

## MEMORANDUM

TO: Water Rights File 34-2330B, 34-7077, 34-7080B, 34-7092, 34-7121A, 34-7121B, 34-7179, 34-12376, 34-13840, and 34-13842

FROM: Daniel A. Nelson

DATE: May 12, 2011

SUBJECT: Telford Lands LLC Water Bank Lease Application

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On November 12, 2009, Mike Telford of Telford Lands LLC submitted a water bank lease for portions of water rights 34-2330B, 34-7077, 34-7080B, 34-7092, 34-7121A, 34-7121B, 34-7179, 34-12376, 34-13840, and 34-13842. The water bank leases requested that portions of these water rights be leased from the water bank excluding the portions of these water rights that are considered supplemental to surface water rights 34-13659 and 34-13661. Water right 34-618 completely overlaps these lands, but was not included in the lease applications. Unfortunately, the water bank lease applications were incomplete and unclear, so I was unable to review the lease applications.

I wrote Mr. Telford a letter on April 11, 2011 requesting that the following information be supplied:

1. The portion of the acres for that particular water right being placed into the water bank.
2. The portion of the diversion rate and volume for that particular water right being placed into the water bank.
3. A map showing the acres that will be retired for that particular water right being placed into the water bank. (A common map for all of the water rights can be used as long as it or an attached spreadsheet designates which acres go to which water rights.)
4. A description of how the combined conditions of the water rights will be met and related to the water rights that will be placed in the water bank and those water rights that will continue to be used. This can be done in spreadsheet format that shows the number of acres per water right, legal descriptions, diversion rates, volumes, overlapping water rights, and the totals of acres and diversion rates.

I did find a map with another portion of this Water Supply Bank lease that was not included with the folder I was working on, but none of the other information is available. Without the above information I am unable to process these water bank leases. I asked that the information be returned to my office no later than April 25, 2011. The maps were not received. On June 23, 2011 the Water Supply Bank lease applications were re-submitted with the maps and calculations showing the amount of water being retired from each water right.

After the maps were received, I began my review of the validity of the water rights. I discovered that that one(1) of the water rights was decreed in November of 2000, one(1) of the water rights was decreed in November of 2001, six(6) of the water rights were decreed in July of 2002, and two(2) of the water rights were decreed in June of 2004. When combined, water rights 34-2330B, 34-7077, 34-7080B, 34-7121A, 34-7121B, 34-7179, 34-12376, 34-13659, 34-13661, 34-13840, and 34-13842 could irrigate total of 1985 acres, and when water right 34-7092 (for 2,124 acres) was added into the combination, a total of 2,124 acres could be irrigated. Water rights 34-618, 34-13659 and 34-13661 are included in the 2124 acre permissible place of use. Water rights 34-13659 and 34-13661 are for 43 acres when combined, but water right 34-618 is for the entire 2,124 acres and should be included in the water bank lease.

My review of the LandSat aerial photography from 2006 to 2009 shows that the maximum number of acres irrigated was in 2009. I found a total of 1,864 acres irrigated in 2009 or 260 acres less than the 2,124 combined acres listed on the water rights. A water right transfer was approved in 2006 that moved 222 acres from water rights 34-618, 34-7179, 34-13659, and 34-13661 into the common permissible place of use now used. Therefore, I checked the original place of use for these water rights to determine the total acres irrigated in 2004 and 2005. I discovered that 1414.2 acres were irrigated in 2004 and 1781.6 acres were actually irrigated in 2005.

I found that 1,691 acres were irrigated in 2010. According to the applicant's attorney, Rob Harris, the 338.7 acres described in the Water Supply Bank Lease was included in the 1,691 acres irrigated in 2010 or 433 acres short of the 2,124 acres allowed by the water right. Therefore, the 2009 irrigation appears to be the most acres irrigated since the latest decree date during the irrigation season of 2004.

