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November 27, 2019

VIA EMAIL ONLY - gary.spackman@idwr.idaho.gov

Director Gary Spackman
Idaho Department of Water Resources

RE: Funk Water Rights 35-14240, 35-14241, 35-14242, and 35-14243 (collectively referred to Funk water rights)

Dear Director Spackman:

This letter is written on behalf of my clients, the Minidoka Irrigation District and American Falls Reservoir District No. 2, as well as the clients of Barker, Rosholt & Simpson: A & B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company (commonly referred to as the Surface Water Coalition or SWC).

This letter is written to you pursuant to the provisions of Water Right License No. 35-14240, condition paragraph 12. An identical provision is contained in all of the Funk water rights. A copy of 35-14240 is enclosed.

Pursuant to the conditions of the Funk water right licenses, paragraph 7, the Funks are required to provide mitigation for the use of the Funk water rights. Paragraph 7 specifies that if the mitigation rights, or a portion thereof, are sold or transferred "then the amount of water authorized under this right approval shall be reduced by the same proportion as the reduction to the mitigation rights."

The Funk water rights also provide in condition paragraph 8 that if the water right holder does not maintain the right to use the described water rights 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."

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Pursuant to condition paragraph 9 of the Funk water rights, the right holder shall provide a written report to the Department describing the source of mitigation for the next irrigation season.

Finally, as set forth in condition paragraph 12 of the Funk water rights, noncompliance of any condition of the right, including the requirement for mitigation, is cause for the director to issue a notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water.

At one point in time, the Funks were leasing the mitigation water rights for the purposes of mitigation. In 2017 the mitigation water rights were purchased by Power County. In 2019 Power County leased the mitigation rights to the Aberdeen American Falls Ground Water District to be used by the Ground Water District as a mitigation source of 6,153.8 acre feet associated with the Ground Water District's obligation under the SWC - IGWA Settlement Agreement.

In the annual report filed by the Funks dated November 5, 2019, a copy of which is enclosed, on page 3, Funks are now reporting that the Ground Water District has verbally indicated that it will sublease the mitigation rights to Funks for the 2020 irrigation season provided that Funks, on behalf of the Ground Water District, arrange for 6,152.8 acre feet of ground water recharge to be performed. The report admits that the agreement has not been finalized or executed. The report goes on the state that Funks and the Ground Water District are in the process of "setting the arrangements for the ground water recharge to occur, and it is anticipated that those details will likewise be contained in the sublease agreement between the parties."

It is the position of the 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. Further, the mitigation arrangements are different than those approved by the Department when the water rights were approved and Funks have not submitted a substitute mitigation plan to the Department.

The SWC would request that the Department closely review the Funk water rights and the annual water report dated November 5, 2019 and make a determination as to whether the report and the mitigation described therein comply with the provisions of the Funk water rights. Further, if the Department determines that the reported mitigation does not comply with the requirements of the Funk water rights, the SWC would request that the Department take action as described in the Funk water rights.

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Thank you for your attention to these matters.

Sincerely,

FLETCHER LAW OFFICE



Kent Fletcher

KF/brd

Enclosures

pc: Rob Harris w/enclosures via email
John Simpson w/enclosures via email
Travis Thompson w/enclosures via email
Jonas Reagan w/enclosures via email
Minidoka Irrigation District w/enclosures via email
American Falls Reservoir District No. 2 w/enclosures via email

State of Idaho
Department of Water Resources
Water Right License
Water Right No. 35-14240

Priority: February 08, 2012

Maximum Diversion Rate: 3.37 CFS

Maximum Diversion Volume: 674.8 AF

It is hereby certified that:

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

has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated February 08, 2012, and has submitted Proof of Beneficial Use on February 09, 2017. An examination confirms water is diverted from:

Source : GROUND WATER

<u>Beneficial Use</u>	<u>Period of Use</u>	<u>Rate of Diversion</u>	<u>Annual Volume</u>
IRRIGATION	04/01 to 10/31	3.37 CFS	674.8 AF

Location of Point(s) of Diversion

GROUND WATER SW¼ SW¼ SE¼, Sec. 1, Twp 07S, Rge 28E, B.M. POWER County

Place of Use: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
07S	28E	12	30.5	30.5	30.5	30.5	31.9	14.8											168.7

