



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

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PO Box 50130
Idaho Falls, Idaho 83405

RECEIVED

MAR 27 2017

Department of Water Resources
Eastern Region

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March 23, 2017

VIA EMAIL and U.S. MAIL

James Cefalo
Hearing Officer
Idaho Department of Water Resources
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

**RE: Documentation Explaining Source of Mitigation Water for Water Right Permit
Nos. 35-14240, 35-14241, 35-14242, and 35-14243 for 2017 Irrigation Season
Only.**

Hearing Officer Cefalo:

Enclosed with this letter is a completed *Agreement for Lease of Water Rights* executed between the Power County Idaho Board of County Commissioners and Lance and Lisa Funk. As you know, the source of mitigation to the above-referenced permits are Water Right Nos. 35-14014 and 35-14015. Power County recently approved a bond to purchase these water rights from Magnolia Nitrogen Idaho, LLC, and the bonding process was recently completed. With the purchase of the water rights completed, and title to these water rights now in the name of Power County, Power County has decided to lease the water rights to Lance and Lisa Funk for the 2017 irrigation season only while they continue to explore options for the utilization of Water Right Nos. 35-14014 and 35-14015 in the future. Please note that the entirety of the water rights have been leased including 80 AF of water that was previously retained by Magnolia for testing on its property.

Accordingly, because the source of mitigation for the above-referenced permits is the same, despite the recent change in ownership, the *Agreement for Lease of Water Rights* enclosed herewith is evidence that sufficient mitigation has been obtained by the Funks consistent with the conditions of the above-referenced permits, which require the permit holder to maintain the legal right to use these water rights. Because the Funks have maintained the legal right to use these water rights, the permits will be exercised in 2017 as they have been historically.

Please note that it is unclear if the County will lease Water Right Nos. 35-14014 and 35-14015 to the Funks for future irrigation seasons. Therefore, we request that no action be taken on the licensing of the above-referenced permits until we know more at the end of this irrigation season.

Established in 1896

James Cefalo
March 23, 2017
Page 2 of 2

We appreciate your attention to this matter. If you have any questions or concerns, please let me know.

Best Regards,



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

Enclosures

cc: Randy Budge (via email and U.S. Mail)
Paul Arrington (via email and U.S. Mail)
John Simpson (via email and U.S. Mail)
Kent Fletcher (via email and U.S. Mail)

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RECEIVED

MAR 27 2017

Department of Water Resources
Eastern Region

AGREEMENT FOR LEASE OF WATER RIGHTS

THIS AGREEMENT FOR LEASE OF WATER RIGHTS (this "Agreement") is made and entered into this 20 day of March, 2017, by and between the **Power County Idaho Board of County Commissioners**, a political subdivision of the State of Idaho, whose address is 543 Bannock Ave., American Falls, ID 83211 (hereinafter "County"), and **Lance and Lisa Funk**, husband and wife, whose address is 2960 Cedar Ln., American Falls, Idaho 83211 (hereinafter "Funk"). The County and Funk are individually a "Party" and together the "Parties".

RECITALS:

A. On November 8, 2016, residents of Power County voted on whether to approve procurement of a bond in the amount of Eight Million Dollars (\$8,000,000.00)¹ to finance the purchase of Water Right Nos. 35-14014 and 35-14015 (the "Water Rights"), which are currently owned by Magnolia Nitrogen Idaho LLC. The bond election passed as Power County residents voted in favor of obtaining a bond to purchase the Water Rights.

B. The Water Rights are currently being utilized as part of a mitigation plan associated with four water right permits denoted as permit nos. 35-14240, 35-14241, 35-14242, and 35-14243 (the "Permits") owned by Funk. The Permits authorize the irrigation of 1316.3 acres of property located in Power County.

C. The Parties desire to utilize the Water Rights to continue to provide mitigation for the Permits for the 2017 irrigation season in order to provide the County with lease revenue, allow the County to evaluate options for use of the Water Rights for 2018 and beyond, and allow Funk time to seek and obtain other mitigation supplies for the Permits.

IN CONSIDERATION of the mutual representations, warranties, and covenants contained herein, the Parties, intending to be legally bound hereby, agree as follows:

AGREEMENTS:

1. Bond Finalization Contingency. The Parties acknowledge that this Agreement is subject to the finalization of the purchase of the Water Rights as a result of the November 8, 2016 bond election. If the bond is not finalized for any reason such that the County does not obtain title to the Water Rights on or before April 1, 2017, this Agreement shall be null and void

¹ The total purchase price is Ten Million Dollars (\$10,000,000.00), but the County has indicated that Two Million Dollars (\$2,000,000.00) will come from existing funds. See <http://www.co.power.id.us/water/> (visited October 28, 2016).

and of no further effect, and the Parties shall be relieved of performance of any further obligations hereunder.

