



Holden Kidwell  
Hahn & Crapo P.L.L.C.  
LAW OFFICES

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DEPARTMENT OF  
WATER RESOURCES

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January 15, 2020

Shelley Keen  
Water Allocation Bureau  
Idaho Department of Water Resources  
P. O. Box 83720  
Boise, ID 83720-0098

**Re: Water Right Nos. 35-14240, 35-14241, 35-14242, 35-14243.**

Dear Shelley:

Thank you for your letter dated January 6, 2020. I apologize for my delay in providing a response to the Department to Kent Fletcher's letter dated November 27, 2019.

As an overall matter, we agree with the conclusions that you have reached in the letter. It is our position that we have complied with the language contained in the conditions of the above-described water rights to provide, by December 1<sup>st</sup> of each year, a written report outlining the source of mitigation for these rights for the following irrigation season. The Aberdeen American Falls Groundwater District, which leases Water Right Nos. 29-2284 and 29-2301 from Power County, has subleased these water rights to Mr. Funk in order to meet the mitigation obligations under these water rights. Enclosed with this letter are copies of the leases from 2019 and 2018, which have an effective date of January 1<sup>st</sup> of each year, even though they typically have been signed around the start of the irrigation season. Given this past practice, we anticipate the same will occur in 2020, but have made a request to the Aberdeen American Falls Groundwater District to expedite execution of a lease agreement for the 2020 irrigation season. As described in your letter, we recognize that if a copy of the lease is not provided to the Department prior to commencement of irrigation, we run the risk of not having a mitigation plan to allow irrigation, which would not leave adequate time to propose, advertise, and evaluate a substitute mitigation plan.

In short, we agree with the contents of your letter that we have complied with the conditions of the above-referenced water rights, and also agree that we are not submitting a substitute mitigation plan. Nevertheless, we will endeavor to secure the lease agreement as early as possible with the Aberdeen American Falls Groundwater District and attempt to alleviate the concerns raised by Mr. Fletcher in his letter.

*Established in 1896*

Shelley Keen  
January 15, 2020  
Page 2 of 2

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We appreciate your attention to this matter. If you have any questions regarding the contents of this letter, please let me know.

Best regards,



Robert L. Harris  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Enclosures

c: Kent Fletcher

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## LEASE AGREEMENT

THIS LEASE AGREEMENT ("Agreement") is made and entered into this 1<sup>st</sup> day of January, 2018 by and between the American Falls Aberdeen Area Groundwater District whose address is 505 N. Oregon Trail Road, American Falls, Idaho 83211 ("District") and Lance Funk and Lisa Funk, husband and wife, whose address is 2960 Cedar Lane, American Falls, Idaho 83211 ("Funk"). The District and Funk are individually a "Party" and together the "Parties".

### RECITALS:

A. Power County, Idaho ("County") owns the following water rights ("Water Rights"), to wit:

Water Right No.	Priority Date	Quantity (cfs / AFA)	Purpose of Use
34-14014	3/2/1949	4.5 cfs / 3215.5 AFA	Industrial and Mitigation by Non-Use
34-14015	4/24/1951	4.0 cfs / 2858.3 AFA	Industrial and Mitigation by Non-Use
Total:		8.5 cfs / 6,153.8 AFA	

B. The County acquired the Water Rights from Magnolia Nitrogen Idaho, LLC, they were previously owned by FMC Corporation with the point of diversion and place of use at the FMC plant site.

C. The District has leased the Water Rights from the County for the term commencing January 1, 2018 and ending December 31, 2019. Thereafter the lease automatically renews for successive one-year terms unless or until either Party gives not less than thirty (30) days written notice of termination.

D. Funk desires to sub-lease a portion of the Water Rights from the District for the year 2018 pursuant to this Agreement.

### AGREEMENT:

- Water Right Lease.** Upon execution of this Agreement the District leases to Funk the right to use up to a maximum of 6,000 acre feet of the Water Rights to be utilized as part of Funk's mitigation plan associated with four water right permits identified as IDWR Permit Nos. 35-14240, 35-14241, 35-142242, and 35-14243 (the "Permits") owned by Funk. The Permits authorize the irrigation of 1,316.3 acres of property located in Power County, Idaho. The portion of the Water Rights leased will be used for mitigation of the Permits and not for the irrigation of any new or additional acreage.

