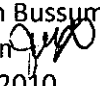


MEMORANDUM

TO: Monica Van Bussum, Shelley Keen
FROM: John Homan 
DATE: October 5, 2010
RE: Richard A. Dalley Water Supply Bank Lease

On May 19, 2009, the Department received an application from Richard B. Dalley to lease water right nos. 36-16127 and 36-16129 into the Water Supply Bank. A review of past irrigation documented in the file memorandum dated July 8, 2010 recommended that the water rights be accepted into the water supply bank, but raised a concern about forfeiture regarding water appurtenant to 12.4 acres that had not been irrigated since 2001. The 12.4 acres had, however been included as part of the Idaho Ground Water User Association's mitigation plan approved by the director for 2004-2006. The file memorandum recommended the application be held until it was determined whether water appurtenant to the 12.4 acres could be accepted into the water supply bank.

Idaho Code Section 42-223(10) provides:

No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from the water right being used for mitigation purposes approved by the director of the department of water resources including as a condition of approval for a new water right appropriation approved pursuant to section 42-203A, Idaho Code, a water right transfer approved pursuant to section 42-222, Idaho Code, a water exchange approved pursuant to section 42-240, Idaho Code, or a mitigation plan approved in accordance with rules promulgated pursuant to section 42-603, Idaho Code.

The above section makes it clear that a no portion of any water right used for mitigation purposes in an approved mitigation plan shall not lost or forfeited for nonuse. The administrator memorandum dated May 3, 2010 concurred and further provided:

"The mitigation plan must be approved by the director, and must be associated with a new application to appropriate water, a water right transfer, a water right exchange, or a mitigation plan related to conjunctive management. This memorandum does not address mitigation plans associated with conjunctive management. "

The administrator's memorandum set out five scenarios involving mitigation addressing different types of new appropriations, transfers and exchanges but did not specifically address mitigation plans in the document. The memorandum concluded that Idaho Code Section 42-223(10) protected from forfeiture water not used and left in the stream or in the ground for

mitigation purposes. Because the nonuse of water for mitigation is authorized and protected from forfeiture during the term of the approved mitigation plan under Idaho Code Section 42-223(10), the water right should not become subject to forfeiture unless 5 continuous years of nonuse is documented after the mitigation plan expires. The file indicates that the water appurtenant to the 12.4 acres was included in an approved mitigation plan for 2006 and the 12.4 acres were not irrigated during the 2007 and 2008 irrigation seasons. At the time of the water bank lease application in 2009, the water appurtenant to the 12.4 acres had not been forfeited and would appear eligible to be leased into the water supply bank.