



Holden Kidwell
Hahn & Crapo P.L.L.C.
L A W O F F I C E S

1000 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, Idaho 83405

Tel: (208) 523-0620
Fax: (208) 523-9518
www.holdenlegal.com

Email: rharris@holdenlegal.com

August 19, 2011

Monica Van Bussum
Sr. Water Resource Agent
Coordinator, State Water Supply Bank
Idaho Department of Water Resources
PO Box 83720
Boise, Idaho 83720-0098

**RE: *Additional Information Regarding Water Bank Application Made by
Telford Lands LLC in Basin 34.***

Dear Monica:

This letter is a follow up to our conversation from last week regarding water bank acres which we had proposed for acceptance into the water bank on behalf of Telford Lands LLC, but which you had some concerns regarding five consecutive years of non-use. As you know, Idaho Code § 42-223 sets forth statutory defenses to forfeiture. Subpart (4) of that statute provides that a water right is not lost or forfeited if the reason for its non-use is in order to comply with a groundwater management plan approved by the Director of the Idaho Department of Water Resources. Additionally, subpart (6) provides that a water right is not forfeited if the non-use results from circumstances over which the water right user had no control.

Beginning in 2004, and continuing to the end of 2005 in the Big Lost River Valley, calls were made by a number of water users that required individual farmers to submit mitigation plans. Attached to this letter are documents that relate to that situation, and I do note that Gary Spackman was involved in those procedures and it may be useful to visit with him regarding these circumstances in the Big Lost River Valley if you need more context. As you can see, on April 25, 2005 Mickelsen Properties LLC, which was the prior owner of the Telford property, received a letter outlining the provisions of a groundwater mitigation plan, along with an allocation of that pumping mitigation that needed to be provided. Steve Burrell from the Department wrote the letter. A few days later, Mitchell Sorensen, who was leasing the Mickelsen property at the time, submitted a notice to initiate delivery to the Basin 34 watermaster, which outlined a number of surface water rights for mitigation, including those owned by Mickelsen. As you correctly noted from our meeting last week, the Mickelsen property is authorized for the irrigation of 2,124 acres, some of which are irrigated with surface water. On May 10, 2005, Mr. Sorensen submitted a temporary change application to the Department of Water Resources to seek a change to a mitigation nature of use for a number of water rights, including Mickelsen water

Established in 1896

rights. On the bottom of the first page, you can see there is an indication of acres that are not irrigated to be offered up as mitigation. Six hundred eighty-five (685) acres of the Mickelsen property were identified as mitigation acreage. If this amount is subtracted from the 2124 acres that are authorized, this amount is well below the acreage that you found irrigated by reviewing the LANDSAT photos previously. In other words, we consider the water rights to have been fully used in 2005 when they were subject to the provisions of this mitigation plan. This is clearly within the provisions of Idaho Code § 42-223. The decision not to plant or irrigate acres that year was based upon the Department's clear indication that there would be mitigation required.

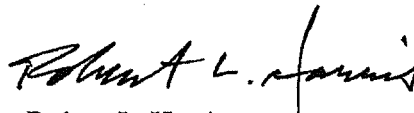
We have also included follow-up correspondence from Steve Burrell dated May 24, 2005, which was after the May 10, 2005 temporary transfer, demonstrating the seriousness of IDWR's intent to require mitigation.

My understanding is that there was some difficulty in implementing any mitigation in the valley based upon some public meetings attended by Mr. Spackman, and even though the temporary change application was not processed, which is evidenced by the attached letter sent by Nick Miller, on October 18, 2005, it is clearly part of a groundwater mitigation plan, and given the uncertainty of likely mitigation, at a minimum, the non-irrigation would be due to circumstances beyond the control of the water user.

Having been fully used in 2005, the forfeiture clock for the Mickelsen water rights would have started anew in 2006. The Water Bank documents were submitted in October 2009, after some difficulty in working with Aaron Marshall during that year to get the Water Bank documents filed, but the filing was nevertheless well within the five (5) year forfeiture window. With this information, it is clear that the acres are not at risk for forfeiture, and qualify under IDWR's water bank rules. The application should therefore be approved.

We appreciate your consideration of these documents. Please let us know if you have any questions. We look forward to hearing back from you.

Best Regards,



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

Enclosure