

**STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES**

**TRANSFER OF WATER RIGHT
TRANSFER NO. 86300**

This is to certify that: **MATTHEW CLEMENTS**
12035 W STAGE COACH RD
NAMPA, ID 83686

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

<u>Water Right</u>	<u>Origin/Basis</u>	<u>Priority Date</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
63-35335	WR/DECREED	4/13/1967	0.020 cfs	4.5 af	N/A	1.0	GROUND WATER

Purpose of Transfer (Changes Proposed)

<u>Current Number</u>	<u>Split</u>	<u>POD</u>	<u>POU</u>	<u>Add POD</u>	<u>Period of Use</u>	<u>Nature of Use</u>
63-35335	NO	YES	YES	NO	NO	NO

Summary Of Water Rights After the Approved Change

<u>Existing Right</u>	<u>New No. (Changed Portion)</u>	<u>Transfer Rate</u>	<u>Transfer Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>New No. (remaining portion)</u>	<u>Remaining Rate</u>	<u>Remaining Volume</u>	<u>Remaining Acre Limit</u>	<u>Remaining Total Acres</u>
63-35335	63-35335	0.020 cfs	4.5 af	N/A	1.0	N/A	N/A	N/A	N/A	N/A
COMBINED TOTALS		0.020 cfs	4.5 af	N/A	1.0		N/A	N/A	N/A	N/A

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 7th day of February, 2024.


SCOTT STORMS, Water Rights Supervisor

WATER RIGHT NO. 63-35335
As Modified by Transfer No. 86300

In accordance with the approval of Transfer No. 86300, Water Right No. 63-35335 is now described as follows:

Right Holder: MATTHEW CLEMENTS
12035 W STAGE COACH RD
NAMPA, ID 83686

Priority Date: 4/13/1967

Source: GROUND WATER

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>
IRRIGATION	03/15	to 11/15	0.020 cfs	4.5 af
			0.020 cfs	4.5 af

LOCATION OF POINT(S) OF DIVERSION

GROUND WATER NENE Sec 12 Twp 01N Rge 03W CANYON County

PLACE OF USE: IRRIGATION

			NE				NW				SW				SE				Totals
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
01N	03W	12	1.0																1.0

POU Total Acres: 1.0

CONDITIONS OF APPROVAL

1. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the place of use.
2. The period of use for the irrigation described in this approval may be extended to a beginning date of 3/1 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before 3/15 is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than 3/19/2009.
3. Right holder shall comply with the drilling permit requirements of Idaho Code § 42-235 and applicable Well Construction Rules of the Department.
4. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
5. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Transfer No. 86300

WATER RIGHT NO. 63-35335
As Modified by Transfer No. 86300

CONDITIONS OF APPROVAL

6. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

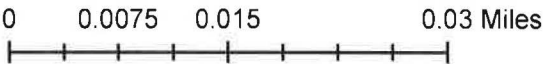


State of Idaho
Department of Water Resources
Attachment to Transfer No. 86300
Water Right: 63-35335

This map depicts the IRRIGATION place of use boundary for this water right at the time of this approval and is attached to the approval document solely for illustrative purposes.



-  Transfer POD
-  Transfer POU
-  Township/Range
-  Sections
-  QQ





IDAHO DEPARTMENT OF
WATER RESOURCES

Western Region • 2735 W Airport Way • Boise, ID 83705-5082

Phone: 208-334-2190 • Fax: 208-334-2348 • Email: westerninfo@idwr.idaho.gov • Web: idwr.idaho.gov

Governor Brad Little

Director Mathew Weaver

February 13, 2024

MATTHEW CLEMENTS
12035 W STAGE COACH RD
NAMPA ID 83686-9133

Re: Transfer No: 86300
Water Right No(s): 63-35335

Transfer Approval Notice

Dear Water Right Holder(s):

The Department of Water Resources has issued the enclosed approved Transfer of Water Right(s). Please be sure to thoroughly review the conditions of approval and remarks listed on the approval document.

The Transfer of Water Right(s) is a PRELIMINARY ORDER issued by the Department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action by the Department unless the APPLICANT petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet.

ANY PERSON aggrieved by any decision, determination, order or action of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Department and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

If the transfer approval includes a condition requiring measuring and recording devices, such devices shall comply with specifications established by the Department. Detailed specifications are available on the Department's home page on the Internet, or you can request a copy by contacting any office of the Department. Please be sure to thoroughly review the specifications to avoid unnecessary costs for reinstallation or modification due to non-conforming or improperly installed devices.

