



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

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DEC 03 2014

Department of Water Resources
Eastern Region

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December 1, 2014

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

RE: *Written Report Describing Source of Mitigation Water for Anticipated Permit Nos. 35-14240, 35-14241, 35-14242, and 35-14243, Consistent with Condition 2(c)(i) of Stipulated Permit Conditions.*

Hearing Officer Cefalo:

Contemporaneous with this letter, we have submitted three *Stipulations for Withdrawal of Protest* regarding the above referenced applications. As it turns out, December 1st is also the date required under one of the agreed-to conditions for the applicant to submit a written report describing the source of mitigation for the following year's irrigation season. While technically this provision is not operative yet because the permits have not been issued, we anticipate that they will be issued soon and therefore, this report is submitted to comply with the stipulation.

For 2015, Funk will utilize Water Right Nos. 35-14014 and 35-14015 as described in the stipulations. While we have previously submitted this to the Department, for ease of reference, we are again including a redacted copy of the *Agreement for Lease of Water Rights* for the Magnida water rights. As described, these water rights have been leased to Funk for 2015 and potentially beyond.

Concerning any technical analysis of these rights for use to mitigate for the above-referenced applications, we previously submitted a series of model runs attached to the *Affidavit of Greg Sullivan* in the summer of 2014 in conjunction with briefing submitted on the legal question posed on the use of non-permanent mitigation. With this information, the Department, the Surface Water Coalition, and IGWA have been notified of the rights we have identified for mitigation of the Funk permits.

If you have any questions or concerns, please let me know.

Established in 1896

James Cefalo
December 1, 2014
Page 2 of 2

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)

G:\WPDATA\RLH\16919 Lance Funk Farms\01\2014-12-01, Cefalo 2.docx

AGREEMENT FOR LEASE OF WATER RIGHTS

THIS AGREEMENT FOR LEASE OF WATER RIGHTS (this "Agreement") is made and entered into this 6th day of February, 2014, by and between Magnolia Nitrogen Idaho LLC d/b/a Magnida, an Idaho limited liability company, whose address is c/o Magnolia Energy Holdings, 410 Park Avenue, Suite 830, New York NY 10022 (hereinafter "Magnida"), and Lance and Lisa Funk, husband and wife, whose address is 2960 Cedar Ln., American Falls, Idaho 83211 (hereinafter "Funk"). Magnida and Funk are individually a "Party" and together the "Parties".

RECITALS:

A. This Agreement supersedes and replaces the prior agreement entered into between the Parties for lease of the Water Rights, as that term is defined below, such that the prior agreement is no longer of any further force or effect.

B. Magnida owns Water Right Nos. 35-14014 and 35-14015 (the "Water Rights")¹ In 2012 Funk agreed to lease the Water Rights from the previous owners, Southeast Idaho Energy, LLC,² for the 2012 and 2013 irrigation seasons. The Water Rights were utilized through the Idaho Water Supply Bank. Funk now desires to lease the Water Rights to be used as mitigation in conjunction with new applications for water right permit, which have been numbered as permit nos. 35-14240, 35-14241, 35-14242, 35-14243, 35-14244 (hereinafter, the "Water Right Applications"). The Water Right Applications seek new irrigation water rights for the irrigation of 1,879.3 acres.

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

AGREEMENTS:

1. Definitive Agreement for Lease of Water Rights. This Agreement is a binding agreement between the Parties for the lease of the Water Rights described herein on the terms, conditions and provisions set forth in this Agreement.

2. Leased Property and Retention of 80 acre-feet. The Water Rights, less eighty (80) acre-feet, shall be leased to Funk. The eighty (80) acre-feet shall be retained by Magnida as a

¹ The owner of the Water Rights has not yet been updated to Magnida on the records of the Idaho Department of Water Resources.

² On January 10, 2013, the Idaho Secretary of State approved a name change of the entity Southeast Idaho Energy LLC to Magnolia Nitrogen Idaho LLC.

precaution to ensure that Magnida has sufficient water available at its project site for future pump tests, dust abatement, and other uses that may be required during the construction and development of the Magnida facility. The Water Rights, less eighty (80) acre-feet, are referred to herein as the "Leased Property".

3. Initial Term.

- (a) Term Length. Subject to the automatic renewal provisions of Paragraph 4 below, the term of this Agreement shall be for an initial term of two (2) years, commencing on January 1, 2014, and ending on December 31, 2015, for water to be used during the 2014 and 2015 irrigation seasons.
- (b) Rental Price. The rental price for the Leased Property shall be [REDACTED] per year for the initial term no matter what use Funk makes of the Water Rights (i.e., use in the Idaho Water Supply Bank or for mitigation for the Water Right Applications).
- (c) Payment Due Dates. For each year of the initial term, the annual amount due shall be paid in two equal payments of [REDACTED] on or before April 15, 2014 and November 15, 2014, as well on or before April 15, 2015 and November 15, 2015.
- (d) Right to Terminate Lease Upon Expiration of Initial Term. This Agreement may be terminated by either party—effective upon expiration of the initial term—by providing notice of intent to terminate on or prior to August 15, 2015.

