

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS)	
FOR PERMIT NO. 35-14240 THRU)	INTERLOCUTORY ORDER
35-14244 IN THE NAME OF LANCE)	ADDRESSING LEGAL QUESTION
<u>AND/OR LISA FUNK PARTNERSHIP)</u>	

On March 14, 2012, the Lance and/or Lisa Funk Partnership (“Funk”) filed five applications for permit (35-14240 thru 35-14244) with the Idaho Department of Water Resources (“Department”), seeking permits to divert ground water for irrigation. The applications stated that the consumptive portion of the permits would be mitigated by holding existing water rights 35-14014 and 35-14015 unused. At the time the applications were filed, the water rights were owned by Southern Idaho Energy. Since that time, the rights have been sold to Magnolia Nitrogen Idaho LLC (“Magnida”).

The applications were advertised in April 2012 and protests were filed by Idaho Power Company, represented by John Simpson of Barker Rosholt & Simpson, Burley Irrigation District, A&B Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company, represented by Paul Arrington of Barker Rosholt & Simpson, Minidoka Irrigation District, represented by Kent Fletcher of Fletcher Law Office, and the Idaho Ground Water Appropriators Inc., represented by Randy Budge of Racine Olson Nye Budge & Bailey.

In February 2014, Funk and Magnida signed an Agreement for Lease of Water Rights. The agreement allowed Funk to hold water rights 35-14014 and 35-14015 unused for mitigation purposes for an initial term of 2 years (2014 and 2015). The agreement also included a provision that the lease would automatically extend in one-year increments until terminated by either party. Notice of termination must be provided on or before August 15th. Otherwise, the lease agreement will automatically extend to cover the subsequent irrigation season.

Protestants Burley Irrigation District, A&B Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company and Minidoka Irrigation District (“the Coalition”) raised a concern that the two-year lease agreement between Magnida and Funk should not be the basis of a proposed mitigation plan. The parties asked the hearing officer to allow legal briefing to address the question of whether short-term lease agreements can be used in mitigation plans. The parties asked the hearing officer to issue a decision on this question before conducting an administrative hearing.

On May 20, 2014, the hearing officer issued an Order Setting Deadlines for Legal Briefing. The order asked the parties to brief the following question: **Do the Idaho Code, the Department’s Water Appropriation Rules (IDAPA 37.03.08), and other rules and orders of the Department allow for the issuance of permits with mitigation plans which are based on short-term or temporary lease agreements?**

This order only addresses the specific question identified above. This order does not attempt to determine whether the mitigation plan proposed by Funk sufficiently mitigates for injury to senior water right holders. This order does not attempt to determine whether Funk has met its burden of proof for the elements listed in Idaho Code § 42-203A(5). These items are fact-dependent and should be addressed in an administrative hearing.

RELEVANT STATUTES, RULES, ORDERS, AND OTHER DOCUMENTS

Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the [Department] may reject such application and refuse issuance of a permit therefor

Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria used to determine whether a proposed use will reduce the quantity of water under existing water rights. Such a reduction exists if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.
- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or
- iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.

Rule 45.01.a also states: "An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director." (IDAPA 37.03.08.45.01.a.iv, emphasis added)

On April 30, 1993, the Department issued an Amended Moratorium Order (“1993 Moratorium”) which restricted the processing and approval of applications within the trust water area. The points of diversion described in Applications 35-14240 thru 35-14244 are located within the trust water area. The 1993 Moratorium allows certain applications to be processed and approved on a case-by-case basis if “[t]he Director determines that the development and use of the water . . . will have no effect on prior surface and ground water rights because of . . . mitigation provided by the applicant to offset injury to other rights.” (1993 Moratorium, page 5)

Although the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) (“Conjunctive Management Rules”) do not pertain to the review of applications for permit, they do include a useful definition for the term “mitigation plan”:

Mitigation Plan. A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director . . . that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights (IDAPA 37.03.11.10.15)

The Conjunctive Management Rules also include a section outlining factors that may be considered by the Director when determining whether a proposed mitigation plan will prevent injury to senior water rights. The factors which are relevant to this order are as follows:

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. . . . The mitigation plan must include contingency provisions to assure protection of the senior priority right in the event the mitigation water source becomes unavailable.

...

