

**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)
_____)

**PRELIMINARY ORDER
DENYING PETITION TO REVOKE
OR MODIFY LEASE**

This matter having come before the Department of Water Resources (“IDWR” or “Department”) as a result of the filing of a petition to revoke or modify a lease of a water right to the Water Supply Bank, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. Water right no. 63-194 was decreed in the Snake River Basin Adjudication (“SRBA”) on May 29, 2009 to T. R. Co. LLC. The right authorizes a total diversion rate of 5.2 cfs from the Boise River for the following uses: irrigation (4.37 cfs for 200 acres); aesthetic storage (112.1 afy); and diversion to storage (0.83 cfs).

2. The right was decreed with the following condition:

Right 63-194 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 acre total surface area of sixteen (16) ponds established under Right 63-32139.

3. The place of use for the irrigation use authorized under water right no. 63-194 is the Two Rivers Subdivision and is described as follows:

Township 4N, Range 1E, Section 17		
Lot 7 (SWNE) 14.6 acres	Lot 8 (SENE) 15.2 acres	Lot 6 (SENE) 8.6 acres
Lot 6 (NESW) 29.4 acres	SESW 6.2 acres	Lot 8 (NESE) 34.9 acres
Lot 7 (NWSE) 29.2 acres	SWSE 26.7 acres	SESE 35.2 acres

4. The place of use for the aesthetic storage and diversion to storage uses authorized under water right no. 63-194 is the same as the irrigation use.

5. Two Rivers Homeowner’s Association Inc. (“the Association”) owns permit to appropriate water no. 63-32139. The permit authorizes development of a diversion volume of 304 afy from ground water tributary to the Boise River for aesthetic storage purposes associated with sixteen excavated ponds in the Two Rivers Subdivision. The permit was approved with conditions, including the following:

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.

6. On April 22, 2008, T. R. Co. LLC submitted an application to the Department to lease a portion of water right no. 63-194 (“lease application”) into the Idaho Water Resource Board’s Water Supply Bank. The application proposed leasing a 1.86 cfs/85.3 acre portion of water right 63-194 into the bank for an indefinite period. The application included statements, including the following:

The property was fully irrigated prior to development. Impervious areas installed during development have retired those acres from irrigation.

...

The portion of 63-194 available for lease represents that portion of the water right that has been retired from irrigation by the installation of impervious surfaces, including roads, driveways, and house footprints. The remaining portion of the water right is currently being put to beneficial use as defined by the approved transfer #72104. The applicant has reserved all water rights prior to the sale of lots to the individual homeowners.

7. The lease application listed the following as the place of use to be leased to the Water Supply Bank:

Township 4N, Range 1E, Section 17

SWNE 9.2 acres	SENE 7.9 acres	SENE 3.7 acres
NESW 10.7 acres	SESW 1.2 acres	NESE 15.2 acres
NWSE 11.9 acres	SWSE 9.2 acres	SESE 16.3 acres

8. On January 21, 2011, the Department accepted the proposed portion of water right no. 63-194 into the Water Supply Bank (“lease acceptance”) as described in the lease application filed by T. R. Co. LLC for a term ending on December 31, 2013.

9. On July 10, 2012, Two Rivers Homeowner’s Association Inc. filed its *Verified Petition to Revoke or Modify Lease* (“petition”). In its petition, the Association asks the Department to revoke or modify the Water Supply Bank lease for water right no. 63-194 pursuant to Idaho Code § 42-1766. The Association argues that, because of the lease acceptance, Two Rivers Subdivision has been deprived of water that has been diverted and used in the past and needed during the current irrigation season. *Petition* at 4. The association argues further that the lease acceptance has also reduced the amount of water available to mitigate permit no. 63-32139 held by the Association. *Id.* at 5. The Association requests that the Department revoke the lease acceptance or modify the lease to require that water under the right first be made

available to the Two Rivers Subdivision place of use as needed under water right 63-194 and to mitigate permit 63-32139. *Id.* at 6.