4. Automatic Extended One-Year Term(s).

- (a) Automatic One-year Term Extensions. If this Agreement is not terminated as described in Paragraph 3(d), then subject to the provisions of this Paragraph 4, it shall automatically extend in increments of one year at a time until it is terminated pursuant to Paragraph 4(d) below.
- (b) Extended Term Rental Prices. For each extended one-year term, the rental price shall be determined by [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- (1) Example. By way of example, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

jm
LF.

- (c) Payment Due Dates. The annual amount due shall be paid in two equal payments on or before April 15th and November 15th of each year. Payment shall be made by either cashier's check or wire transfer completed by the dates identified herein.
- (d) Right to Terminate Agreement Upon Expiration of Extended Term. If the term of the Agreement is extended pursuant to Paragraph 4(a), it may thereafter be terminated by either party—effective upon expiration of the extended one-year term—by providing notice of intent to terminate on or prior to August 15th of the lease year. If such notice is given, the Agreement shall terminate on December 31st of the extended lease year. If notice is not given by August 15th of the lease year, the Agreement will automatically extend for another year.

5. Additional Payment for 2012 and 2013 Idaho Water Supply Bank Rentals. Use of the Water Rights through the Idaho Water Supply Bank was not clearly addressed in the prior agreement. To resolve any dispute over that issue, within seven (7) days of the execution of this Agreement, Funk shall pay [REDACTED] to Magnida for use of the Water Rights in 2012 and 2013. This amount does not include the amounts already paid by Funk to Magnida through the Idaho Water Supply Bank.

6. Non-Use of Water Rights by Magnida. Magnida covenants and agrees that it will not divert or utilize the Water Rights in excess of the eighty (80) acre-feet retained by it as provided in this Agreement. Magnida 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.

7. 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.

8. 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:

JP
LF

Magnida

Magnolia Nitrogen Idaho LLC
410 Park Avenue Suite 830
New York, NY 10022

Funk

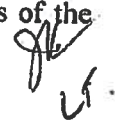
Lance and Lisa Funk
2960 Cedar Ln.
American Falls, ID 83211
(208) 201-1500

Magnida's Representative

John K. Simpson
Barker Rosholt & Simpson, LLP
1010 W. Jefferson St., Ste. 102
Boise, ID 83702
(208) 336-0700

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 Magnida 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.

"Magnida"

MAGNOLIA NITROGEN IDAHO LLC

By: 
RIC SORBO, Managing Member 

"FUNK"


Lance Funk

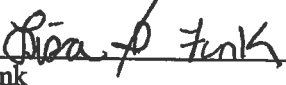

Lisa Funk

Exhibit 1
Water Rights Reports

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

2/10/2014

WATER RIGHT NO. 35-14014

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	SOUTHEAST IDAHO ENERGY LLC PO BOX 409 SOUTH SALEM, NY 10590-0409 (410)340-9441
Original Owner	FMC IDAHO LLC PO BOX 4111 POCATELLO, ID 83205 (208)236-8236

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	4.5 CFS	3257.9 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

Place(s) of use:

Place of Use Legal Description: INDUSTRIAL POWER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
07S	30E	35		SWSE			SESE							
		36		SWSW			SESW							
08S		1		NENW			NWNW			SWNW			SENW	
		2		NENE			NWNE			SWNE			SENE	
				NESE			NWSE			SWSE				

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.
5. 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.
6. 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.
7. 213 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.
8. R02 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.
9. X35 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.
10. 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.
11. 046 Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
12. 205 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.

13. F06 The following rights are diverted through point(s) of diversion described above: 35-14014 (29-2284), 35-14015 (29-2301)
14. 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.
15. T19 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.
16. T07 The right holder shall accomplish the change authorized by this transfer within one year(s) of the date of this approval.

Dates:

Licensed Date:

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

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

2/10/2014

WATER RIGHT NO. 35-14015

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	SOUTHEAST IDAHO ENERGY LLC PO BOX 409 SOUTH SALEM, NY 10590-0409 (410)340-9441
Original Owner	FMC IDAHO LLC PO BOX 4111 POCATELLO, ID 83205 (208)236-8236

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	4 CFS	2895.9 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

Place(s) of use:

Place of Use Legal Description: INDUSTRIAL POWER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
07S	30E	35		SWSE			SESE							
		36		SWSW			SESW							
08S		1		NENW			NWNW			SWNW			SENW	
		2		NENE			NWNE			SWNE			SENE	
				NESE			NWSE			SWSE				

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12. X35

- Rights 35-14014 (29-2284) and 35-14015 (29-2301) when combined shall not exceed a total diversion rate of 8.5 cfs, a total annual maximum diversion volume of 5070 af.
- 13.205 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.
- 14.004 This right does not grant any right-of-way or easement across the land of another.
- 15.T19 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.
- 16.T07 The right holder shall accomplish the change authorized by this transfer within one year(s) of the date of this approval.

Dates:

Licensed Date:

Decreed Date: 03/22/2004

Enlargement Use Priority Date:

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Application Received Date:

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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