



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 E Front Street, Suite 648 • PO Box 83720 • Boise ID 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700

Website: idwr.idaho.gov • Email: idwrinfo@idwr.idaho.gov

BRAD LITTLE
Governor

GARY SPACKMAN
Director

January 6, 2020

LANCE AND/OR LISA FUNK PARTNERSHIP
PO BOX 310
AMERICAN FALLS ID 83211-0310

Re: Water Rights 35-14240, 35-14241, 35-14242, and 35-14243

Dear Mr. and Mrs. Funk:

On November 27, 2019, the Idaho Department of Water Resources ("IDWR") received a letter from attorney Kent Fletcher about licensed Water Rights 35-14240, 35-14241, 35-14242, and 35-14243 ("the four licenses"), which you own. Mr. Fletcher wrote on behalf of Minidoka Irrigation District, American Falls Reservoir District No. 2, A & B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company. These entities are commonly referred to collectively as the Surface Water Coalition ("SWC"). In Mr. Fletcher's letter, SWC alleges your mitigation practices are not consistent with the requirements of the four licenses, and it asks IDWR to investigate and "take action."

SWC alleges the following about the four licenses:

1. "It is the position of SWC that Funks have failed to comply with the terms of the Funk water rights due to the fact that their mitigation arrangements for the 2020 irrigation season are not in place."
2. "Further, the mitigation arrangements are different than those approved by the Department when the water rights were approved and the Funks have not submitted a substitute mitigation plan to the Department."

On December 6, 2019, your attorney, Rob Harris, emailed IDWR that you "will be providing a written response to Kent's letter early next week." IDWR has not received the response. Meanwhile, IDWR has reviewed SWC's allegations.

Allegation No. 1

Regarding the first SWC allegation, each of the four licenses has the following conditions of approval:

By December 1st of each year, the right holder shall provide a written report to the Department describing the number and location of acres irrigated that year, the volume of water diverted under this right, the source of mitigation for the next

irrigation season, and the number and location of acres proposed to be irrigated in the following year. [Emphasis added.]

In the event the right holder does not maintain the right to use water rights 29-2284 and 29-2301 for mitigation purposes, the right holder may propose a substitute mitigation plan. *The substitute plan must be provided to the Department no later than December 1st in the year immediately prior to the irrigation season where the substitute plan is proposed to be implemented.* The Department will advertise the substitute plan to the public and the protestants shall have the right to challenge the substitute plan. If the substitute plan is not approved by the Department, the right holder shall not divert under this right. [Emphasis added.]

The four licenses authorize consumptive water uses of ground water that has been subject to a moratorium on new consumptive uses since 1992. When approving the applications for the four licenses in 2015, IDWR required ongoing mitigation to offset consumptive use so that the applications could be approved in the moratorium area.

The four licenses state that the right holder will mitigate by non-use of Water Rights 29-2284 and 29-2301 (previously numbered 35-14014 and 35-14015, respectively, and referred to as the “mitigation rights” in this letter). In his 2019 written report, Greg Sullivan of Brockway Engineering stated as follows:

In 2019, Power County leased water Right Nos. 29-2284 and 29-2301 to the Aberdeen American Falls Ground water District ("AAFGWD") to be used by the AAFGWD as a mitigation source of 6,153.8 acre-feet associated with the AAFGWD's obligations under the settlement Agreement Entered into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participation Members of the Idaho Ground Water Appropriators, Inc. and its addenda. AAFGWD has verbally indicated that it will sublease Water Right Nos. 29-2284 and 29-2301 to Lance and Lisa Funk for the 2020 irrigation season provided that the Funks, on behalf of the AAFGWD, arrange for 6,153.8 acre-feet of ground water recharge to be performed. The sublease agreement has not yet been finalized and executed, but it is anticipated that it will be executed prior to the commencement of the 2020 irrigation season (April 1, 2020).