10. On July 31, 2012, T.R. Co. LLC filed *TR Company, LLC's Motion to Dismiss* ("motion") and *Memorandum in Support of TR Company, LLC's Motion to Dismiss* ("memorandum"). It is memorandum, T.R. Co. LLC argues that because the Association does not own the portion of water right no. 63-194 that is in the water bank, the lease is not causing the Association to be deprived of water to which it may be otherwise entitled. *Memorandum* at 4. 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. *Id.*

ANALYSIS

Water right no. 63-194 was decreed to T. R. Co. LLC in the SRBA and T.R. Co. LLC continues to be listed as the owner of water right no. 63-194 in records of the Department. In its petition, the Association admits this fact. *Petition* at 2. However, the Association claims that the water right is now "operated" by the Association and that the Association is entitled to continue to use the water right. *Id.* The problem with this argument is that the Association has failed to explain what "operating" the water right has to do with exercising the rights of an owner of the water right. . Until the Association is able to provide documentation that it is the owner of the water right, the Association is not being deprived of water to which it may be otherwise entitled. While water right no. 63-194 is appurtenant to and may have historically used in the Two Rivers Subdivision, this does not prevent the owner from putting the water right in the Water Supply Bank for use somewhere else.

If the Association believes it has a legitimate claim to the title of the water right, the Association's remedy is to file a quiet title action against T.R. Co. LLC in district court. Disputes over title to real property can only be resolved by a quiet title action brought before a district court. Idaho Code § 6-401; *see also Rural Kootenai Organization, Inc. v. Board of Com'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999)(Kootenai County Board of Commissioners lacks jurisdiction to determine who owns title to submerged lands.); *see also Bonner Bldg. Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 685, 682 P.2d 635, 638 (Ct. App. 1984)(A district court has jurisdiction in action to quiet title.).

Two Rivers Subdivision is the beneficiary of at least some portion of water right no. 63-194 and has been diverting water under the right for irrigation and aesthetic purposes. The portion of water right no. 63-194 accepted into the Water Supply Bank is the portion associated with lands no longer irrigated due to the existence of roads and homes in the subdivision. Whether Two Rivers Subdivision needs more water or has used more water to irrigate lands in the subdivision is not relevant to the question presented by the petition. The Association has not demonstrated ownership of the portion of water right no. 63-194 leased into the bank and cannot demand that portion for delivery and use in the subdivision. 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.

CONCLUSIONS OF LAW

1. Idaho Code § 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.

2. Pursuant to Idaho Code § 42-1766(1), the Director has caused an investigation to be made. No additional hearing or argument is necessary to decide the petition.¹

3. The Association has not demonstrated that it owns or controls the portion of water right no. 63-194 leased to the Water Supply Bank.

4. Because the Association does not own the portion of water right no. 63-194 that is in the water bank, the lease is not causing the Association to be deprived of water to which it may be otherwise entitled.

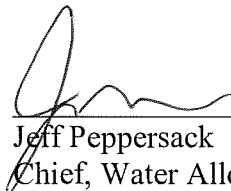
5. The Department should deny the petition filed by the Association.

ORDER

IT IS HEREBY ORDERED that:

The *Petition to Revoke or Modify Lease* filed by Two Rivers Homeowner's Association Inc. on July 10, 2012 is hereby DENIED.

DATED this 6 day of August, 2012.



Jeff Peppersack
Chief, Water Allocation Bureau

¹ While T.R. Co. LLC filed a motion to dismiss instead of a response to the petition, Idaho Code § 42-1766 provides the Department with broad discretion when responding to a petition alleging injury by a water right leased to the Water Supply Bank. The reason is that the Department needs to be able to act quickly to respond to petitions alleging injury. In light of this, the Department reviewed the motion to dismiss but is prepared to rule on the merits of the petition. Failure to do so would only prolong this proceeding further, beyond what is needed to resolve the petition.

CERTIFICATE OF SERVICE

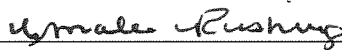
I hereby certify that on the 6th day of August, 2012, I mailed a true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER DENYING PETITION TO REVOKE OR MODIFY LEASE** to the persons listed below:

RE: Water Right 63-194

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Emalee Rushing
Administrative Assistant