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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. 63-194

**VERIFIED PETITION TO REVOKE OR
MODIFY LEASE**

COMES NOW, Two Rivers Subdivision Homeowners Association, Inc. ("Two Rivers" or the "HOA"), by and through its counsel, Norman M. Semanko of MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., pursuant to Idaho Code Section 42-1766, IDAPA 37.02.03 (the Water Supply Bank Rules) and IDAPA 37.01.01 (the Department's Rules of Procedure), and files this petition to revoke or modify the existing water supply bank lease for water right no. 63-194.

To assist the Director in this matter, we have set forth a summary of the Two Rivers' water rights and the water bank lease at issue, the applicable authority, the deprivation and injury caused by the lease, and a request for the lease to be revoked or modified through immediate action in order to avoid further deprivation and injury to Two Rivers.

A. Two Rivers Water Rights

Water right no. 63-194¹ was decreed in the Snake River Basin Adjudication (SRBA) on May 29, 2009. The right has a priority date of June 1, 1877, from the Boise River, in the amount of 5.2 cfs. Of this amount, 4.37 cfs is for irrigation of 200 acres, while 0.83 cfs is for aesthetic storage and diversion to storage. The SRBA decree states: “Property is also known as **Two Rivers Subdivision**” (emphasis added). IDWR’s records still list the owner of water right no. 63-194 as T. R. Co. LLC, the developer of Two Rivers Subdivision, but it is now operated by the HOA. A change of ownership for 63-194 has yet to be finalized with IDWR, with a previous change of ownership form, prepared by T. R. Co. LLC, having been withdrawn by the HOA on March 1, 2012. It is beyond dispute that 63-194 is appurtenant to and has been used in the Two Rivers Subdivision.

Two Rivers HOA is also the owner of water right no. 63-32139, a year-round ground water right for aesthetic storage, in the amount of 304 AFA. The permit was approved on July 7, 2006, and proof was made on June 26, 2007. This right was assigned to the HOA by T. R. Co. LLC on April 2, 2008. The water right includes the following condition:

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.***” (emphasis added).

¹ All water right and water bank lease documents referred to or quoted from herein are available on IDWR’s Water Right and Adjudication Search page (<http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp>).

A similar provision is contained in the SRBA decree for 63-194:

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.

B. Water Bank Lease

After assigning 63-32139 to the HOA, T. R. Co. LLC submitted a water bank application for a portion of 63-194, in the amount of 1.86 cfs, on or about April 22, 2008. The right was accepted into the water bank by letter dated January 24, 2011, accompanied by a “Water Supply Bank Lease Acceptance” document, dated January 21, 2011. The lease expires on December 31, 2013.

IDWR’s analysis of the water bank application included a January 21, 2011 memo, which stated that “no injury is apparent.” It did note, however, the watermaster’s comments of the same date as follows: “Rex Barrie expressed some curiosity why they would be leasing this water to the Bank when they have rented from the rental pool last year.” The January 21, 2011 email from Watermaster Rex Barrie to IDWR, attached to the IDWR memo, reads as follows:

Last year the homeowners had to rent water from the rental pool in order to meet their demand for the subdivision. My concern is reducing the natural flow by 1.86 will leave them with 2.51 cfs of natural flow at 100% of the Stewart Decree then reducing down with each cut to 75%, 60% and so on. I guess if they can live with it, so can I. If this is granted please inform Liz Cresto so she can adjust the accounting program to reflect the reduced amounts.

C. Authority To Revoke Or Modify Water Bank Lease

Idaho Code Section 42-1766(1) provides that during the period of a water bank lease, any water right holder who determines that the lease is causing injury through the

deprivation of water to which it may otherwise be entitled, may petition the Director to revoke or modify the lease. The Director may revoke or modify the lease to insure that no injury occurs.

D. Deprivation And Injury Caused By Water Bank Lease

As a result of the water bank lease filed by T. R. Co. LLC and accepted into the bank, the amount of water available to the Two Rivers Subdivision under 63-194 has been reduced from 5.2 cfs to 3.34 cfs this year.

Existing water right accounting and historical records on IDWR's website (http://maps.idwr.idaho.gov/qWRAccounting/WRA_Select.aspx) indicate that more than 3.34 cfs has been diverted under water right no. 63-194 (Thomas Aiken Canal) and delivered to the Two Rivers Subdivision during the previous four irrigation seasons (2008-2011). In 2011, the maximum diversion rate was 4.59 cfs and more than 3.34 cfs was diverted for 49 straight days, from July 18 through September 4. In 2010, the maximum diversion rate was 6.0 cfs and the diversion rate exceeded 3.34 cfs on 91 different days, from June 20 through July 30 and August 11 through October 4. In 2009, the maximum diversion rate was 4.0 cfs and diversions of more than 3.34 cfs occurred from May 16 through June 5 and again from October 4 through 6. In 2008, the maximum diversion rate was 4.0 cfs, with diversions in excess of 3.34 cfs from May 18 through 20. Amounts in excess of 3.34 cfs were diverted in previous years, as well.

