

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

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Filing Fee: \$25.00

JAN 19 2023

WATER RESOURCES
WESTERN REGION

NOTICE OF PROTEST

This form may be used to file a protest under Sections 42-203A, 42-203C, 42-211, 42-222 or 42-240, Idaho Code. The Department will also accept a timely protest completed in a different format if it contains the same information requested on this form. Each protestant must provide a separate \$25 filing fee for each application protested. The Department's Rules of Procedure (IDAPA 37.01.01) require the protestant to **send a copy of the protest to the applicant.**

1. Matter protested. Application for ☒ Permit ☐ Amendment of Permit ☐ Transfer ☐ Exchange
No. 65-24195 in the name of Terrace Lakes Recreation Ranch, Inc.
2. Protestant's Name: Terrace Lakes Water Company (Dennis Largent, Board President)
Address: P.O. Box 141, Garden Valley, ID 83622
Telephone: 208-957-3937 Email: dlargent@terracelakeswater.com
3. Protestant's Representative: Murray D. Feldman, Holland & Hart LLP
Address: P.O. Box 2527, Boise, ID 83701
Telephone: 208-383-3921 Email: mfeldman@hollandhart.com
4. Basis of protest. Clearly state your objections to approval of the application and identify the applicable review criteria. See Instructions for Filing a Notice of Protest for the relevant review criteria.
See attached sheet.

(Additional pages may be attached to describe the basis of your protest.)

Identify any review criteria that are not a basis for your protest:

I.C. § 42-203A(5)(g)

5. ☒ Check here if Protestant and Representative will accept service of documents by email at the email address(es) listed under Item #2 and #3 above.

I acknowledge that if I, or my designated representative, fail to appear at any regularly scheduled conference or hearing in the matter, of which I have been properly notified, the Department may issue a notice of proposed default against me in this matter for failure to appear. **I also verify that I have served a copy of this protest upon the applicant.**

Murray D. Feldman

Protestant's or Representative's Signature

Murray D. Feldman

Printed Name and Title (if applicable)

1/19/2023

Date

FOR DEPARTMENT USE ONLY

\$25.00 fee receipted by LE

Receipt # W050975

Date 1/19/2023

**Terrace Lakes Water Company, Notice of Protest of Application No. 65-24195,
Item no. 4 (Basis of Protest) Additional Pages (Page 1 of 2)**

4. Basis of protest. Clearly state your objections to approval of the application and identify the applicable review criteria.

- a. The applicant remarks incorrectly and deficiently describe the availability of a point of diversion or distribution system by which Terrace Lakes Recreation Ranch may exercise, divert, and apply to beneficial use the applied for water right. The applicant remarks incorrectly state that “The water right will be diverted and distributed by TLWC and will have the same Points of Diversion (POD), and TLRR will continue to be served by TLWC.” This is incorrect.

Not all of the properties or uses where TLRR is proposing to use or apply the water right it seeks are within the areas where TLWC is permitted to have Subscribers under its Bylaws. For instance, based on information and belief, TLRR’s present and proposed uses of water for its restaurant, lounge, pro shop, swimming pool, and golf course restroom uses are outside the areas, and outside the allowed uses, where TLWC may have Subscribers. Only TLRR’s motel and cabin uses are within the geographic areas where TLWC may have Subscribers, but those commercial uses of water for TLRR’s motel and cabin are not within the scope of uses permitted under TLWC’s water rights. *See* IDWR Letter at 2 (complete reference to this letter below).

Thus, for the majority of TLRR’s preset and proposed uses described in its application, TLRR is not “served” by TLWC presently. For the majority of TLRR’s present and proposed water uses as noted in its application, TLRR is not a member or Subscriber of the Terrace Lakes Water Company and does not receive water as a member or Subscriber of the Terrace Lakes Water Company, and therefore is not “served” by Terrace Lakes Water Company.

