing pursuant to Idaho Code Section 42-1766 to petition the Department for modification or revocation of the lease. For the reasons set forth below, the Motion to Dismiss is without merit and should be denied.¹

II. ARGUMENT

“To satisfy the case or controversy requirement of standing, a litigant must allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury.” *Martin v. Camas County Ex Rel. Bd. Com'rs*, 150 Idaho 508, 513 (2011), *citing Young v. City of Ketchum*, 137 Idaho 102, 104-105 (2002).

Idaho Code Section 42-1766(1) provides the following:

During the period of a lease, any water right holder who determines that the lease is causing a water right to which the holder is entitled, to be deprived of water to which it may be otherwise entitled, may petition the director of the department of water resources to revoke or modify the lease. Upon such a petition, the director shall cause an investigation to be made and 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 insure that no injury to other water rights occurs.

¹ On August 6, 2012, the Chief of the Water Allocation Bureau issued a Preliminary Order Denying Petition to Revoke or Modify Lease (“Preliminary Order”). The Petitioner hereby reserves the right and plans to file a petition for reconsideration and/or exceptions to the Preliminary Order, pursuant to the Department’s Rules of Procedure, prior to the applicable deadline. The Preliminary Order noted that T R Company LLC “filed a motion to dismiss instead of a response to the petition” and that “the Department reviewed the motion to dismiss but is prepared to rule on the merits of the petition.” Preliminary Order at 4, n.1. In as much as the Department has not expressly denied or ruled on the Motion to Dismiss, the Petitioner has chosen to file this response in opposition to the motion prior to the 14-day deadline provided for such motions in Rules 270.02 and 565 of the Department’s Rules of Procedure and requests that the Motion to Dismiss be expressly denied and disposed of so that the matter can continue to be determined on the merits.

IDAHO CODE § 42-1766(1).

As required by the statute, Two Rivers HOA is a “water right holder.” It owns Water Right No. 63-32139 and also has ownership in Water Right No. 63-00194. In support of its Motion to Dismiss, T R Company LLC asserts that “it is without dispute, based upon the allegations of HOA’s Petition, that the HOA does not own or hold Water Right No. 63-194.” T R Company LLC’s Memorandum in Support of Motion to Dismiss (“Memorandum in Support”) at 4. The Petition says no such thing and T R Company LLC’s assertion is absolutely and patently false. To the contrary, the Petition makes clear that the change of ownership for Water Right No. 63-00194 still needs to be completed, with specific reference made to the withdrawal of the previously filed Change of Ownership form by Two Rivers HOA. The letter withdrawing the previous Change of Ownership form makes clear that Two Rivers HOA has and continues to assert ownership of Water Right No. 63-00194. In pertinent part, the letter (a copy of which is attached hereto as Exhibit A for the Department’s convenience but is already part of the Department’s files for Water Right No. 63-00194, as referenced in the Petition), states:

[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.

T R Company LLC and its predecessors in interest were the developers of the Two Rivers Subdivision. Two Rivers HOA is the current owner/operator of the water system, as demonstrated by various documents in the Department’s water right files for Water Right No. 63-00194 and attested to in the Verified Petition filed by the HOA. Why T R Company LLC

feels that it is appropriate to attempt to withhold water rights (or a portion thereof) which Two Rivers HOA needs, has used, and has a right to is an absolute mystery to the HOA. Perhaps it is a misunderstanding about the amount of water which may be diverted and used in Two Rivers Subdivision.

The Petition was filed in an attempt to rectify this situation. To the extent that the current conflict and disagreement about the ownership of Water Right No. 63-00194 is an issue, that should be decided on the merits. To say that Two Rivers HOA has no ownership interest and therefore the Petition should be dismissed, however, is without merit. Of course, this applies with equal rigor to Two Rivers HOA's undisputed ownership of Water Right No. 63-32139.

In its Petition, Two Rivers HOA alleges facts that, if proven true, indicate that "the lease is causing a water right to which the holder is entitled, to be deprived of water to which it may be otherwise entitled." As a result, Two Rivers HOA has a right—under the statute—to "petition the director of the department of water resources to revoke or modify the lease." IDAHO CODE § 42-1766.

Given this analysis, it is clear that Two Rivers HOA has been able to "allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury," as required for standing under the *Martin* and *Young* cases.

The Department has already decided to move forward on the merits of the Petition, issuing its Preliminary Order on the Petition on August 6, 2012, which is subject to a request for reconsideration and/or exceptions. While the merits of the Petition are a separate consideration and will continue to be contested, there can be no doubt that Two Rivers HOA has standing, and an absolute right under Idaho Code Section 42-1766, as a water right owner who alleges that it is being deprived of water because of the current lease, to pursue its Petition and

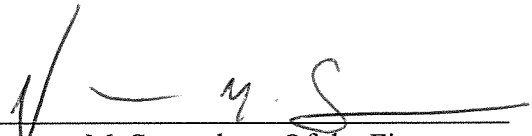
seek to cancel or modify the lease. As a result, the Motion to Dismiss for lack of standing should be denied by the Department.

**III.
CONCLUSION**

For the reasons set forth above, T R Company LLC's Motion to Dismiss should be denied.

DATED this 14 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 14 day of August, 2012, I caused a true and correct copy of the foregoing **TWO RIVERS SUBDIVISION HOMEOWNERS ASSOCIATION, INC.'S RESPONSE IN OPPOSITION TO T R COMPANY LLC'S TO MOTION TO DISMISS** 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

RECEIVED
MAR 06 2012
DEPARTMENT OF
WATER RESOURCES

March 1, 2012

Idaho Department of Water Resources
Attn: Jeff Peppersack
P.O. Box 83720
Boise, ID 83720-0098

Re: Withdrawal of Change of Ownership - 63-194

Dear Mr. Peppersack:

This letter will confirm that the Two Rivers Home Owners Association (HOA) hereby withdraws the Change of Ownership form previously submitted by the HOA for Water Right No. 63-194.

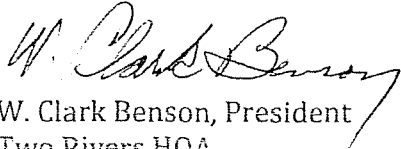
Our understanding is that the Change of Ownership form has not been processed by IDWR due to insufficient documentation regarding the splitting of the water right. In addition, the Two Rivers HOA believes that the Change of Ownership form inappropriately and inaccurately limits the quantity of water 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.

We wish to work with the seller/grantor of the water right to clarify these questions and will submit a new Change of Ownership form, along with the appropriate documentation, when they are resolved to our satisfaction. In the meantime, please refund the \$100 filing fee for the withdrawn Change of Ownership form to:

Two Rivers HOA
c/o Advantage Idaho
5537 Glenwood, Suite A
Garden City, ID 83704

Thank you for your attention to this matter.

Sincerely,


W. Clark Benson, President
Two Rivers HOA