

Robert L. Harris, Esq. (ISB #7018)
rharris@holdenlegal.com
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

*Attorneys for the Applicant Lance and/or Lisa Funk Partnership and
Petitioner Upper Snake Mitigation Solutions, LLC*

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 35-14243 TO APPROPRIATE
WATER IN THE NAME OF LANCE
AND/OR LISA FUNK PARTNERSHIP

**USMS MITIGATION PLAN
(2012-1-L.Funk-2)**

Lance and/or Lisa Funk Partnership (the “Applicant”) by and through its counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, hereby submits this *USMS Mitigation Plan (2012-1-L.Funk-2)* (the “Plan”) to the Director of the Idaho Department of Water Resources (“Director” or “IDWR”).

The Plan is submitted in conjunction with an *Application for Permit* in the name of the Applicant filed contemporaneously herewith (the “Water Right”).¹ The Applicant requests that IDWR review and approve the Plan in accordance with Idaho Code § 42-203A, IDAPA 37.03.08 (IDWR’s Water Appropriation Rules), and the provisions of the *Amended Moratorium Order* (In the Matter of Applications for Permits for the Diversion and use of Surface and Ground Water Within the Eastern Snake Plain Area and the Boise River Drainage Area), dated April 30, 1993 (the “Moratorium”).

¹ We recognize that an application for permit is not a water right until it has been approved in accordance with Idaho law. However, for purposes of this Plan, the application for permit submitted with this Plan will be referred to as the “Water Right” to underscore that the goal of the Plan is to mitigate for an approved permit and ultimately for a perfected and licensed water right.

RECEIVED

FEB 07 2013

Department of Water Resources
Eastern Region

Preliminary Plan Details

The following preliminary information is provided in support of the Plan:

1. The names and mailing addresses of the persons and entities responsible for the Plan are:

Water Right Applicant:

Lance and/or Lisa Funk Partnership
2960 Cedar Lane
American Falls, Idaho 83211

Plan Manager:

Upper Snake Mitigation Solutions, LLC
1645 Woodruff Park
Idaho Falls, Idaho 83401

Attorney:

Robert L. Harris, Esq. (ISB #7018)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, Idaho 83405

2. The Applicant seeks a new appropriation of water from the Eastern Snake Plain Aquifer (“ESPA”) under the Water Right. Pursuant to paragraph 9(b) of the Moratorium, this Plan seeks to (1) provide replacement water through managed ground water recharge for mitigation of impacts from the diversion of water under the Water Right, and/or (2) direct delivery of storage water to affected reaches of the Snake River. The mitigation activities proposed under this Plan will protect senior ground water right holders who divert ground water from the ESPA and any senior surface water right holders who divert surface water from sources that are hydraulically-connected to the ESPA and are administered by a state water district watermaster appointed by the Director. According to ESPA Model Version 1.1, pumping from the ESPA at the location proposed by the Applicant can affect the water sources relied upon by senior water right holders entitled to protection of such supplies under Idaho law.

3. It is the desire and intent of the Applicant, through this Plan, to have a reliable, permanent, and ongoing mitigation plan in place that can be implemented on a year-to-year basis to allow for the diversion of water for irrigation purposes under the Water Right.

4. It is anticipated that the elements of the Water Right will be as follows:

Source of Supply:	Ground water
Point of Diversion:	Twp. 7S, Rge. 29E, Sec. 5, NWNE
Purpose of Use:	Irrigation
Period of Use:	4/1 to 10/31
Quantity:	11.3 c.f.s. and/or 2252 acre-feet per year
Place of Use:	563 acres in Twp. 6S, Rge. 29E, Sec. 28, SE; Sec. 33, E1/2NE, NESE; Sec 34, W1/2NW, NWSW; Twp. 7S, Rge. 29E, Sec. 4, E1/2

The elements of the Water Right set forth herein are as they appear on the application for permit for the Water Right submitted contemporaneous with this Plan. However, the Applicant recognizes that one or more of the elements may be subsequently changed through amendment of the application or eventual issuance of a water right permit and/or license by IDWR, and are therefore set forth for information purposes only. It is further recognized that the governing document establishing the elements of the Water Right at any point in time is the most current version of the application for permit, permit, or license for the Water Right. For purposes of this Plan, these documents are incorporated herein by reference to the extent that they exist or come into existence.