The actual irrigated acres per the LandSat aerial photography are as follows:

2004 – 1414.2 acres irrigated  
2005 – 1787.6 acres irrigated  
2006 – 1643.5 acres irrigated  
2007 – 1643.5 acres irrigated  
2008 – 1665.7 acres irrigated  
2009 – 1864 acres irrigated  
2010 – 1691 acres irrigated

It must be noted that I originally showed that 1192.2 acres irrigated in 2004 and 1565.6 acres irrigated in 2005. I did discover that water right transfer 71254 was approved that moved 222 acres described in water rights 34-618, 34-7179, 34-13659, and 34-13661 into the 2124 permissible place of use. That increased the acreage amounts to the amounts shown above. A second water right transfer, transfer number 73320, was approved in 2007 that converted the 139 acres described in 34-618 from a primary water right to a supplemental surface water right that covered the entire 2,124 acres.

Our office contacted the applicant's attorney, Rob Harris, to discuss the discrepancies between the acres actually irrigated and the acres allowed by the water rights. The Water Supply Bank leases were submitted after the irrigation season in 2009, so 2009 would be included in any water right forfeiture issues. The last decree date was in June of 2004, so the 2004 irrigation season would also be included in any forfeiture issues. Therefore, there are 6 years between the last decree date and the receipt of the Water Supply Bank leases.

In an attempt to resolve possible forfeiture issues, Mr. Harris then supplied additional information that suggests that a portion of the ground had been offered as mitigation in 2005 for a water call in Water District 34. The information that Mr. Harris supplied were a cover letter, a Temporary Transfer Application, and three letters from the Department. In order to properly review this information, I also needed to review documents found in the Water District 2005 records. Most of these documents are attached to this memo. Any additional records can be found at <http://www.idwr.idaho.gov/WaterManagement/WaterDistricts/default.htm>. The lands involved with the Water Supply Bank Lease are currently in the name of Telford Lands LLC, but Micklesen Properties LLC (Micklesen) owned the Telford lands property in 2005. Therefore, the documentation discussed concerning the 2005 irrigation season is in Micklesen's name. In order to address this situation properly, I created a timeline. A time line is important in this case, because it assists in determining whether or not the submitted information is acceptable or not. The following is my interpretation of the information:

**On March 18, 2005:**

Gary Spackman composed a letter to the Loy Pehrson and Mitchell Sorensen regarding mitigation of their ground water systems. Mitchell Sorensen was the farm manager for Micklesen's property. A copy of the "2005 Consolidated Basin-Wide Mitigation Plan for Basin 34 Water Users" (Basin 34 Mitigation Plan) was included with the letter. This letter approved two mitigation plans. Both of these mitigation plans were titled the "Consolidated Plan." Both plans requested mitigation water for the entire Water District in the amount of 6,110 acre feet. Mr. Spackman's letter was used to unite the two plans into a single working document. Mr. Spackman goes into a very detailed discussion of how Water District 34 Distribution Rule 50.054 is to be administered. Mr. Spackman's discussion highlights the timing required to properly use recharge to mitigate the 6,110 acre feet.

Under the Consolidate Plan, water would be provided in the following order of preference: managed recharge, storage or stored water, natural flow water rights, and ground water. Ground water users could satisfy their mitigation burden by contributing mitigation water or request mitigation water that may be available through the watermaster. Mr. Spackman's letter is very clear on what would be required for approval of water for mitigation in his statement below:

Before any water is recognized as mitigation water, a water right must authorized the use of the water for mitigation. In most cases, the underlying water right must either be transferred to change the nature of use and other associated components of the water right, or the water right must be leased to the Water Supply Bank and subsequently rented from the Water Supply Bank for mitigation purposes.

Mr. Spackman's letter goes on to say in bold lettering **"If the 6,110 acre feet of water is not dedicated for mitigation under the consolidated plans by May 15, 2005, and mitigation has been requested, each ground water user will be responsible for providing mitigation water equal to 13% of the average annual volume of ground water pumped during 2003 and 2004."**

Probably the most important portion of this letter states that "(a)ny ground water user not mitigating for depletions to the Big Lost River caused by his pumping when mitigation is required should not be allowed to divert ground water. " A special Water District meeting was scheduled for April 18, 2005 to determine if they plan to participate in the Consolidated Plan.

