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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER SUPPLY
BANK LEASE FOR WATER RIGHT NO.
63-194

**MEMORANDUM IN SUPPORT OF
T R COMPANY, LLC's MOTION TO
DISMISS**

COMES NOW T R COMPANY, LLC, party in interest and owner of record of Water Right No. 63-194, at issue in the Two Rivers Subdivision Homeowners Association, Inc.'s Verified Petition to Revoke or Modify Lease ("Petition"), filed with the Department of Water Resources ("Department") on or about July 10, 2012, by and through the undersigned counsel, and hereby submits its Memorandum in Support of T R Company, LLC's Motion to Dismiss.

ORIGINAL

I. INTRODUCTION

The present Verified Petition to Revoke or Modify Lease, filed with the Department on or about July 10, 2012 (“Petition”), is being pursued by Two Rivers Subdivision Homeowners Association, Inc. (“HOA”) pursuant to Idaho Code § 42-1766, against the Lease Acceptance issued by the Department on January 21, 2011 to T R Company, LLC (“T R Co.”) related to Water Right No. 63-194. As alleged by the HOA, T R Co. is the current record owner of Water Right No. 63-194. *See* Petition, p. 2. With no legal or factual support, the HOA suggests it “operate[s]” Water Right No. 63-194. *Id.* Even without consideration of the invalidity and inaccuracy of such assertion, and despite the lack of any recognized legal support for its position, the HOA’s petition must fail, as a matter of law, on the basis the HOA has no standing pursuant to Idaho Code § 42-1766 to petition the Department for modification or revocation of the Lease.

Because the HOA lacks standing, its Petition is invalid as a matter of law, and it is proper for the Department to apply its Rules of Procedure and Rule 12(b)(6) of the Idaho Rules of Civil Procedure to dismiss the HOA’s Petition. Dismissal is proper due to its failure to state a claim to revoke or modify the Acceptance of Lease upon which relief may be granted by the Department.

II. ARGUMENT AND ANALYSIS

A. The HOA’s Petition Fails To State A Claim Upon Which Relief May Be Granted.

1. *Motion to dismiss standard.*

A motion to dismiss pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure tests the legal sufficiency of a claim. Pursuant to Rule 12(b)(6), the Hearing Officer looks at the pleadings, and all inferences are viewed in favor of the non-moving party. *Owsley v. Idaho*

Industrial Comm'n, 141 Idaho 129, 106 P.3d 455 (2005); *Covington v. Jefferson County*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). Pursuant to Rule 12(b)(6), an action is to be dismissed for failure to state a claim upon which relief can be granted when, after reading the pleadings in a light most favorable to petitioner, it appears it has alleged no facts in support of its claims entitling it to relief. *See, e.g., Rincover v. State, Dept. of Fin., Sec. Bureau*, 128 Idaho 653, 917 P.2d 1293 (1996). In order to survive such a motion, the non-moving party's pleading must, on its face, contain allegations that, if proven, would entitle the non-moving party to the relief claimed. *See Ernst v. Hemenway and Moser, Co., Inc.*, 120 Idaho 941, 821 P.2d 996 (Ct. App. 1991).

In certain circumstances, Rule 12(b) also permits consideration of matters outside of the initial pleadings. If, upon a motion to dismiss filed pursuant to Rule 12(b)(6), matters outside the pleading are presented to -- and not excluded, "the motion shall be treated as one for summary judgment and disposed of as provided in [Rule] 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." I.R.C.P. 12(b). The Idaho Supreme Court has held that when matters outside the pleadings, in the form of affidavits, are presented to and considered, it is proper to treat such motion to dismiss as a motion for summary judgment. *Boesiger v. DeModena*, 88 Idaho 337, 399 P.2d 635 (1965) (citation omitted).

T R Co. respectfully submits there is no requirement to look beyond the pleadings with regard to the present motion to dismiss because the HOA's claims are, as a matter of law, invalid and the HOA lacks standing to pursue the claims which it attempts to assert. However, in the

event the Hearing Officer disagrees, T R Co. reserves the right to present additional evidence for consideration pursuant to a Rule 56 motion for summary judgment standard.