5. The proposed mitigation water supply under this Plan will consist of Snake River natural flow water rights and storage water accrued to storage space holders in the Upper Snake River Reservoir System. These water supplies will be made available through commitments received from water-provider participants who hold rights to such supplies. The amount of mitigation water required to be provided under this Plan may vary from year to year based upon past and proposed water usage under the Water Right and the amount of mitigation water provided in prior years. Required information regarding the specific water rights which are proposed to supply mitigation water, the validity and sufficiency of the rights, and authorization to utilize water diverted under the rights is proposed to be provided as set forth below under the "Plan Description."

6. Quantification of recharge credits will be performed using the current Eastern Snake Plain Aquifer Model based upon a superposition rendition similar to IDWR's ESPAM 1.1

Enhanced Ground-Water Rights Transfer Spreadsheet. The recharged volumes will be quantified according to the model cells in which they occur.

7. Upper Snake Mitigation Solutions, LLC (“USMS”) will account for all recharge credit using the current Eastern Snake Plain Aquifer Model based upon a superposition rendition similar to IDWR’s ESPAM 1.1 Enhanced. It is proposed that once the recharge credit is recognized and recorded by IDWR, the credits will not be modified due to the subsequent adoption of a new or revised version of the model. Likewise, all mitigation requirements will be accounted for using the numerical superposition version of the ESPA model current at the time of withdrawal, and once recorded, will remain unchanged. The “current version” of the ESPA model means the version of the Eastern Snake Plain Aquifer Model being used by IDWR to perform water right transfer analysis at the time USMS provides certification for the current year’s recharge and other mitigation.

8. The results of recharge will be described in terms of when and where the water supply effect is modeled to appear. The credit for recharge, representing volumes of water, is directly comparable to the modeled depletionary effects of ground water pumping on interconnected surface water sources with respect to time, amount, and location.

9. Direct delivery of storage water to affected reaches will be administered in accordance with real time accounting by Water District 01 (“WD1”) that identifies a potential excess use during the irrigation season and end of year accounting that will actually define the amount of storage that was provide to the affected river reaches for mitigation.

10. The Applicant and USMS reserve the right to augment or modify this Plan as may be necessary to secure approval and to comply with other requirements that may be imposed by the Director. It is acknowledged that an application for transfer may be required by IDWR to process a change in the mitigation plan once the current Plan has been approved by the Director.

IDWR Oversight

11. The Applicant and USMS recognize that the exact amount of mitigation credit obtained from a specific mitigation activity that occurs under the Plan will be subject to analysis and calculation by the Director based upon the ESPA Model or other methodologies as determined by IDWR.

12. The Applicant and USMS recognize that mitigation of the type provided for under the Plan is required to obtain IDWR approval of most applications for permit to appropriate new ground water rights from the ESPA. The bases for the requirement are understood to be; 1) the Moratorium; 2) the need for compliance with the requirements of Idaho Code § 42-203A(5)(a), which precludes the approval of applications “that [] will reduce the quantity of water under existing water rights,” and 3) Water Appropriation Rule 40.05, which provides with respect to such applications: “Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights.” IDAPA 37.03.08.40.05.c.iii.

Plan Development

13. The Plan was prepared for the Applicant and other participating water users (the “Plan Participants”) by USMS. The Plan is intended to provide the information necessary to describe the operational techniques that will be employed on behalf of the Applicant and other Plan Participants in conjunction with their respective applications for permit to appropriate water in order to mitigate the impact on existing senior water rights as may be required by the Director pursuant to IDWR’s Water Appropriation Rules. *See* IDAPA 37.03.08.40.05.c.iii.

14. The Plan furthers a primary purpose of USMS, which is to pursue recharge of water to the Eastern Snake Plain Aquifer for mitigation and other purposes. Entities or persons comprising USMS include Idaho Water Engineering, LLC, Rocky Mountain Environmental Associates, Inc., Stan Clark, and Dean Mortimer.