#### **My Understanding of Mr. Spackman's Letter and Consolidated Basin-Wide Mitigation Plan as it Pertains to the Water Supply Bank Leases:**

A mitigation burden of 6,110 acre feet of water is required of all water users in Basin 34 for subsequent calls on the water in the Big Lost River. There are three ways for a post 1905 water use to supply water. They can participate in a recharge project under water rights 34-7571 and 34-7573, they can place their lands into the CREP program, or they can donate a portion of their water rights. Of the various options, recharge is given the highest priority in both the mitigation plan and Mr. Spackman's letter. The mitigation plan clearly states **"(a)ll donated water supplies will be subjected to an approved IDWR transfer before mitigation credits can be acquired."** Therefore, in order to receive credit for acres being retired or not irrigated, **a temporary transfer must be approved.** Finally, the most important issue is mitigation needs to be determined by a special meeting scheduled for April 18, 2005. **Anyone not involved in the some type of approved mitigation plan after April 18, 2005, shouldn't have been allowed to irrigate their ground.** Therefore, some type of approved mitigation did occur to allow Micklesen to irrigate his ground.

**On April 25, 2005:**

A letter was sent to Micklesen by Steve Burrell of the Water Distribution Section of the Idaho Department of Water Resources (IDWR). This letter described the Consolidated Plan and informed Micklesen what would be required of them for mitigation purposes based on their 2004 pumping records. The letter states that they would be required to supply 371.54 acre feet mitigation, or 6.081% of the 6,110 acre feet mitigation requirement. If the mitigation requirement is not met, then they would need to reduce their annual pumping requirement by 663.85 acre feet of water.

**My Understanding of Mr. Burrell's Letter:**

This letter was written to inform Micklesen that the mitigation burden for his ground water use was 371.54 acre feet if he wished to use the Donated Water portion of the Basin 34 Mitigation Plan. Mr. Micklesen still had the options to join in the recharge program or join the CREP program at this point. 371.4 acre feet of water would equate to 106 acres required for mitigation, or they would have had to reduce their annual pumping rate by 663.85 acre feet or 190 acres. The standard conversion factor used throughout the documentation in this area is 3.5 acre feet per acre. If we are going to count these acreage amounts then the total irrigated acres for 2005 could increase from 1787.6 acres to 1893.6 for mitigation requirement to 1977.6 acres for full pumping requirement. Both of these acreage amounts are still well below the 2,124 acres allowed by the water rights.

**On April 29, 2005**

A letter was sent to the water master of Water District 34 making a call on the Big Lost River by Micklesen's representative Mitchell D. Sorensen. This call included water rights 34-618, 34-13659, and 34-13661, which are the surface water rights for Micklesen. The call does not state that these water rights have not been delivered, but requests that if they cannot be delivered that junior water user begin the process of shutting down their water rights per Water District 34 Distribution Rule 50.04.

**My Understanding of Mr. Sorensen's Letter:**

This letter provides a call on the Big Lost River, which puts into play the requirement for the 6,110 acre feet of mitigation water to be supplied if the Big Lost River went below the point where mitigation was required. The point at which mitigation is required was described as if water rights with a 1905 priority date or earlier cannot be delivered. It is interesting to note that the same people calling for the water are the same people that filed the Temporary Transfer to be discussed next.

## **On May 13, 2005**

A Temporary Change Application was filed by several water users in Basin 34 to change the water right's nature of use on these water rights for mitigation. This Temporary Change Application included water rights 34-618, 34-13659, and 34-13661. The Temporary Change Application states that the application was for mitigation for several individuals including 411 acre feet of water for Micklesen. 411 acre feet of water would equate to 117 acres. In the Purpose of Transfer portion of the application, the application clearly states "(t)his transfer of water supplies is contingent upon a valid request for mitigation pursuant to Water District 34 Distribution Rule 50.04. and the enforcement of regulation other groundwater users not participating in an approved mitigation plan.