2. Definitive Agreement for Lease of Water Rights. Provided that the contingency in Paragraph 1 is satisfied, upon full execution, this Agreement will be a binding agreement between the Parties for the lease of the Water Rights on the terms, conditions, and provisions set forth in this Agreement. The Parties hereby agree that they will work with each other in good faith to resolve any and all issues that may arise in order to complete the intended overall objectives of this Agreement. Funk will undertake all prudent and necessary actions to use, preserve, and protect the Water Rights leased under this Agreement for the term of the Agreement.

3. Leased Property. The Water Rights shall be leased to Funk. No other property rights of the County shall be leased to Funk under this Agreement.

4. Initial Term.

(a) Term Length. The term of this Agreement shall be for ten (10) months, commencing on January 1, 2017, and ending on October 31, 2017, for water to be used under the Water Rights by Funk during the 2017 irrigation season.

(b) Rental Price. The rental price for the Water Rights shall be:

(c) Payment Due Date. The rental price shall be paid in one installment due on or before March 15, 2017. In the event the rental price is paid by Funk, and the County is subsequently unable to obtain title to the Water Rights on or before April 1, 2017, the County shall return the rental payment to Funk by April 15, 2017.

5. Non-Use of Water Rights by County. The County covenants and agrees that it will not divert or utilize the Water Rights during the term of this Agreement. The County may not sell the Water Rights while the Water Rights are leased pursuant to the terms of this Agreement, unless such sale is subject to this Agreement.

6. Default. In the event either party breaches this Agreement and such defaults are not cured within thirty (30) days after receipt of written notice thereof, the non-breaching party, at their option, may elect to terminate this Agreement and recover any damages or pursue any other remedy under Idaho law by reason of such breach. In addition to either Party's failure to perform any material term or condition of this Agreement or a Party's breach of any of such Party's representations or warranties (in which event the non-defaulting party may pursue any available remedy, including equitable relief), either Party shall be deemed in default hereof if it files a petition in bankruptcy or is adjudicated bankrupt or insolvent.

7. Miscellaneous.

- (a) Attorneys' Fees. If either party commences any legal action or proceeding to enforce any of the terms of this Agreement (or for damages by reason of an alleged breach hereof), the prevailing party therein shall be entitled to recover from the other, in addition to any other relief granted, its reasonable attorney's fees, costs and expenses incidental to such legal action.
- (b) Notices. Any notice under this Agreement shall be in writing and be delivered in person, by U.S. Mail, by private courier, or by facsimile. Notice shall be provided to the following:

County

Power County Idaho Board of
County Commissioners
543 Bannock Ave.
American Falls, ID 83211

Funk

Lance and Lisa Funk
2960 Cedar Ln.
American Falls, ID 83211
(208) 201-1500

County's Representative

Douglas Balfour
Douglas J. Balfour Chtd.
P.O. Box 490
Pocatello, ID 83204-0490

Funk's Representative

Robert L. Harris
Holden, Kidwell, Hahn & Crapo,
P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, ID 83405
(208) 523-0620

- (c) Merger. This Agreement supersedes any and all other written or verbal agreements between the Parties hereto regarding the Water Rights. Neither Funk nor the County shall be bound by any understanding, agreement, promise, representation or stipulation, express or implied, not specifically contained herein.
- (d) Remedies Cumulative. Upon any breach, any and all rights and remedies which either Party may have under this Agreement or by operation of law or equity, shall be distinct, separate and cumulative and shall not be deemed inconsistent with each other. No such right or remedy, whether exercised by said Party or not, shall be deemed to be in exclusion of any other right or remedy, any two or more of all such rights and remedies may be exercised at the same time or separately as desired.
- (e) Further Documents. 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.

- (f) Enforceability. The validity or enforceability 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.
- (g) Counterparts. This 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.
- (h) Governing Law. This Agreement shall be governed by the laws of the State of Idaho.
- (i) Successors. This Agreement is for the benefit only of the Parties hereto and shall inure to the benefit of and bind their respective heirs, agents, personal representatives, successors and assigns.

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement effective on the date set forth above.

"County"

POWER COUNTY BOARD OF COUNTY
COMMISSIONERS, a political subdivision of
the State of Idaho

By: _____

Ron Funk

ATTEST

Sharee Sprague

"FUNK"

Lance Funk

Lisa Funk

Exhibit 1 Water Rights Reports

2/22/2017

Water Right Report

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

2/22/2017

WATER RIGHT NO. 35-14014

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	MAGNOLIA NITROGEN IDAHO LLC MAGNOLIA ENERGY HOLDINGS 410 PARK AVE STE 830 NEW YORK, NY 10022
Original Owner	FMC IDAHO LLC C/O RICHARD PASQUIER 1735 MARKET ST PHILADELPHIA, PA 19103 (215)299-6347
Security Interest	KELLOGG BROWN & ROOT LLC 601 JEFFERSON ST HOUSTON, TX 77002 (713)753-3496

Priority Date: 03/02/1949
Basis: Decreed
Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
INDUSTRIAL	01/01	12/31	0.06 CFS	42.4 AFA
MITIGATION BY NON-USE	01/01	12/31	4.44 CFS	3215.5 AFA
Total Diversion			4.5 CFS	