Please note that water right owners are required to report any change of water right ownership and/or mailing address to the Department within 120 days of the change. Failure to report these changes could result in a \$100 late filing fee. Contact any office

of the Department or visit the Department's homepage on the Internet to obtain the proper forms and instructions.

If you have any questions, please contact me at (208) 334-2190.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lynne Evans'.

Lynne Evans
Administrative Assistant I

Enclosure(s)

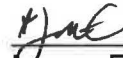
CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2024 I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER (Approved Transfer) to the person(s) listed below:

Re: Transfer No.: 86300
Water Right No(s): 63-35335

MATTHEW CLEMENTS
12035 W STAGE COACH RD
NAMP ID 83686-9133

ATTN: PATRICK KELLY
HDR INC
412 E PARKCENTER BLVD STE 100
BOISE ID 83706-6659



Lynne Evans
Administrative Assistant I

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

MEMORANDUM

TO: Transfer No. 86300
FROM: Aaron Olson
DATE: 1/29/2024
RE: Evaluation of Application

The transfer proposes to split parent right (63-33384) and change the place of use for 1 acre irrigated by ground water. The child right (63- 35335) will be used for home lawn irrigation around a domestic property.

The site is approximately 5.5 miles south of Lake Lowell

Summary of Information Submitted

Authority to File:

IDWR records show the applicant Matthew Clements as the current owner of water right 63-35335. Water right 63-35335 was split from parent right 63-33384 as part of the transfer process using conveyance documents submitted with the application. Canyon County taxlot data shows the applicant as the current owner of the proposed place of use and point of diversion.

Water Right Validity:

The partial decree for parent water right no. 63-33384 was issued on 03/19/2009. During initial review of the parent right a period of non-use greater than 5 years appeared evident since aerial photography showed little to no evidence of irrigation back to the decree date of the water right. During further review as detailed in the "Preliminary Order Concluding That Water Right No. 63-33384 Has Not Been Lost Due To Abandonment Or Forfeiture" it was determined that the parent right is still valid at the time of issuance, as the period of non-use accumulated would be four years. With the evidence in this order the child right 63-35335 involved in this transfer is also considered to be valid at the time the application was filed.

Injury to Other Water Rights:

Other water rights should not be impacted by the proposed transfer. The quantity of water used and number of acres irrigated for these rights will not change as a result. The proposed transfer was advertised along with requests for comment and no protests were received.

Enlargement of Use:

Enlargement does not appear to be an issue. The proposed changes will not result in an increase of diversion rate or number of acres irrigated.

Local Public Interest:

This application proposes a change consistent with the local public interest.

Beneficial Use/Conservation of Water Resources:

The application proposes beneficial use consistent with conservation of water resources in Idaho.

The application is consistent with criteria of I. C. § 42-222 and should be processed.

Discussion

If approved the following changes should be made to the conditions of water right no. 63-35335

Add condition 046 because the proposed new POD is a groundwater well

Update condition S39 to X61

Update condition C18 to T19.

Add standard transfer conditions T07 and T08

Assuming protests are not filed and/or other information does not contradict the above analysis, the application can be approved as reflected by the draft approval.

RE: Application for Transfer No. 86300

Scanlan, Terry <Terry.Scanlan@hdrinc.com>

Thu 1/11/2024 4:36 PM

To: Olson, Aaron <on.Olson@idwr.idaho.gov>

Cc: Matthew Clements <drylaketater@gmail.com>; John Marshall <johnmarshall@jmarshalllaw.com>; Kelly, Patrick <Patrick.Kelly@hdrinc.com>

📎 1 attachments (1,002 KB)

Preliminary Order Concluding that Water Right 63-33384 Has Not Been Lost to Abandonment or Forfeiture.pdf;

CAUTION: This email originated outside the State of Idaho network. Verify links and attachments BEFORE you click or open, even if you recognize and/or trust the sender. Contact your agency service desk with any concerns.

Aaron,

See attached preliminary order determining that the parent right associated with T86300 has not been forfeited. Let me know if you need anything else to approve the transfer. Thanks.

Terry M. Scanlan, P.E., P.G.

D 208-872-9530 M 208-861-4758

hdrinc.com/follow-us

From: Olson, Aaron <on.Olson@idwr.idaho.gov>

Sent: Thursday, January 4, 2024 9:21 AM

To: Scanlan, Terry <terry.scanlan@hdrinc.com>

Cc: Matthew Clements <drylaketater@gmail.com>; John Marshall <johnmarshall@jmarshalllaw.com>; Kelly, Patrick <Patrick.Kelly@hdrinc.com>

Subject: Re: Application for Transfer No. 86300

You don't often get email from on.olson@idwr.idaho.gov. [Learn why this is important](#)

CAUTION: [EXTERNAL] This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Terry,

Thank you for letting me know, I will change the dates for that file.