This Temporary Change Application requested to retire 905 acres of ground. Of the 905 acres, 685 acres appeared to have been associated with the Mickleson property. Water rights 34-618, 34-1313659, and 34-13661 were described as the water rights to be used in the Temporary Transfer, however, the place of use for these water rights in 2005 were in Township 5 North, Range 26 East, in section 28 and Township 4 North, Range 26 East, in Section 4. The place of use described in the Temporary Transfer does not match the legal description for the place of use for the water rights. In Section 6, of the application under General Information, the application states that only 237 acres of the 905 acres would actually be retired, and those acres would be put back into use at the end of the irrigation season to germinate alfalfa or winter wheat seed used for the next year's production. The application goes on to say that 142.6 acre feet of water would come from storage allocation and 831.4 acre feet would come from natural flow. The 237 acres was determined by dividing the 831.4 acre feet of natural flow water by 3.5 acre feet per acre to attain the 237 acres.

### **My Understanding of the Temporary Transfer:**

It appears from the Temporary Transfer that only 237 acres within the 905 acre permissible place of use would actually be retired. These 237 acres would only be retired for a portion of the season. Under the diversion rates, Micklesen's water rights 34-618, 34-13659, and 34-13661 only make up 5.17 of the 19.03 cfs or 27.2% of the water being retired under the water right transfer. Therefore, Micklesen's acreage portion would only be 27.2% of the 237 acres or 64 acres of the lands actually being retired. The 411 acre feet described in the Temporary Transfer would require 117 acres. **Even though Micklesen's portion of the 905 acres is 76% of the Permissible Place of Use, they can only receive credit in this portion of the mitigation plan for 64 acres using the diversion rates or the 117 acres described as the amount of volume allotted to Mickelsen. Either way, the place of use would need to include the place of use described on the water rights, and not a general location of the future location of the water rights. If you add the 64 acres onto the 1787.6 acres found to be actually irrigated the total amount of credit against forfeiture would be 1,851.6 acres. Even if the 117 acres described in the Temporary transfer based on the volume were used, the 1904,6 acres plus full mitigation would be well short of the 2,124 acres allotted by the water rights.**

### **On May 27, 2005:**

A letter was sent to several individuals in Water District 34 from Steve Burrell of IDWR. This letter requests clarification of the mitigation plan that was submitted. It also changes the minimum delivery date from 1905 to 1887. Therefore the 6,110 acre feet of water or portion thereof would not be required until a 1887 water right could not be delivered with existing natural flows.

### **My Understanding of Mr. Burrell's May 27<sup>th</sup> Letter:**

This letter clearly states that the mitigation plan submitted by Water District 34 including the Temporary Transfer submitted on May 13<sup>th</sup> was inadequate. Additional information was needed before a mitigation plan and the Temporary Transfer could be approved.

### **On October 18, 2005:**

Nick Miller of IDWR sent a letter to Mitchell Sorensen stating that the Temporary Change Application submitted on May 13<sup>th</sup> was not processed and returned with the \$50.00 application fee.

### **My Understanding of Mr. Miller's Letter:**

There is no clear definition why the Temporary Transfer was returned. I can only speculate that it was returned because of the following reasons:

- 1.) As stated in the Temporary Transfer, the Temporary Transfer would only be needed contingent upon the need to enforce regulation on ground water users under Water District 34 Distribution Rule 50.054. If there was no need to enforce the rule, then there would be no need for mitigation, so the Temporary Transfer would have been returned unprocessed.
- 2.) The only other reason that the Temporary Transfer would have been returned would have been if the information sought in Steve Burrell's May 27, 2005 letter was not submitted.

In Gary Spackman's letter dated March 18, 2005, he clearly states that unless the Temporary Transfer was approved, then no mitigation credit could be given. **Therefore, we cannot count Micklesen's 64 or 117 acres described in the Temporary Transfer as being protected from forfeiture.** They had to follow through with the rules of the Water District 34 Distribution Rule 50.054 to count these acres as mitigation, and they simply did not follow through with the necessary requirements. The Temporary Transfer was unacceptable as filed as evidence of that the place of use for Micklesen water rights were not even included in the legal description of lands to be retired.