15. USMS is responsible for the operational management of the recharge project, including (1) water measurement and accounting for the recharge project in coordination with WD1; (2) conducting aquifer modeling of recharge benefits; (3) developing, maintaining and utilizing a process for monitoring and tracking recharge credits; (4) developing and submitting to IDWR and Plan Participants an annual recharge and mitigation report; and (5) submitting such other documentation of the recharge activities to IDWR as may be required to verify compliance with the Plan as approved.

Plan Description

16. On or before March 1st of each year that use of the Water Right is anticipated, USMS will certify to IDWR that it has adequate mitigation water in place to cover 150% of all modeled current year depletions, not covered by existing credits, for up to 12 months of anticipated pumping under the Water Right. The provision of the additional 50% of available mitigation water is to ensure an adequate supply should unforeseen conditions reduce the quantity of water available under one or more of the acquired water supplies. The certification may include other water rights covered under the same or a similar mitigation plan to allow for pumping in the forthcoming irrigation season beginning on April 1st.

17. The USMS certification, submitted by March 1st of each year, will identify and document the portion of the required mitigation for the forthcoming year that is covered by existing credit from recharge that occurred in previous years and the portion that is to be covered by current-year recharge and/or direct delivery of storage water. For the current-year recharge and other mitigation, USMS will identify and provide copies of the agreements and documentation then in place to satisfy the following three necessary components:

- a. A water supply is secured through use of natural flow recharge water rights owned by USMS and/or water-provider participants, or through private lease using storage water owned by water-provider participants, or through rental of storage water from the WD1 Rental Pool, or through lease of natural flow water rights from the Idaho Water Resource Board's State Water Supply Bank, or through any combination of the foregoing;
- b. Agreements are in place to convey the water to the recharge locations; and
- c. Agreements are in place to authorize access to the recharge sites.

18. The volume of water required under the USMS certification will be calculated using authorized acreage and the IDWR standard consumptive-use rate per acre for irrigation rights, or the annual pumping volume requested by the water right holder for non-irrigation rights (not to exceed the volume authorized by the water-right).²

19. Each year upon receipt of the USMS certification, IDWR will provide timely notice to USMS prior to commencement of the irrigation season regarding the adequacy of the

² Irrigation consumptive use can be found at <http://www.idwr.idaho.gov/ftp/gisdata/Spatial/Irrigation/ConsumptiveUse/>

certification to satisfy the current year's mitigation requirements. Timely notice by IDWR is of the essence, particularly if IDWR finds the certification to be inadequate, so that USMS shall have time to correct any deficiencies and resubmit the certification prior to commencement of the irrigation season. Upon notification by IDWR that the certification is adequate, the right holders will be authorized to divert water under their rights up to the volumes authorized. At the end of the irrigation season (for irrigation rights) or after April 1 of the following year (for non-irrigation rights) a final accounting will be determined by adding current-year recharge and delivered storage water as documented by WD1, to the accrued credits, followed by a deduction of the depletions associated with the current year's pumping.

20. For irrigation rights, the depletion volume to be applied in the final accounting will be the pumping volume reported by the applicable water district, ground water district, or irrigation district, multiplied by a consumptive use fraction of field-applied irrigation water of seventy-five percent (75%).³ For other types of uses, the depletion volume for the right to be applied in the final accounting will be the pumping volume reported by the applicable water district, ground water district or irrigation district.

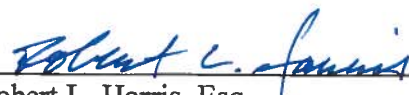
RELIEF REQUESTED

Based upon the foregoing and any data and information submitted simultaneously herewith or subsequently submitted, and consistent with relevant provisions of the Idaho Code and the Water Appropriation Rules, the Applicant and USMS request that the Director:

1. Approve the use of the USMS Mitigation Plan (2012-1-L.Funk-2) as a means of providing the mitigation water required to mitigate for the impacts of ground water depletion from the ESPA that are anticipated to occur as a result of the withdrawal of water under the Water Right; and
2. Such other relief as the Director may deem appropriate and beneficial in light of and consistent with the above requested relief.

³ The 75% consumptive-use fraction is the largest consumptive-use fraction implicit in IDWR data set "Consump_irr.shp" downloaded from (<http://www.idwr.idaho.gov/ftp/gisdata/Spatial/Irrigation/ConsumptiveUse/>) on January 11, 2013.

DATED this 7th day of FEBRUARY, 2013.


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