Aaron

From: Scanlan, Terry <Terry.Scanlan@hdrinc.com>

Sent: Tuesday, January 2, 2024 11:13 AM

To: Olson, Aaron <on.Olson@idwr.idaho.gov>

Cc: Matthew Clements <drylaketater@gmail.com>; John Marshall <johnmarshall@jmarshalllaw.com>; Kelly, Patrick <Patrick.Kelly@hdrinc.com>

Subject: RE: Application for Transfer No. 86300

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Aaron,

We are still waiting for a decision on 63-33384. Probably should push Transfer No. 86300 another 60 days.

Terry M. Scanlan, P.E., P.G.

D 208-872-9530 M 208-861-4758

hdrinc.com/follow-us

From: Olson, Aaron <on.Olson@idwr.idaho.gov>

Sent: Monday, October 2, 2023 2:05 PM

To: Scanlan, Terry <terry.scanlan@hdrinc.com>

Cc: Matthew Clements <drylaketater@gmail.com>; John Marshall <johnmarshall@jmarshalllaw.com>; Kelly, Patrick <Patrick.Kelly@hdrinc.com>

Subject: RE: Application for Transfer No. 86300

CAUTION: [EXTERNAL] This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Terry,

Thank you for letting me know.

Thanks,

Aaron

From: Scanlan, Terry <Terry.Scanlan@hdrinc.com>

Sent: Monday, October 2, 2023 10:41 AM

To: Olson, Aaron <on.Olson@idwr.idaho.gov>

Cc: Matthew Clements <drylaketater@gmail.com>; John Marshall <johnmarshall@jmarshalllaw.com>; Kelly, Patrick <Patrick.Kelly@hdrinc.com>

Subject: RE: Application for Transfer No. 86300

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Aaron,

FYI, the hearing scheduled for October 4 has been postponed until November 15. If a decision is not timely following the November 15 hearing, we will request another extension in December. Thanks.

Terry M. Scanlan, P.E., P.G.

D 208-872-9530 M 208-861-4758

hdrinc.com/follow-us

From: Olson, Aaron <on.Olson@idwr.idaho.gov>

Sent: Wednesday, August 30, 2023 1:52 PM

To: Scanlan, Terry <terry.scanlan@hdrinc.com>

Cc: Matthew Clements <drylaketater@gmail.com>; John Marshall <johnmarshall@jmarshalllaw.com>; Kelly, Patrick <Patrick.Kelly@hdrinc.com>

Subject: RE: Application for Transfer No. 86300

CAUTION: [EXTERNAL] This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Terry,

Thank you for the response to the letter, your request for more time to provide the additional information has been approved. The information requested by the Idaho Department of Water Resources on August 22, 2023 is therefore due by December 31, 2023 to prevent the application from being voided.

Thanks,

Aaron Olson - Water Resource Agent
Idaho Dept. of Water Resources
2735 W Airport Way
Boise, ID 83705
(208) 605-4629
Aaron.Olson@idwr.idaho.gov

From: Scanlan, Terry <Terry.Scanlan@hdrinc.com>

Sent: Tuesday, August 29, 2023 5:59 PM

To: Olson, Aaron <on.Olson@idwr.idaho.gov>

Cc: Matthew Clements <drylaketater@gmail.com>; John Marshall <johnmarshall@jmarshalllaw.com>; Kelly, Patrick <Patrick.Kelly@hdrinc.com>

Subject: Application for Transfer No. 86300

CAUTION: This email originated outside the State of Idaho network. Verify links and attachments BEFORE you click or open, even if you recognize and/or trust the sender. Contact your agency service desk with any concerns.

Aaron,

Matthew Clements forwarded to me your attached letter dated August 22, 2023. The letter requests an explanation or evidence showing that parent right 63-33384 and child right 63-35335 were not forfeited due to nonuse. This same issue is the subject of an upcoming hearing on October 4, 2023 associated with an application to lease water right 63-33384 into the Water Supply Bank. Because the outcome of the October 4, 2023 hearing will have a direct bearing on your request, we seek additional time to respond. Assuming that an order will be issued within 60 days of the hearing, and that we would like approximately 30 days to respond following receipt of the order, we request a delay until December 31, 2023. We look forward to your response.

Terry M. Scanlan, P.E., P.G.