Records in the water rights files maintained by IDWR show that Power County acquired the mitigation water rights in mid-2017 and leased them to you for mitigation during the 2017 irrigation season. Power County leased the mitigation water rights to AAFGWD from January 1, 2018, through December 31, 2019. The lease renews “for successive one-year terms unless or until either Party gives . . . written notice of termination.” Records in the water right files show that AAFGWD sub-leased the mitigation rights to you for mitigation purposes during the 2018 and 2019 irrigation seasons. In both 2018 and 2019, the sub-lease from AAFGWD to you was not signed until after the start of the year (March 2018 and June 2019, respectively). That practice is consistent with Greg Sullivan’s report of a verbal agreement between AAFGWD and you for the 2020 irrigation season. If past practice is indicative of future practice, you and

AAFGWD may yet complete a sub-lease early in 2020. Greg Sullivan's written report complies with the requirement to notify IDWR of the mitigation source for the 2020 irrigation season.

Nonetheless, delaying finalization of the sub-lease until after December 1 leaves no time for compliance with the substitute mitigation requirement if the sub-lease is not finalized. Proposing a substitute mitigation plan after December 1 would not allow enough time for the plan to be advertised and evaluated by IDWR before the start of the irrigation season. If you delay finalizing your mitigation plans, you risk planting a crop without the mitigation necessary for irrigation to occur.

Allegation No. 2

On the four licenses the following approval condition defines the mitigation requirement:

To mitigate for the depletion of water resulting from the use of water under water rights 35-14240, 35-14241, 35-14242 and 35-14243 and to prevent injury to senior water right holders, the right holder shall cease diverting and using water as authorized by the following water rights for the purposes and amounts specified below. Moreover, the official records for the following water rights will be changed to show that diversion and use of water is not authorized because the rights, or a portion thereof, are being dedicated to mitigation purposes.

Right No.	Use Changed to Mitigation	Mitigation Rate (cfs)	Mitigation Volume	Mitigation Acres
29-2284 (previously 35-14014)	Industrial	4.44	3215.5	N/A
29-2301 (previously 35-14015)	Industrial	3.95	2858.3	N/A
	Combined Limit:		6073.8	

If the specified mitigation rights, or portion thereof, are sold, transferred, leased, used on any place of use, or are not deliverable due to a shortage of water, a priority call, or a termination in lease contract then the amount of water authorized for diversion under this right approval shall be reduced by the same proportion as the reduction to the mitigation rights.

Except for updating the water right numbers, the licensed mitigation requirement is the same as IDWR required when it approved the applications in 2015.

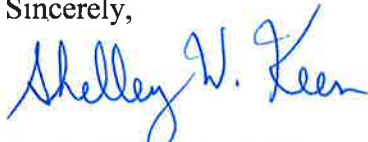
The final sentence of the mitigation requirement ensures that if the mitigation water rights are partly or completely unavailable to accomplish the required mitigation, you will reduce or discontinue your water diversion and use under the four licenses. As noted above, AAFGWD sub-leased the mitigation rights to you for mitigation purposes during the 2018 and 2019 irrigation seasons. By sub-leasing the mitigation rights and not using them, you accomplished the mitigation in the manner required by the four licenses. The actual mitigation practices in 2018 and 2019 were not "different than those approved by the Department when the water rights were approved."

The SWC letter also expresses concern that, in the future, AAFGWD may dedicate the mitigation rights for ground water recharge to satisfy its mitigation obligations under the *Settlement Agreement Entered Into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.* Greg Sullivan's 2019 report states that AAFGWD will sub-lease the mitigation rights to you if you arrange for ground water recharge to occur, presumably using some other source of water, such as Snake River storage water. IDWR does not view such an arrangement to require approval of a substitute mitigation plan. The mitigation plan requires non-use of the mitigation rights. IDWR's concern is that the mitigation rights are available to you for mitigation purposes, not how you acquire use of the mitigation rights.

Mitigation for the 2020 Irrigation Season

If you finalize a sub-lease or other arrangement enabling you to dedicate the mitigation rights for mitigation purposes again in 2020, please notify IDWR immediately. IDWR needs to know that the arrangement is in place before you divert water pursuant to the four licenses in 2020. If your arrangements to use the mitigation rights are not finalized, you will not be authorized to divert and use water under the four licenses during 2020, because the December 1 deadline for proposing a substitute mitigation plan has passed.

Sincerely,



Shelley W. Keen, Chief
Water Allocation Bureau

cc: James Cefalo
Rob Harris
Kent Fletcher