Nonetheless, for all of the uses presently applied for in TLRR’s application, TLRR is taking—improperly—water from the TLWC distribution system. But as to the majority of its applied for uses as described above, TLRR’s taking of such water under TLWC’s water rights is not authorized by or within the scope of TLWC’s water rights as confirmed by prior correspondence from IDWR dated September 7, 2022 (IDWR Letter) (copy attached). As IDWR stated in that letter, while “[e]ither TLRR or TLWC can file the application and hold the water right . . . in either case, the other entity would have to provide consent - . . . from TLWC to use its delivery system if TLRR files [for the water right].” IDWR Letter at 2 (emphasis added). This TLRR has not done—it has not obtained consent from TLWC to use TLWC’s points of diversion or distribution system as represented in TLRR’s application, nor has TLRR entered into or reached an agreement with TLWC for the use of TLWC’s facilities.

In short, for the majority of its applied for water uses and water right, TLRR presently is not eligible, and may not in the future be eligible, to be served by TLWC. For all of the uses and water right applied for by TLRR, and based on the limited places of use and types of use under TLWC’s water rights, as well as TLWC’s operating restrictions contained in its Bylaws, TLRR may not continue to use or take water from TLWC’s

**Terrace Lakes Water Company, Notice of Protest of Application No. 65-24195,
Item no. 4 (Basis of Protest) Additional Pages (Page 2 of 3)**

water rights as indicated in the prior IDWR correspondence and as provided by applicable Idaho law. Applicable review criteria: I.C. § 42-203A(5)(a)-(f).

- b. TLRR applied incorrect estimation factors in its application to determine the proposed amount of diversion and scope of the water right. For example, TLRR in its application correspondence claimed that it used “the Department’s guidance document for usage for purposes of usage in the application.” But the factors in the documentation TLRR provided for application item 8 do not correspond with the appropriate estimation factors listed in the Department’s guidance. *See* <https://idwr.idaho.gov/water-rights/water-use-information/>. For example, TLRR used an estimate of 8 gallons per day (GPD) per patron for a “restaurant w/restroom” use, but IDWR’s guidance indicates a range of 9-12 GPD per patron for a restaurant with bar/lounge, toilet facilities use. Thus, the appropriate use estimate should be higher in TLRR’s application. While TLRR breaks out the estimated use between the restaurant with a restroom and attached bar/lounge, there is no indication why the lower range of an estimate of 10 GPD/patron overall should be applied as opposed to the higher end of the 9-12 GPD per patron range given in the Department’s guidance. Next, on the cabin use, TLRR applied an estimating factor of 60 GPDs per bed space, but the cabins presumably have kitchens and other facilities beyond that of a bed in a single hotel room with a private bath, including the need for outdoor water usage, that is not accounted for in TLRR’s estimate. Additionally, TLRR does not provide any estimate for its use of drinking water on its golf course, or any outdoor uses of water associated with the restaurant, pro shop, swimming pool, motel, cabins, or its other commercial uses. Thus, TLRR has incorrectly estimated potential use and likely has understated such use, and therefore understated its potential effects on the overall water supply and potential interference with TLWC’s exercise of its established and senior water rights. Applicable review criteria: I.C. § 42-203A(5)(a)-(c), (e)-(f).
- c. TLRR has provided incorrect place of use information in application item 9. TLRR elsewhere indicates that all of its commercial use is within Sections 33 and 34, Township 10 North, Range 4 East, and the only commercial use is associated with its clubhouse, restaurant/bar, and lodging facilities associated with its golf course, restrooms, and similar uses. *See* Water Rights Application, page 4. However, TLRR then goes on to list many other places of use including in Section 28 of Township 10 North, Range 4 East and Sections 3 and 4, Township 9 North, Range 4 East that are beyond the scope of the commercial use claimed in the application. TLRR needs to correct its application and supporting materials to correspond with the actual claimed place of use for the commercial uses applied for. Applicable review criteria: I.C. § 42-203A(5)(a)-(c), (e)-(f).
- d. TLRR provides no indication or documentation of whether it has an adequate supply of water or how TLWC’s water rights would be affected by the proposed amount of withdrawals and diversions for TLRR’s applied for water right. Applicable review criteria: I.C. § 42-203A(5)(a)-(f).
- e. There is no indication of how in times of shortage TLWC’s senior water rights will be protected and TLRR’s proposed junior water right would be subordinated to TLWC’s water rights where TLRR is proposing to withdraw its water rights using common points