Total Acres: 168.7

Conditions of Approval

1. Rights 35-7973 and 35-14240 when combined shall not exceed a total diversion rate of 4.96 cfs.
2. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 120.
3. Prior to diversion of water under this right, the right holder shall install and maintain a flow meter measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.
4. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the place of use.
5. This right is for the use of trust water, and it is subject to review 5 years after the date of permit approval to re-evaluate the availability of trust water for the authorized use and to re-evaluate the public interest criteria for reallocating trust water.
6. Administration of this right to satisfy the minimum stream flow water rights in the Snake River at Murphy Gage shall not be required because use of water pursuant to this right is either non-consumptive or the right holder is required to provide ongoing mitigation to offset the depletion of water resulting from the use of this right.

State of Idaho
Department of Water Resources
Water Right License
Water Right No. 35-14240

7. 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 (AF)	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.

8. 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.
9. 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.
10. As resources allow, the Department will conduct at least one in-person field examination of the authorized place of use of this right each year to verify the required mitigation and authorized irrigation under this right prior to June 15th of each year. It shall be the responsibility of the right holder to follow up with the Department by June 15th of each year to determine if the field examination was performed. If the Department is unable to conduct the field examination for any reason, the right holder or its consultant shall perform the field examination and report findings from the field examination to the Department and the protestants to this right by July 15th of each year.
11. The diversion and use of water described in this right may be subject to additional conditions and limitations agreed to by the protestant and the right holder under a separate agreement to which the Department is not a party. Because the Department is not a party, the Department is not responsible for enforcement of any aspect of the agreement not specifically addressed in other conditions herein.
12. Noncompliance with any condition of this right, including the requirement for mitigation, is cause for the director to issue a notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water.

Keen, Shelley

From: Rob Harris <rharris@holdenlegal.com>
Sent: Friday, December 06, 2019 2:40 PM
To: Kent Fletcher; Spackman, Gary; Keen, Shelley; Luke, Tim; Baxter, Garrick
Cc: John K Simpson; Travis Thompson; Jonas Reagan
Subject: RE: Funk Water Rights 35-14240 et al.

All:

On behalf of the the water right owner, we will be providing a written response to Kent's letter early next week.

Thanks,

Rob Harris

-----Original Message-----

From: Kent Fletcher <wkf@pmt.org>
Sent: Friday, December 6, 2019 9:28 AM
To: Spackman, Gary <Gary.Spackman@idwr.idaho.gov>; Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Luke, Tim <Tim.Luke@idwr.idaho.gov>; Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>
Cc: Rob Harris <rharris@holdenlegal.com>; John K Simpson <jks@idahowaters.com>; Travis Thompson <tlit@idahowaters.com>; Jonas Reagan <jreagan@idahowaters.com>; MID <MID@pmt.org>; Dan Davidson <dan.mid@pmt.org>; AFRD2 <janesabala@cableone.net>; David Stephenson <davidstephenson@cableone.net>; Ellis Gooch <goochfarms@live.com>
Subject: Re: Funk Water Rights 35-14240 et al.

Thank you.

Kent Fletcher
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208-878-2548 (fax)
wkf@pmt.org

On 12/6/2019 8:34 AM, Spackman, Gary wrote:

> Kent,
> This email confirms receipt of your letter sent via email. I will forward your letter and the attached information on to staff for investigation.

> Thanks,
> Gary Spackman

>
> -----Original Message-----

> **From:** Kent Fletcher [mailto:wkf@pmt.org]
> **Sent:** Wednesday, November 27, 2019 11:32 AM
> **To:** Spackman, Gary <Gary.Spackman@idwr.idaho.gov>
> **Cc:** Rob Harris <rharris@holdenlegal.com>; John K Simpson <jks@idahowaters.com>; Travis Thompson <tlit@idahowaters.com>; Jonas Reagan <jreagan@idahowaters.com>; MID <MID@pmt.org>; Dan Davidson <dan.mid@pmt.org>; AFRD2 <janesabala@cableone.net>; David Stephenson <davidstephenson@cableone.net>; Ellis Gooch <goochfarms@live.com>

> Subject: Funk Water Rights 35-14240 et al.
>
> Director Spackman,
>
> Please see attached letter and enclosures.
>
> Thanks.
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