2. *The Protections of Idaho Code § 42-1766 apply only to water right holders and, therefore, the HOA lacks standing to pursue its Petition.*

The HOA's petition is pursued pursuant to Idaho Code § 42-1766, which provides in relevant part:

(1) 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 [D]irector of the [D]epartment of [W]ater [R]esources 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 [D]irector 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.

Id. (emphasis added).

In the matter at issue, 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, and therefore it does not have standing to pursue revocation or modification of the Acceptance of Lease pursuant to Idaho Code § 42-1766.¹ *See* Petition. Specifically, despite the HOA's inaccurate, misleading and invalid assertion that it "operate[s]" Water Right No. 63-194, it cannot establish standing to pursue its

¹ The HOA asserts in its Petition that it is the current holder of Water Right No. 63-32139, which was assigned to it by T R Co. in 2008. *See* Petition, p. 2. However, the HOA's reliance on its status of a holder of this ground water right does not establish standing under Idaho Code § 42-1766. Not only is the right a groundwater right, but given the mitigation diversion limitations and Basin 63 Watermaster records for the 2012 Thomas Aiken diversion, the mitigation requirement of 112.1 acre-feet has been fully delivered for this year. Therefore, HOA cannot show the portion of 63-194 approved for lease and committed to the Bank "caus[es] a water right to which the holder is entitled, to be deprived of water to which it may be otherwise entitled". *See* I.C. § 42-1766. Further, the very terms of Water Right No. 63-32139 warns against attempting to maintain pond levels with the irrigation (63-194) right. Therefore, to the extent the HOA is attempting to do so, it cannot rely upon 63-32139 for purposes of its Petition.

position where it is not a water right holder being deprived of water to which it is entitled. I.C. § 42-1766.

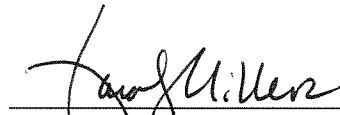
It is a fundamental tenet of American jurisprudence that a party wishing to invoke a Court's (or in this case, the Department's) jurisdiction must have standing. *Martin v. Camas County ex. Rel. Bd. Com'rs*, 150 Idaho 508, 513, 248 P.3d 1243, 1247 (2011), *citing Young v. City of Ketchum*, 137 Idaho 102, 104-105, 44 P.3d 1157, 1159-1160 (2002). Standing is a preliminary question to be determined before reaching the merits of the matter, and is a subcategory of justiciability. *Id.* Fundamentally, here, in order to invoke the protections of Idaho Code § 42-1766, the HOA must establish it has the right and standing to do so. *See, Trotter v. Bank of New York Mellon*, 152 Idaho 842, 275 P.3d 857, 861 (2012)(applying judicial foreclosure statutory analysis). The HOA, as the petitioning party, must show that it is the holder of the water right(s) allegedly suffering injury to establish standing to pursue its position. It did not do so. Therefore, because there are no facts or law to support a finding that the HOA is a holder of a water right being deprived of water it is entitled to, it lacks standing to pursue the present action. Furthermore, the purpose of the Water Bank is to obtain the "highest duty for beneficial use" of the available water supply. *See* I.C. § 42-1761. The Water Supply Bank Lease Acceptance issued on January 21, 2011 serves this purpose and the HOA's Petition must fail, as a matter of law here, where it has not and cannot show it is a holder of a water right being deprived of water it is otherwise entitled to.

III. CONCLUSION

On the basis of the foregoing, T R Co., the record holder and owner of Water Right No. 63-194, respectfully requests the Department enter an order dismissing the HOA's Petition.

DATED this 31st day of July, 2012.

GREENER BURKE SHOEMAKER P.A.

A handwritten signature in cursive script, appearing to read "Tara Martens Miller", is written over a horizontal line.

RICHARD H. GREENER
TARA MARTENS MILLER
Attorneys for T R COMPANY, L.L.C.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of July, 2012, a true and correct copy of the within and foregoing instrument was served upon:

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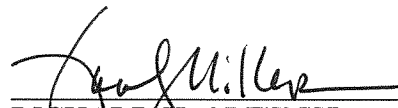
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