**On November 8, 2005:**

The watermaster of Water District submitted his annual report to then IDWR Director, Karl Dreher. The watermaster stated that the Reservoir filled on May 24<sup>th</sup> and began spilling. The reservoir was continued to remain full until the first week in July. Recharge efforts began in the Middle of May and Continued until the first week of July. Over 3800 acre feet of water was credited towards mitigation of the 6,110 acre feet requirement. At the end of the season, Mackay Reservoir still had 14% of its storage capacity, which hadn't happen in several years. The Howell Gauge peaked at 3,240 cfs and maintained good flows through the middle of July.

**My Understanding of the Watermaster's Annual Report:**

Fortunately, the requirement of mitigation was not needed until late July, because there was adequate early flow in the river prior to the irrigation season to address a large portion of the 6,110 acre feet requirement through recharge and natural seepage in the channel. This would have reduced the mitigation requirement per Water District 34 Distribution Rule 50.04. The 3,800 acre feet of mitigation credit that the recharge program produced appears to have been more than enough to account for the mitigation requirement. This report tells me that there was sufficient water in 2005 to address the mitigation requirement without pursuing the Temporary Transfer or any other portion of the mitigation plan beyond the recharge project. It appears that this fact would have been known on or around May 24<sup>th</sup>, 2005 when the Mackay Reservoir Filled.

**On August 22, 2011:**

I spoke with Nick Miller who took over the IDWR administration of Water District 34 from Steve Burrell in 2005. Mr. Miller informed me that he believed that all mitigation for the 6,110 acre feet had been addressed by recharge for 2005. Mr. Miller looked through his files, but he couldn't find any documentation to confirm this statement, but he was convinced that full mitigation had been attained in 2005.

**CONCLUSION:**

Due to the fact that Micklesen irrigated in 2005, there had to be some type of approved mitigation plan. Whereas the Temporary Transfer was never processed or approved, clearly suggests that Micklesen changed tactics after the Temporary Transfer was submitted, and decided to go with the Consolidated Plan that pursued recharge. The documentation available suggests that Micklesen knew on May 25, 2005 when the Mackay Reservoir filled that they would not need to pursue their Temporary Transfer, because there would be adequate water to provide all of the mitigation needs through recharge. Micklesen had until the April 18, 2005 to get the Temporary Transfer approved, or pursue another avenue to provide the needed irrigation. The only plan that I can find that was approved by April 18, 2005 was the Consolidated Plan, so the only way that Micklesen could have irrigated the 1787.6 acres in 2005 was to become a partner in the Consolidated Plan's recharge project.

Therefore, any acres that might not have been irrigated simply cannot be attributed to mitigation, and is not protected from forfeiture. Even if the 117 or the 64 acres described in the Temporary Transfer for mitigation could be accepted there still wouldn't be sufficient protection from forfeiture. Even if we used the base mitigation requirement of 106 acres or the pumping requirement of 190 acres described in Mr. Burrell's April 25, 2005 letter, there would still not be enough acres to provide protection to all of the 2,124 acres described in the water rights. Micklesen may have taken a risk to idle acres for possible future mitigation in subsequent years, but that risk does not provide any protection against forfeiture. There is no documentation that the future mitigation was being sought, so future mitigation can't even be counted as forfeiture protection.

After reviewing this information, it is clear that the maximum number of acres that can be protected against forfeiture in 2005 are only those acres actually irrigated or 1,787.6 acres. If we could find a way to accept the information provided by Mr. Harris and in the Water District files, I would gladly do so, but I simply cannot find adequate acres to protect these water rights against forfeiture. This leads us back to the question of whether or not a portion of these water rights have been forfeited. The Water Supply Bank cannot declare forfeiture, but it also cannot move forward with a lease where forfeiture may have happened. **Therefore, this Water Supply Bank lease should be rejected, and returned to the applicant. No further processing of this application should be done until an administrative review of the water rights have been performed to determine the validity of the water rights.**

It should also be noted that Telford has not provided a Water Supply Bank lease for water right 34-618. Since it overlaps all 2,124 acres, it must be included in the Water Supply Bank lease package. Water rights 34-13569 and 34-13661 are for only 43 acres, so the applicant has the option to include these two water rights, or to leave them out of the Water Supply Bank lease package. This information may have slipped through earlier communications with Mr. Harris, but it should be addressed if additional time is allowed to supply additional information.