- Funk shall be solely responsible at his expense to change the point of diversion and

place of use of the leased Water Rights as may be necessary as a part of his mitigation plan.

- 1.2. Upon termination of this lease Funk shall be responsible at his sole expense to change the point of diversion and place of use of the Water Rights back to the original location at the FMC plant site.
2. **Term.** The term of this lease will commence January 1, 2018 and end December 31, 2018.
3. **Consideration.** As consideration, Funk will provide the District with 6,000 acre feet of water recharge within the Snake River Basin Aquifer on or before April 3, 2018 and provide proof and documentation thereof. All other mitigation credits associated with non-use of the Water Rights shall belong solely to the District.
4. **Administrative and Transfer Fees.** Funk will pay any administrative fees associated with the lease of the Water Rights. Funk will pay all fees associated with the change of the point of diversion and place of use of the Water Rights back to the original FMC site.
5. **Use of Water Rights.** It is understood and agreed that the leased Water Rights will not be pumped by Funk and will be used for mitigation purposes only pursuant to Funk's mitigation plan for the Permits.
6. **Conditions.** This Agreement is entered into conditional upon the following:
  - 6.1. The County's approval of the sub-lease of the Water Rights to Funk pursuant to the Agreement.
  - 6.2. The District's ability to enter into this Agreement for the purpose of leasing the Water Rights to Funk.

In the event any of these conditions are not met, the District reserves the right to terminate this Agreement.

7. **Breach.** If either party defaults in the performance of its obligations under this Agreement, and such default is not cured within thirty (30) days after receipt of written notice thereof, the non-breaching party, at its option, may elect any or all of the following exclusive remedies:
  - 7.1. To terminate this Agreement.
  - 7.2. To seek specific performance of this Agreement.
8. **Assignment.** This Agreement may not be assigned by the Funk without the expressed written consent of the District.
9. **Negotiation and Mediation.** In the event of a substantial dispute between the Parties in connection with this Agreement, the Parties shall attempt in good faith to resolve such dispute.

If no resolution is reached through informal negotiations, any complaining Party must give the other Party written notice that a dispute exists (“**Notice of Dispute**”). The Notice of Dispute shall include a statement of the Party’s position. Within fifteen days of the delivery of a Notice of Dispute, the Parties shall endeavor to settle the dispute by mediation under the then-current CPR Mediation Procedure (“**CPR Mediation Rules**”). The Parties shall agree upon a mediator or, if they cannot agree upon a mediator within five days of commencement of the mediation procedure, they shall select a mediator pursuant to the CPR Mediation Rules. Expenses of mediation shall be divided equally between the Parties.

10. **Arbitration.** If Parties do not resolve any substantial dispute through negotiation and mediation, as set forth above, such dispute shall be settled by arbitration in American Falls, Idaho, by a single arbitrator mutually acceptable to the Parties. Once 60 days have passed since delivery of a Notice of Dispute, either Party may initiate arbitration. Arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. § 1-16, and the arbitrator’s award shall be final and binding on the Parties and shall also be non-appealable. Both Parties shall share equally the fees and expenses of the arbitrator. Arbitration will be governed by the CPR Rules for Non-Administered Arbitration (“**CPR Arbitration Rules**”).
11. **Litigation.** Litigation of a dispute between the Parties in connection with any transaction, contract, or agreement arising from this Agreement is not allowed, except to 1) enforce a settlement agreement entered into by the Parties through mediation or 2) enforce or confirm an arbitrator’s decision. If litigation ensues, jurisdiction and venue shall be in the District of the State of Idaho in Power County.
12. **Attorney Fees and Costs.** The prevailing Party shall be entitled to reasonable attorney fees and costs incurred during arbitration and litigation, including costs incurred to compel mediation and/or arbitration. Each party shall bear their own attorney fees and costs incurred during negotiations and mediation.
13. **Choice of Law.**
  - 13.1. **Governing Law, Jurisdiction, and Venue.** This Agreement will be construed and interpreted in accordance with the laws of the State of Idaho. The parties agree that the courts of Idaho shall have exclusive jurisdiction, and agree that Power County is the proper venue.
  - 13.2. **Exclusive Procedures.** The procedures specified in paragraph 9 are the exclusive procedures for the resolution of disputes between the parties. All applicable statutes of limitation shall be tolled while the mediation and arbitration procedures specified above are pending.
14. **Notices.** All notices given pursuant to this Lease must be in writing and shall be sent in one of the following manners: (a) by certified mail, return receipt requested, postage prepaid; (b) by recognized overnight courier such as Federal Express; (c) by facsimile transmission; (d) by email if the receiving party acknowledges receipt of the emailed notice. Notices shall be deemed received on the earlier of actual receipt, three days after mailing for certified mail and

regular mail, the next business day if given by fax, or the date the receiving party acknowledges receipt of email notice.