Principal Engineer

We are now HDR | SPF

412 E. Parkcenter Boulevard., Suite 100

Boise, ID 83706

D +1.208-872-9530 **M** +1.208-861-4758

Terry.Scanlan@hdrinc.com

hdrinc.com/follow-us

spfwater.com

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION TO
LEASE WATER RIGHT NO. 63-33384
INTO THE WATER SUPPLY BANK FOR
THE 2022 TO 2025 SEASONS

**PRELIMINARY ORDER CONCLUDING
THAT WATER RIGHT NO. 63-33384
HAS NOT BEEN LOST DUE TO
ABANDONMENT OR FORFEITURE**

BACKGROUND

On September 12, 2022, Farm Development Corp. ("FDC") submitted an application to lease Water Right No. 63-33384 (Water Right) into the Water Supply Bank ("Bank") for the 2022 to 2025¹ seasons (Application). The Idaho Department of Water Resources staffs the Bank for the Idaho Water Resource Board ("IWRB"). On December 8, 2022, IDWR informed FDC the Application could not be processed without information showing the Water Right had not been forfeited due to nonuse. After further discussions between IDWR and FDC, the Department again declined to process the Application. On April 14, 2023, FDC requested a hearing to contest IDWR's determination that FDC had not shown that Water Right No. 63-33384 was not forfeited. IDWR held the requested hearing on November 15, 2023. The Hearing Officer concludes that the Water Right has not been lost to abandonment or forfeiture.

ISSUE

Idaho Code § 42-222(2) states:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code. The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.

Water Supply Bank Rule 25.02 (IDAPA 37.02.03.025.02) lists items that must be submitted with an application to lease a water right into the Bank. Among those items is, "Information that the water right has not been lost through abandonment, or forfeiture as defined by Section 42-222(2), Idaho Code." IDAPA 37.02.03.025.02.c. Water Supply Bank Rule 25.06

¹ Prior orders in this matter refer to the "2022 to 2026" seasons. Item 5.b of Farm Development Corporation's 2022 application to lease Water Right No. 63-33384 to the Water Supply Bank states the proposal is for 2022 to 2025.

(IDAPA 37.02.03.025.06) lists criteria that the IWRB “will consider” when determining whether to accept water rights into the Water Supply Bank. Among those criteria is, “Whether the information available to the Board indicates that the water right has been abandoned or forfeited.” IDAPA 37.02.03.025.06.c. IDWR, working on behalf of the IWRB, believes FDC has not met the requirements of Water Supply Bank Rules 25.02 and 25.06. FDC does not dispute that there have been periods during which Water Right No. 63-33384 has not been used. However, Idaho Code § 42-223 and common law offer defenses to forfeiture, and FDC asserts that certain defenses to forfeiture apply to Water Right No. 63-33384. Therefore, the issue in this matter is whether there are defenses to forfeiture that apply to the non-use of Water Right No. 63-33384.

This matter is limited to the requirements of IDAPA 27.02.03.025.02.c and IDAPA 27.02.03.025.06.c. Determining whether FDC has complied with the other application criteria stated in Water Supply Bank Rule 25.02 and the other review criteria stated in Water Supply Bank Rule 25.06 is not within the scope of this proceeding.

FINDINGS OF FACT

At the hearing, the hearing officer approved a Stipulation of Facts jointly submitted by FDC and IDWR. The stipulated facts are as follows:

Procedural Background Leading to Hearing

1. Farm Development Water submitted an Application to Sell or Lease a Water Right to the Water Supply Bank for water right 63-33384 (the “Application”) to the Department on or about April 7, 2022.
2. On or about October 18, 2022 the Department sent a letter to FDC stating that it had completed its review of the Application and enclosed two Water Supply Bank Lease Contracts (the “Contracts”) for FDC to sign and return to the Department.
3. On or about November 9, 2022, FDC sent two executed copies of the Contracts to the Department.
4. On or about December 8, 2022, the Department sent FDC an email stating that upon further review, it needed additional information before it could execute the Contracts because it appeared to the Department that right 63-33384 had not been used for 6 years—a period from 2010 to 2014, and then in 2021.
5. FDC provided information to the Department in response to the December 8, 2022 email, but the Department found that the information that FDC provided does not qualify as an exception or defense to forfeiture under Idaho Code § 42-223 and therefore has placed the Application on hold.

Background and History of Right 63-33384

6. Right 63-33384 is derivative of a water right 63-3599B, a water right for which a license was issued by the Department.