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (IDAPA 37.03.11.43.03)

On May 3, 2010, Jeff Peppersack, the Department’s Water Allocation Bureau Chief, issued Application Processing Memo #72 (“Memo #72”) to “provide guidance to Department staff regarding the evaluation of mitigation plans submitted with an application for permit” (Memo #72, page 1) The relevant provisions from Memo #72 are as follows:

When the Department determines that the source of water is not sufficient to supply the proposed appropriation of water . . . and approval would result in injury to other water rights, the applicant may mitigate for the injury to avoid denial of the application by the Department. (Memo #72, page 2)

A mitigation plan must identify the source of water (including water rights) to be used for mitigation and must describe the quantity, method and location of delivery to ensure that compensation is adequate. The plan must include ownership documentation or authority to use the source of water and/or water rights. In addition, the mitigation plan must include information confirming the validity and historic use of any rights to be used for mitigation. (Memo #72, page 3, emphasis added)

Although rental of water rights from the Water Supply Bank could substitute for a transfer to provide mitigation, rental from the Bank is often a short-term transaction and could provide a source of mitigation water where mitigation is only required on a temporary basis (e.g. filling a pond). For applications seeking to appropriate water for development of subdivisions or other long-term uses with significant investment and reliance on the water supply, a short-term rental may not be used as a source of mitigation water without a long-term source of mitigation water being identified and ready to approve as a condition of a new permit. (Memo #72, page 3)

Storage Release - Purchase of storage water from a rental pool or other storage acquisition and release at the appropriate time to allow diversion and use of water from the same or connected surface water source under a new permit. . . . This method is only approvable if the storage supply is reliable and assured either by pre-purchase or through other accepted operation plans within a rental pool and if the mitigation water can be delivered at the time and to the location where depletion occurs. (Memo #72, page 4)

Evaluation of a mitigation plan by Department staff requires confirmation of the following: . . . Ownership or authority to use the mitigation source including water right(s) and consent from any water delivery entity for use of water and updates to water right records. . . . Transfer or rental agreement or purchase agreement for water/right as necessary. (Memo #72, page 5)

Approval conditions should refer to the mitigation plan, state any measuring, monitoring and reporting requirements, and explain the consequences for failure to comply with the plan. . . . In addition, approvals will be conditioned to require curtailment of the diversion and use of water anytime the mitigation requirements are not met. (Memo #72, page 6)

Failure of the holder of the right to implement and continuously comply with the requirements of an approved mitigation plan, while continuing to divert and use water, constitutes a violation subject to enforcement action under Sections 42-311, 350, 351, and/or 1701B, Idaho Code. Any approval must be conditioned that failure to mitigate as described by the plan of mitigation, while still diverting water under the permit, is cause for the director to cancel a water right permit or revoke a subsequently approved water right license. (Memo #72, page 6)

ANALYSIS

The documents cited above make it clear that the Director has broad discretion to determine whether a mitigation plan sufficiently protects senior water right holders from injury. Inclusive in that discretion is the authority to determine the types of arrangements or legal agreements which may be used to form the basis of mitigation plans.

The documents cited above do not require a mitigation source to be permanent. Except for instances where a mitigation water right is formally abandoned, mitigation plans are rarely permanent. The documents cited above also do not establish a minimum duration of agreement to make the agreement available for use in a mitigation plan.

Memo #72 contemplates that short-term rentals may be used in mitigation plans. For example, Memo #72 states that storage water purchased through a local rental pool may be used as mitigation for new appropriations from the same or a connected water source. These types of storage rentals are generally secured on a year-to-year basis.

Over the last twenty years, the Department has issued a number of permits which rely on the acquisition of storage water through the Water District 01 Rental Pool (or through Fremont Madison Irrigation District) to mitigate for the depletions resulting from the permits. (For examples of mitigation based on storage rentals, see water rights 1-7091, 1-7127, 1-7145, 1-10414, 1-10438, 21-12856, 21-12866, 23, 7180 and 23-11333.)

Rental pool mitigation plans are based on short term agreements. The permit holder's ownership interest in the storage water only exists in one-year increments. In some ways, annual rental pool agreements are more tenuous than the agreement submitted by Funk. A water user relying on an annual rental through the Water District 01 Rental Pool has no ownership interest in the storage prior to the rental and has no guarantee that any water will be available for rent from year to year. Drought cycles and constantly-shifting rental pool rules create a risk that the rental water will simply not be available.

Funk, on the other hand, has a continuing legal interest in the Magnida water rights. As long as the agreement is not terminated by Funk or Magnida prior to August 15th, the agreement automatically extends to the next irrigation season. This type of automatic renewal is more reliable than a promise to rent water through the rental pool, which requires positive action on behalf of the permit holder on an annual basis.