By placing a significant portion of 63-194 in the Water Bank, T. R. Co. LLC has deprived the Two Rivers Subdivision of water that has been diverted and used in the past and that is needed during the current irrigation season. It has also reduced the amount of water available to mitigate water right no. 63-32139, held by Two Rivers HOA.

Regulation on the Boise River began on June 27 of this year, limiting the Two Rivers diversion at the Thomas Aiken Canal to 3.34 cfs because of the water bank rental of

the 1.86 cfs portion of 63-194; otherwise, Two Rivers would have been able to divert in excess of 3.34 cfs, up to the maximum diversion rate of 5.2 cfs. The Stewart Decree cutbacks will further limit the Two Rivers diversion to 2.5 cfs (instead of 3.9 cfs) at 75%, and even further to 2.0 cfs (instead of 3.1 cfs) at 60%.

This has, and will continue to, dramatically cut back the amount of water that Two Rivers is able to supply to the residents of the Two Rivers Subdivision, as well as the vast common areas in the subdivision, through its pressurized irrigation system. Lake levels are receding and will recede even further. If the lake levels recede far enough, the entire pressurized irrigation system will need to be shut off. To make up for these shortages, the HOA is being forced to rent additional water. Of course, the amount of water available to provide mitigation, as required by 63-32139, has also been reduced, creating further deprivation and injury. The bottom line is that the developer's decision to place 1.86 cfs of the 5.2 cfs water right in the water bank has deprived the HOA and Two Rivers Subdivision of water that it needs, and to which it is otherwise entitled, for irrigation storage, irrigation, aesthetic storage and mitigation purposes under both water right nos. 63-194 and 63-32139.

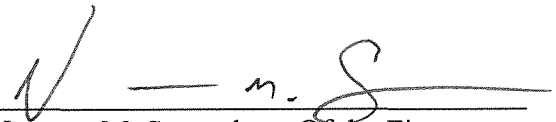
E. Request To Revoke Or Modify Lease And For Immediate Action

In order to cure these injuries and halt the ongoing deprivation of water rights that would otherwise be available, Two Rivers HOA respectfully requests that the Director revoke the existing water bank lease for 63-194 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 63-194 and to mitigate 63-32139. This would allow in excess of 3.34 cfs to be diverted, up to the maximum diversion rate of 5.2 cfs, subject of course to any required cutbacks under the Stewart Decree.

The leased portion of 63-194 is available and has not been rented (<http://www.idwr.idaho.gov/apps/ExtSearch/WSBSearch/WSBSearch.aspx>). However, it cannot be diverted and used by Two Rivers while it is in the Water Bank. IDAHO CODE § 42-1762. Given the current status of regulation of the Boise River and the ongoing shortages to the HOA and Two Rivers Subdivision, the Petitioner hereby requests immediate action be taken by the Director, pursuant to Idaho Code Section 42-1766(1), to revoke or modify the water bank lease, as requested, and that the Boise River Watermaster be immediately notified of the same before further deprivation of water and injury occurs.

DATED this 10th day of July, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

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

VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

W. CLARK BENSON, being first duly sworn, deposes and says:

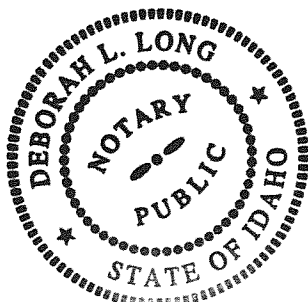
I am the President of **TWO RIVERS SUBDIVISION HOMEOWNERS ASSOCIATION, INC.** and am authorized to make this verification on its behalf.

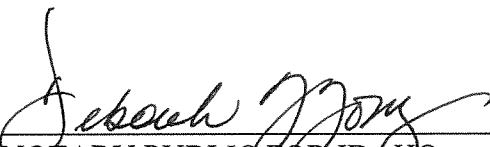
I have read the foregoing **VERIFIED PETITION TO REVOKE OR MODIFY LEASE**, know the contents thereof and that the same are true to the best of my knowledge, information, and belief.



W. Clark Benson

SUBSCRIBED AND SWORN to before me this 10th day of July, 2012.





NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 10/10/2013

CERTIFICATE OF SERVICE

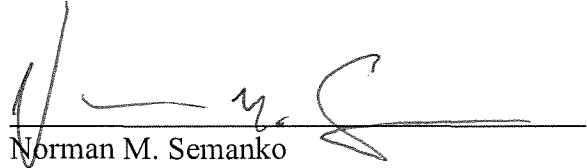
I HEREBY CERTIFY that on this 10th day of July, 2012, I caused a true and correct copy of the foregoing **VERIFIED PETITION TO REVOKE OR MODIFY LEASE** to be served by the method indicated below, and addressed to the following:

T. R. Co. LLC
250 S. Beechwood Avenue, Suite 120
Boise, ID 83709

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Richard H. Greener
Tara L. Martens
GREENER BURKE & SHOEMAKER, P.A.
950 W. Bannock, Suite 950
Boise, ID 83702

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile


Norman M. Semanko