7. When the license for water right 63-3599B was issued, the place of use included an overlap of 79 acres with the authorized place of use of water right 63-3589 (the "Overlapping Acres"). The Overlapping Acres are located in the NWSW (40 acres) and the SWSW (39 acres) of Section 14 of Township 2 North, Range 3 West, Boise Meridian.

8. Right 63-3589 is senior in priority to right 63-3599B. Both rights are ground water rights that authorize use of water for irrigation.

9. Right 63-3589 authorized a volume of 4.5 acre feet ("AF") per acre for all authorized acres in the place of use, which includes the Overlapping Acres.

10. Right 63-3599B on its face authorized 904.5 AF, which equates to 3.23 AF per acre on a total of 280 acres, including the Overlapping Acres.

11. Water right 63-32635 is a derivative of the splits of water right 63-3599B. Right 63-32635 was split as a result of a Notice of Change in Ownership. In the SRBA, the Department submitted a Notice of Completed Administrative Proceeding and Amended Director's Report recommending that right 63-32635 should be disallowed and split into rights 63-32921 and 63-32922. Both recommendations for rights 63-32921 and 63-32922 contained a section titled "Explanatory Material." The Explanatory Material section contained the following statement: "Right 63-32919 & 63-32920 overlap 79 acres of the place of use described above in the W1/2SW, S14, T2N, R3W."

12. FDC purchased that portion of right 63-32921 appurtenant to 25 acres in Section 15 of Township 2 North, Range 3 West, Boise Meridian, in May of 2007. The portion of the right purchased by FDC did not include any of the Overlapping Acres.

13. FDC submitted a Notice of Change of Ownership to the Department in May 2010 for the portion of water right 63-32921 that FDC had purchased. FDC's Notice of Change did not reference the Overlapping Acres.

14. When processing the Notice of Change of Ownership, the Department split right 63-32921 into two new rights, 63-33384 and 63-333833. Right 63-33384 is the right owned by FDC.

15. When splitting right 63-32921, the Department did not consider the Overlapping Acres or the explanatory material in 63-32921. The Department created right 63-33384 for the portion owned by Farm Development Corp., and

the portions of 63-32921 not owned by Farm Development Corp. were assigned right number 63-33383. As a result, right 63-33384 was allocated a total of 27.9 AF for a place of use of 25 acres, which equates to allowing a diversion volume of 1.2 AF per acre. Right 63-33383, which included 76.3 of the 79 Overlapping Acres, was allocated 84.7 AF.

16. FDC alerted the Department via letter dated May 9, 2013, that the full volume for right 63-32921 should have been allocated to 63-33384 when the Department split right 63-32921 into rights 63-33383 and 63-33384.

17. On November 18, 2014, the Department notified FDC that it agreed with FDC and updated the records for rights 63-33384 to assign the full 112.8 AF volume authorized under right 63-32921 to right 63-33384.

APPLICABLE STATUTES AND RULES

In addition to Idaho Code § 42-222(2), which is quoted above, Idaho Code § 42-223(5) and Idaho Code § 42-223(6) are relevant to this matter. Idaho Code § 42-223(5) states:

A water right shall not be lost or forfeited by a failure of the owner of the right to divert and apply the water to beneficial use while the water right is placed in the water supply bank or is retained in or rented from the water supply bank pursuant to sections 42-1761 through 42-1765A, Idaho Code, or while the water right is leased pursuant to sections 43-335 through 43-342, Idaho Code, or sections 42-2501 through 42-2509, Idaho Code, or while use of the water is made under any other provision of law authorizing the rental or lease of water rights.

Idaho Code § 42-223(6) states:

No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.

In addition to the Water Supply Bank Rules quoted above, Water Supply Bank Rule 25.04 (IDAPA 37.03.02.025.04) is relevant to this matter. Water Supply Bank Rule 25.04 states:

If an application is not complete, the Director will correspond with the applicant to obtain the needed information. If the requested information is not returned in thirty (30) days, the application will no longer be considered a valid request to place a water right into the Board's water supply bank.

ANALYSIS

Water Supply Bank Rule 25.02.c

In this matter, a threshold question is whether FDC's application to lease Water Right No. 63-33384 into the Water Supply Bank meets the requirements of Water Supply Bank Rule 25.02.c, providing information the water right has not been lost to forfeiture. If it does not meet the requirements, the Application is not "a valid request to place a water right into the Board's water supply bank." IDAPA 37.02.03.025.04. If FDC's application meets the Water Supply Bank Rule 25.02.c requirement, then the application can be accepted and reviewed for compliance with Water Supply Bank Rule 25.06.c.