Location of Point(s) of Diversion:

GROUND WATER NWNE Sec. 02 Township 08S Range 30E POWER County
GROUND WATER NWNE Sec. 02 Township 08S Range 30E POWER County

<http://www.idwr.idaho.gov/apps/ExtSearch/RightReportAJ.asp?BaseNumber=35&SequenceNumber=14014&SplitQulity=%20%20&TypeWaterRight=Trust>

1/3

Place(s) of use: No POUs found for this right

Conditions of Approval:

1. 082 Prior to the diversion and use of water under this approval, the right holder shall comply with applicable county zoning and use ordinances.
2. 004 This right does not grant any right-of-way or easement across the land of another.
3. 212 Prior to diversion and use of water under Transfer approval 75147, the right holder shall install and maintain acceptable measuring device(s) at the authorized point(s) of diversion, in accordance with Department specifications.
4. Industrial use is for a Coal/Fertilizer Gasification Plant.
Use of water under this right will be regulated by a watermaster with responsibility for the distribution
5. R05 of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 120.
Water right 35-14014 (29-2284) was leased to the Water Supply Bank on April 15, 2005. In accordance with the water supply bank lease acceptance, the lessor may not use the right while it is in the bank, even if the right is not rented from the bank. The right will remain in the bank indefinitely unless released earlier by the Water Resource Board, or upon request by the lessor. To change the term of the lease or to release the right(s) from the bank, the lessor must submit a request in writing to the department.
6. Upon specific notification of the Department, the right holder shall install and maintain data loggers to record water usage information at the authorized point(s) of diversion in accordance with Department specifications.
7. 213 A lockable device subject to the approval of the Department shall be maintained on the diverting works in a manner that will provide the watermaster suitable control of the diversion.
8. R02 Rights 35-14014 (29-2284) and 35-14015 (29-2301) when combined shall not exceed a total diversion rate of 8.50 cfs, a total annual maximum diversion volume of 5070 af.
9. X35 Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture.
10. 106 Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
11. 046 The approval of this transfer redefines all of the elements of this water right, and the new use of water authorized by this approval shall constitute the full extent of the right.
12. 205 The following rights are diverted through point(s) of diversion described above: 35-14014 (29-2284), 35-14015 (29-2301)
13. F06 Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
14. T08 Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.
15. T19 The right holder shall accomplish the change authorized by this transfer within one year(s) of the date of this approval.
16. T07

Dates:

Licensed Date:

2/22/2017

Water Right Report

Decreed Date: 03/22/2004
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number: 120
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit:
Combined Volume Limit: 5070
Combined Rate Limit: 8.5
Civil Case Number:
Old Case Number:
Decree Plaintiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False
Close

2/22/2017

Water Right Report

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

2/22/2017

WATER RIGHT NO. 35-14015

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	MAGNOLIA NITROGEN IDAHO LLC MAGNOLIA ENERGY HOLDINGS 410 PARK AVE STE 830 NEW YORK, NY 10022
Original Owner	FMC IDAHO LLC C/O RICHARD PASQUIER 1735 MARKET ST PHILADELPHIA, PA 19103 (215)299-6347
Security Interest	KELLOGG BROWN & ROOT LLC 601 JEFFERSON ST HOUSTON, TX 77002 (713)753-3496

Priority Date: 04/24/1951
Basis: Decreed
Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
INDUSTRIAL	01/01	12/31	0.05 CFS	37.6 AFA
MITIGATION BY NON-USE	01/01	12/31	3.95 CFS	2858.3 AFA
Total Diversion			4 CFS	

Location of Point(s) of Diversion:

GROUND WATER NWNE Sec. 02 Township 08S Range 30E POWER County
GROUND WATER NWNE Sec. 02 Township 08S Range 30E POWER County

<http://www.idwr.idaho.gov/apps/ExtSearch/RightReportAJ.asp?BmInNumber=35&SequenceNumber=14015&SplitSuffix=%20%20&TypeWaterRightsTrue>

1/3

Place(s) of use: No POUs found for this right

Conditions of Approval:

1. T08 Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
2. 106 Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture.
3. R05 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.
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15. T19 The right holder shall accomplish the change authorized by this transfer within one year(s) of the date of this approval.
16. T07

Dates:

Licensed Date:

<http://www.idwr.idaho.gov/apps/ExtSearch/RightReportAJ.asp?BasicNumber=35&SequenceNumber=14015&SplitSuffix=%20%20&TypeWaterRight=True>

2/2

2/22/2017

Water Right Report

Decreed Date: 03/22/2004
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number: 120
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit:
Combined Volume Limit: 5070
Combined Rate Limit: 8.5
Civil Case Number:
Old Case Number:
Decree Plaintiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False
Close

<http://www.idwr.idaho.gov/apps/ExtSearch/RightReportAJ.asp?BasinNumber=35&SequenceNumber=14015&SplitSuffix=%20%20&TypeWaterRight=True>

2/5