**Terrace Lakes Water Company, Notice of Protest of Application No. 65-24195,
Item no. 4 (Basis of Protest) Additional Pages (Page 2 of 3)**

of diversion. TLRR has to identify how TLWC's use of its senior water rights will be protected and TLRR will not be taking water from the common points of diversion in such times of shortage. Applicable review criteria: I.C. § 42-203A(5)(a)-(f).

- f. As noted in item a. above, for the majority of its proposed uses and diversion, TLRR is not a member or Subscriber of TLWC and TLWC's Bylaws prohibit it from serving non-Subscribers. *See* Bylaws of TLWC Section 2.1 (definition of "Subscriber"); Section 1.5 (purposes of TLWC are to "distribute water to Subscribers"). Thus, TLRR's assertions that it has been or might continue to be "served" by TLWC for all of TLRR's proposed uses and diversion are contrary to the local public interest as it conflicts with the interests of TLWC and its Subscribers who reflect the interests of the people in the area directly affected by the proposed water use by TLRR. Applicable review criteria: I.C. § 42-203A(5)(e).
- g. Such other reasons as may be documented or shown at the hearing in this matter. Applicable review criteria: I.C. § 42-203A(5)(a)-(f).

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IDAHO DEPARTMENT OF
WATER RESOURCES

Western Region • 2735 W Airport Way • Boise, ID 83705-5082

Phone: 208-334-2190 • Fax: 208-334-2348 • Email: westerninfo@idwr.idaho.gov • Web: idwr.idaho.gov

Governor Brad Little

Director Gary Spackman

September 7, 2022

CHUCK STEELE
797 E 2795 S
HAGERMAN ID 83332

RE: Ground Water Use from Terrace Lakes Water Company System

Dear Mr. Steele:

This letter responds to concerns raised with staff at the Idaho Department of Water Resources (IDWR) by you and Dennis Largent¹ beginning in April 2021 regarding use of water from the Terrace Lakes Water Company (TLWC) water system by Terrace Lakes Recreational Ranch Inc (TLRR). This letter will summarize IDWR's activities and perspective in this matter and suggest potential routes forward.

During the phone conversations with IDWR staff beginning in April 2021, both you and Mr. Largent asserted that some or all of the TLRR facilities associated with the Terrace Lakes Resort are supplied with water from the TLWC water system, and that TLRR's use is not authorized by a valid water right. The initial phone conversations with staff resulted in a letter from IDWR to TLWC in early May 2022 describing the elements of TLWC's water rights. That letter did not address whether TLRR is using water from the TLWC system or whether it has any water right authorization that would allow it to do so. In late May 2022, you filed a formal complaint with IDWR asserting, "TLRR commercial water use is causing the homeowners, Terrace Lakes Water Company, to be in violation of their water rights." Subsequent to your complaint, the Department was contacted by multiple homeowners in TLWC concerned that TLWC and/or IDWR will curtail delivery to the TLRR facilities. The homeowners' concerns appear to be based on a June 1, 2022, letter from TLWC to the homeowners suggesting that TLWC may, "shut off TLRR commercial water." Further, at least one of the homeowners provided IDWR a copy of an August 24, 2022, letter sent by the TLWC attorney to TLRR stating that, "no later than December 1, 2022, TLWC will terminate the use of TLRR's use of TLWC's water rights..."