On December 8, 2022, IDWR notified FDC's legal counsel, John Marshall ("Marshall"), by email that periods of non-use suggest that Water Right No. 63-33384 may have been forfeited. Marshall replied to IDWR within two days to ask for more than the usual 30 days to respond to IDWR's email. Marshall asked to have until February 8, 2023, to provide the requested information. Marshall responded to IDWR on February 5 and February 6, 2023. The record does not contain a response from IDWR to Marshall's request for additional time, but the fact that IDWR did not return the application to FDC before Marshall's responses signals IDWR's acquiescence to Marshall's request for extra time.

Rule 25.02.c does not require IDWR to concur with the conclusion asserted in the information submitted by FDC; it merely requires FDC to submit information. John Marshall's emails, particularly the one sent on February 6, 2023, offer a detailed explanation of FDC's interpretation of the facts pertaining to whether Water Right No. 63-33384 had been forfeited. The Hearing Officer finds that FDC has satisfied the information submittal requirement of Water Supply Bank Rule 25.02.c.

Water Supply Bank Rule 25.06.c

The Hearing Officer must next evaluate the Application with respect to Water Supply Bank Rule 25.06.c, which states that among the criteria for determining whether a water right can be accepted into the Water Supply Bank is, "Whether the information available to the Board indicates that the water right has been abandoned or forfeited."

Abandonment is a common law construct for voluntarily relinquishing a water right. It requires the water right owner to discontinue use of the water right and to communicate intent to relinquish the water right. *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). IDWR has not alleged that FDC abandoned Water Right No. 63-33384. Furthermore, FDC's actions to defend Water Right No. 63-33384 in this matter demonstrate that it has not voluntarily relinquished the right. FDC has not abandoned Water Right No. 63-33384. The question in this matter is whether Water Right No. 63-33384 has been forfeited, not whether it has been abandoned.

The standard for water right forfeiture, as stated in Idaho Code § 42-222(2), is "failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated."

FDC has not used Water Right No. 63-33384 since it acquired the right in 2007. *Testimony of Craig Castagneto* ("Castagneto"). FDC asserts that legal defenses to forfeiture prevent the statutory forfeiture standard of five years of non-use from accruing to Water Right No. 63-33384. The proper course of review is to evaluate, year-by-year, whether defenses to forfeiture apply to Water Right No. 63-33384.

2007 through 2009

Water Right No. 63-33384 is a portion of decreed Water Right No. 63-32921, which was split into two parts because FDC acquired only a portion of the right, not the entire right. The Snake River Basin Adjudication Court issued a partial decree for Water Right No. 63-32921 on March 19, 2009. Pursuant to Memorandum Decision and Order on Challenge; and, Order of Partial Decree, *In re SRBA Case No. 39576, Subcase No. 65-05663B (Wood v Troutt)* (May 9, 2002), non-use of a water right does not count toward the Idaho Code § 42-222(2) forfeiture period while a claim to the water right is pending in a general stream adjudication. Therefore, FDC's non-use of Water Right 63-33384 from its acquisition of the right in 2007 to the partial decree in 2009 is protected from forfeiture.

2010 through 2012

FDC does not have forfeiture protection for Water Right No. 63-33384 for the 2010, 2011, and 2012 irrigation seasons. Because FDC did not acquire the place of use (land) where Water Right No. 63-33384 was appurtenant, FDC would have to apply for a transfer to move the right before it could use it. *Finding of Fact No. 12* and *Testimony of Castagneto*. FDC was in "no hurry" to use Water Right No. 63-33384 because it had not yet figured out how to use it in its farming operations. *Testimony of Castagneto*.

2013 through 2014

In 2013, FDC reviewed the elements of Water Right No. 63-33384 and found the annual diversion volume limit to be far less than it expected. FDC notified IDWR at the beginning of the 2013 irrigation season and asked IDWR to correct the annual volume limit on Water Right No. 63-33384. *Finding of Fact No. 16* and *May 9, 2013, letter from Marshall to IDWR*. In 2013, rather than filing an application for transfer to reconfigure Water Right No. 63-33384 for its own use or seeking to lease Water Right No. 63-33384 into the Water Supply Bank, FDC awaited IDWR's response to its request. *Testimony of Castagneto*. FDC was concerned that administrative approval of a transfer of Water Right No. 63-33384 or use of the right within the Water Supply Bank could permanently limit the annual volume stated on the water right at that time. *Testimony of Castagneto*. IDWR's response to FDC's request to correct the annual volume limit would be crucial to FDC's determination of how it could use its water right. *Testimony of Castagneto*. If the annual volume remained uncorrected, Water Right No. 63-33384 could not be used to irrigate the number of acres FDC originally thought it could. *Testimony of Castagneto* and *Testimony of Terry Scanlan* ("Scanlan"). After the 2014 irrigation season, IDWR notified FDC that it had corrected the annual volume limit on Water Right No. 63-33384, as FDC had requested. *Finding of Fact No. 17*.