**ADDRESSES TO BE USED FOR NOTICES AND DELIVERY OF LEASE PAYMENTS SHALL BE AS FOLLOWS:**

The District

American Falls Aberdeen Area Groundwater District  
505 N. Oregon Trial Rd.  
American Falls, Id 83211

District's Representative

Randall C. Budge  
Racine Olson Nye & Budge, Chartered  
P.O. Box 1391  
Pocatello, Idaho 83204-1391

Funk

Lance and Lisa Funk  
2960 Cedar Lane  
American Falls, Idaho 83211

Funk's Representative

Robert L. Harris  
HOLDEN KIDWELL  
P.O. Box 50130  
Idaho Falls, Idaho 83405-0130

**15. Miscellaneous Provisions.**

- 15.1. This Agreement supersedes any and all other written or verbal agreement between the parties hereto regarding the Water Rights. Neither the District nor the County shall be bound by any understanding, agreement, promise representation or stipulation, express or implied, not specifically contained herein.
- 15.2. The parties hereby agree that they shall sign such other and further documents as may be required by the Idaho Department of Water Resources or others to carry into effect the terms and conditions of this Agreement.
- 15.3. The validity of enforce ability of any term, phrase, clause, paragraph, restriction, covenant, agreement or other provision hereof, shall in no way affect the validity or enforcement of the remaining provisions, or any part hereof.

- 15.4. The Agreement may be executed in any number of counterparts for all the convenience of the parties, all of which, when taken together and after execution by all parties, hereto, shall constitute one and the same Agreement.
- 15.5. The Agreement is for the benefit only of the parties hereto and shall inure to the benefits of and bind their respective heirs, agents, personal representatives, successors and assigns.
- 15.6. This Agreement will not be recorded. Instead, the parties will execute a Memorandum of Agreement for recording in the Power County Recorder's Office to give notice of this Agreement.
- 15.7. Funk shall take all and any actions necessary, during the term of this lease, to fully protect and maintain the Water Rights before the Idaho Department of Water Resources, or any other entity or challenge.
- 15.8. Funk shall indemnify and hold harmless the District from (a) any and all claims, costs, liability, or expenses, including reasonable attorney fees, arising out of Funk's operation and use of the leased Water Rights; (b) any breach of this Agreement; and (c) all actions, suits, proceedings, demands, assessments, judgments, costs and expenses incident to any of the foregoing.

(Signatures on following page)

American Falls Aberdeen Area Groundwater District

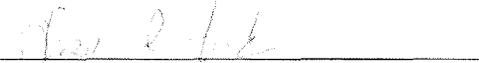
Dated: 3-1-18

By:   
NIC BEHREND, Chairman

Dated: 3-1-18

  
LANCE FUNK

Dated: 3-1-18

  
LISA FUNK

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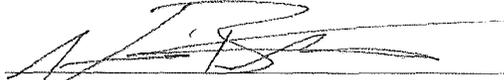
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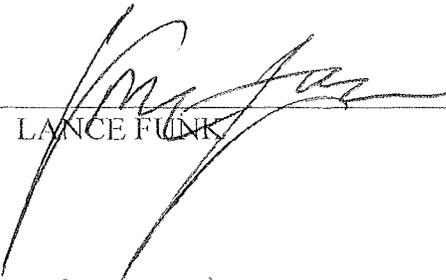
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American Falls Aberdeen Area Groundwater District

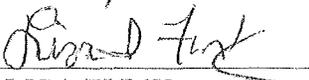
Dated: 4-17-19

By:   
NIC BEHREND, Chairman

Dated: 5-2-19

  
LANCE FUNK

Dated: 6-2-19

  
LISA FUNK