IDWR has not conducted an onsite investigation. We do not know how much water TLWC and TLRR are currently using or for what purposes, and we do not have a completely clear picture of how the water uses may have changed over time. IDWR has met with Ilene Johnson and Lonnie Bramon (associated with TLRR), and they confirmed that the TLWC system is providing water to the TLRR facilities and has been doing so for many years. IDWR has reviewed water right

¹ Although both you and Mr. Largent are members of the TLWC board of directors, it is unclear whether your communications with the Department were made on behalf of the TLWC or its board.

records for TLWC's three water rights that authorize diversion and use of ground water through the TLWC's system. Those rights describe only water uses associated with homes. Neither the applications nor the licensing examination reports describe any connection to or uses by the TLRR facilities. IDWR has identified no other recorded water right that would authorize delivery of ground water to TLRR facilities via the TLWC system.²

Given that the asserted use by TLRR does not appear to be authorized by a valid water right, a full investigation by IDWR under its authorities in Idaho Code could be warranted. Pursuant to Idaho Code § 42-351, enforcement action for unauthorized water use may result in civil penalties and an order to cease and desist any unauthorized uses. However, IDWR's water rights program operates with the primary goal to educate water users and to correct violations, not strictly to levy penalties. IDWR believes both TLWC and TLRR are aware that TLRR's use is potentially unauthorized and that both entities want to resolve this issue. With this in mind, an investigation by IDWR seems premature at this time.

The following list describes some potential routes to resolution, depending on a number of factors:

1. TLRR could disconnect from the TLWC system, acquire water rights as necessary to authorize its uses, and drill its own wells.
2. TLRR and TLWC could demonstrate that TLRR's use from the TLWC system is authorized by a water right. For example, TLRR could identify an existing, valid water right that authorizes the uses (if one exists), or it could pursue recognition of the historical uses through the Snake River Basin Adjudication Court by filing a claim(s) to deferred domestic use(s).
3. TLRR or TLWC can engage in the process to obtain a water right authorization to continue to use water as it is currently, either by filing an application for permit with IDWR to establish a new water right, or by acquiring (through purchase or otherwise) an existing water right and filing for a water right transfer to change the right to authorize the TLRR uses. Either TLRR or TLWC can file the application and hold the water right, recognizing that in either case, the other entity would have to provide consent - either from TLRR to hold a water right to deliver water to TLRR property if TLWC files, or from TLWC to use its delivery system if TLRR files.
4. TLWC could file an application for transfer to change a portion of the TLWC water rights to cover the TLRR use. This approach would require TLWC to cease some currently authorized use recognized on the rights to make water available for the TLRR uses.

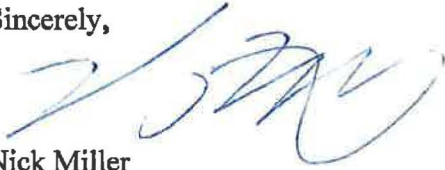
If it would be useful, IDWR is willing to meet with TLWC and TLRR to discuss the issue and provide information about pursuing water right authorization. IDWR does not believe the situation warrants an investigation at this time, in part because it believes TLWC and TLRR are committed to resolving the issue. However, if the situation is not resolved (i.e. no water right

² A discussion with Mr. Bramon and Mrs. Johnson suggests the uses of ground water by the resort pre-date the establishment of the TLWC water rights and delivery system, but are not recorded because those uses were not required to be claimed in the Snake River Basin (SRBA) or Payette River Adjudications. If so, TLRR could potentially pursue a deferred claim in the SRBA.

Terrace Lakes
September 7, 2022
Page 3 of 3

authorization is identified or obtained and the use continues), IDWR may elect to review the matter further.

Sincerely,



Nick Miller
Manager, IDWR Western Region

Cc: Terrace lakes Water Company - PO Box 141, Garden Valley, ID 83622
Terrace Lakes Recreational Ranch Inc. – 101 Holiday Dr. Garden Valley, ID 83622