FDC asserts that its non-use of Water Right No. 63-33384 during the 2013 and 2014 irrigation seasons was due to IDWR's delayed decision on the annual volume limit determination, which amounted to circumstances beyond FDC's control. If so, the non-use would be protected from forfeiture by the provisions of Idaho Code § 42-223(6). IDWR suggests that while FDC awaited IDWR's determination of the annual volume limit, FDC could have used Water Right No. 63-33384 in 2013 and 2014 to effectively irrigate fewer than the total number of acres authorized by the right. *Testimony of Phill Hummer.*

The Hearing Officer concurs with FDC's assertion that its non-use of Water Right No. 63-33384 was protected by Idaho Code § 42-223(6). To use Water Right No. 63-33384, FDC would have had to apply for a transfer to change the water right's place of use. But until the annual volume limit question was resolved, FDC did not know for sure how it could effectively use Water Right No. 63-33384 in its farming operations. This was no small question. The annual volume limit asserted by FDC, 112.8 acre-feet, is adequate for the irrigation of 25 acres of just about any crop typically grown in the area of FDC's farming operations. *Exhibit 1.* The annual volume limit stated on Water Right No. 63-33384 would not have been sufficient for an economically viable crop on 25 acres. *Testimony of Scanlan.* The annual volume limit stated on Water Right No. 63-33384, 27.9 acre-feet, would have been viable for a maximum area of about 15 acres if FDC limited its crop to "Snap and Dry Beans – Seeds." *Exhibit 1.* Irrigating another higher value crop with 27.9 acre-feet of water would have required limiting the place of use to even less than 15 acres. *Exhibit 1 and Testimony of Scanlan.* For FDC to know how it could use Water Right No. 63-33384, and therefore what transfer to propose, IDWR had to resolve the annual volume limit matter, which it did near the end of 2014. IDWR's timeline for resolving the annual volume limit matter was beyond FDC's control.

2015 through 2020

FDC has forfeiture protection for Water Right No. 63-33384 for the 2015, 2016, 2017, 2018, 2019, and 2020 irrigation seasons. In those years, the IWRB accepted Water Right No. 63-33384 in its entirety into the Water Supply Bank through a series of one-year or two-year lease contracts. Water rights leased into the Water Supply Bank are protected from forfeiture pursuant to Idaho Code § 42-223(5) for the lease term. However, a five-year period of nonuse continues "to accrue if a period of nonuse occurred prior to the effective date of acceptance of the right into the bank and the right was not beneficially used while in the bank." Idaho Code § 42-1764(2). Water Right No. 63-33384 was not rented out (beneficially used) during the time the Water Right was leased into the Water Supply Bank.² Therefore, the Hearing Officer must look beyond the time the Water Right was leased in the Water Supply Bank.

2021

FDC does not have forfeiture protection for Water Right No. 63-33384 for the 2021 irrigation season. FDC did not lease Water Right No. 63-33384 into the Water Supply Bank in 2021, nor does it assert any other forfeiture protection for that irrigation season.

² The Department records leases and rentals in each water right file. In Water Right No. 63-33384's file, no record of a rental is recorded.

2022 through 2023

In September of 2022 FDC applied to lease Water Right No. 63-33384 into the Water Supply Bank and has not used the water right since then.³ Idaho Code does not contain a provision protecting water rights from forfeiture of the basis of a pending application to lease a water right into the Water Supply Bank. However, when the applicant applies to lease a water right into the Water Supply Bank, it cannot also be using the water right in the same irrigation season.⁴ Water Supply Bank lease contracts, including those contracts between FDC and the IWRB for Water Right No. 63-33384 for the 2015 through 2020 irrigation seasons, contain the following provision, "While a right is in the bank, the lessor may not use the right without approval of the Department even if the right is not rented from the bank." (Emphasis in original.) Furthermore, since FDC filed the Application, the validity of Water Right No. 63-33384 has been in question. *Finding of Fact No. 17.* FDC could not be expected to use Water Right No. 63-33384 while IDWR thinks the right may not be valid. In fact, Idaho Code § 42-1701B authorizes IDWR to levy substantial penalties for irrigating without a valid water right. Thus, FDC's non-use of the water right during the 2022 and 2023 irrigation seasons was due to circumstances beyond its control, and Water Right No. 63-33384 was protected from forfeiture by the provisions of Idaho Code § 42-223(6) during those two irrigation seasons.