The Coalition points to a specific paragraph of Memo #72, which suggests that short-term arrangements should not be used to develop long-term water rights. It is understandable why certain water uses should not be based on short-term agreements. Water for residential or commercial use cannot be easily curtailed because of public health concerns. Once these types of water rights are established, there is an ongoing public reliance on the water being available.

Irrigation on the other hand, is easily curtailed with little risk to the public welfare. In fact, agricultural ground is often voluntarily fallowed as a result of federal subsidies, commodity prices, or availability of water. In this case, if the Funk-Magnida Agreement is terminated, Funk, Magnida and the Department will have nine months prior to the subsequent irrigation season to prepare for curtailment, if needed.

The Coalition raises a separate concern about the non-permanent nature of the Funk-Magnida Agreement. In general, very few mitigation plans are permanent. Mitigation water rights, which are not formally abandoned, are always subject to sale, transfer, or resumption of use. Often, the Department will add a condition to the diversion water right stating: “Water shall not be diverted under this right if the . . . mitigation rights are sold, transferred, leased or used on any place of use.” (See water right 36-15637) This condition specifically recognizes the non-permanence of mitigation arrangements.

To address the non-permanent nature of mitigation plans, the Department has developed another standard permit condition. Department records indicate that 67 water rights currently include Condition 170, which states:

To mitigate for the depletion of water resulting from the use of water under this right 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 record for the following water right will be changed to show that diversion and use of water is not authorized because the rights, or portion thereof, are being dedicated to mitigation purposes.

Right No.	Use Changed to Mitigation	Mitigation Rate (cfs)	Mitigation Volume (AF)	Mitigation Acres
_____	_____	_____	_____	_____

The land that will no longer be irrigated under this right is located within the _____, Section _____, Township _____, Range _____, B.M.

If the specified mitigation right, or portion thereof, is sold, transferred, leased, used on any place of use, or is not deliverable due to a shortage of water or a priority call, 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.

If the Funk permits are ultimately approved, Condition 170 in combination with attentive regulation by the Department and Water District 120 staff will be sufficient to address the temporary nature of the Funk-Magnida Agreement. In the event that the agreement is terminated and a new mitigation plan is not approved, the proposed diversions could be immediately curtailed and the permit or subsequent license may be cancelled or revoked pursuant to Idaho Code § 42-311 or § 42-350.

The briefs filed by the Coalition and by Funk included arguments relating to the sufficiency of the mitigation plan to offset impacts. This is a fact-dependent issue that can only be addressed through an administrative hearing. The Coalition specifically argues that the lease agreement between Funk and Magnida is not sufficient to offset delayed impacts caused by ground water diversions. This, too, is a fact-dependent issue that must be addressed in a hearing.

The Coalition also raised arguments relating to speculation. This order only addresses the question of whether short-term lease agreements can form the basis of a mitigation plan. Funk will bear the burden of addressing all of the elements of Idaho Code § 42-203A(5) in an administrative hearing.

ORDER

IT IS HEREBY ORDERED that the lease agreement between Funk and Magnida may form the basis of a proposed mitigation plan. There are no provisions in statute or rule that prohibit the use of short-term lease agreements in mitigation plans. The Department has approved permits with mitigation plans based on short-term agreements, including year-to-year rentals from the Water District 01 Rental Pool. The applications for permit and the proposed mitigation plan should be evaluated on their merits.

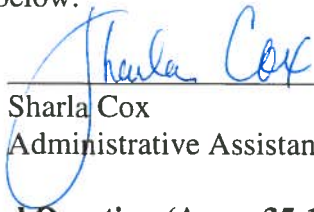
This interlocutory order is issued pursuant to Rule 710 of the Department's Rules of Procedure (IDAPA 37.01.01). The parties have agreed to reserve any petitions, exceptions or appeals relating to this order to be included with any other petitions, exceptions or appeals filed in response to the preliminary order issued by the Department either approving or denying the subject applications.

Dated this 14th day of July, 2014.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of July 2014, I mailed a true and correct copy, postage prepaid, of the foregoing INTERLOCUTORY ORDER ADDRESSING LEGAL QUESTION to the person(s) listed below:


Sharla Cox
Administrative Assistant

RE: Interlocutory Order Addressing Legal Question (Apps. 35-14240 thru 35-14244)

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