CONCLUSIONS OF LAW

Water Right No. 63-33384 has not been lost due to abandonment. Water Right No. 63-33384 has accumulated four seasons of non-use -- 2010, 2011, 2012, and 2021 -- that apply to the forfeiture provisions of Idaho Code § 42-222(2). Because Idaho Code § 42-222(2) requires five years of non-use for forfeiture, Water Right No. 63-33384 has not been lost due to forfeiture.

ORDER

IT IS HEREBY ORDERED that IDWR shall continue its evaluation of the Application to determine if the IWRB should offer a lease contract to FDC for the 2022 through 2025 irrigation seasons.

DATED this 10th day of January 2024.



Shelley W. Keen
Hearing Officer

³ In April of 2022 FDC sold a one-acre portion of Water Right No. 63-33384.

⁴ It could be argued that FDC Water Right No. 63-33384 is not protected from forfeiture during the 2022 irrigation season because the season was nearly over when FDC submitted the Application. However, IDWR's practice is to consider any action taken to prevent forfeiture during a calendar year to apply to the whole calendar year. Furthermore, IDWR initially offered a lease contract to FDC in mid-September 2022, two months before the end of the irrigation season authorized for Water Right No. 63-33384.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January 2024, the above and foregoing was served by the method indicated below, and addressed to the following:

John Marshall PO Box 2297 Boise, ID 83701 john@jmarshalllaw.com <i>Attorney for Farm Development Corp.</i>	☒ Email
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Jean Hersley
Technical Records Specialist 2

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.



Governor Brad Little

Director Gary Spackman

August 22, 2023

MATTHEW CLEMENTS
12035 W STAGE COACH RD
NAMPA ID 83686

HDR ENGINEERING INC
ATTN PATRICK KELLY
412 E PARKCENTER BLVD STE 100
BOISE ID 83706-6659

HDR ENGINEERING INC
ATTN TERRY SCANLAN
412 E PARKCENTER BLVD STE 100
BOISE ID 83706-6659

RE: Application for Transfer No. 86300

Dear Mr. Clements:

The Idaho Department of Water Resources (IDWR) is currently reviewing the above referenced application for transfer to change a water right. Additional information is needed to evaluate and process your application.

After preliminary review of the application, some concerns have been identified regarding validity of parent right 63-33384 that the applicant's child right (63-35335) was split from. Evaluation of 63-33384 shows the right was decreed in 2009 and placed into the Water Supply Bank in 2015 where it remained until the end of 2020. Review of aerial photography and remote sensing data at the place of use shows little evidence of irrigation following the release from the supply bank and also during the years between the decree and the initial placement in the Water Supply Bank. If the right had not been used since decreed then years 2010 through 2014 would represent a 5-year period of non-use, the placement of the right in the Supply Bank in 2015 tolled the 6th year of the forfeiture period. Following the release from the bank the final 6th year of the forfeiture period would have resumed in 2021.

Please explain or provide evidence of how this right has been used for irrigation at the original place of use. You may also provide a valid defense against forfeiture, defenses against forfeiture are outlined in Idaho Statutes Title 42 Chapter 2 section 42-223 (which can be found at: <https://legislature.idaho.gov/statutesrules/idstat/Title42/T42CH2/SECT42-223/>).

Please submit the requested information for application processing to continue. You may seek additional time to provide the information by making a written request to delay processing. Your written response including the requested information, or a request for more time to seek the information, must be received within the next thirty (30) days.

Without a timely reply, IDWR will issue a preliminary order to reject the application. The application fee will not be refunded for a rejected application. A rejected application may be re-filed when adequate information can be provided.

IDWR forms and other information are available on the Internet at www.idwr.idaho.gov. Please contact me at 208-605-4629 if you have any questions. Thank you for your attention to this matter.

Sincerely,



Aaron Olson - Water Resource Agent
Idaho Dept. of Water Resources
2735 W Airport Way
Boise, ID 83705
(208) 605-4629
Aaron.Olson@idwr.idaho.gov

Olson, Aaron

From: Olson, Aaron
Sent: Tuesday, March 7, 2023 2:49 PM
To: Scanlan, Terry
Subject: Matthew Clements Transfer 86300

Good Afternoon Terry,

After review and discussion of this transfer it has been determined there may be an issue with the validity of parent right 63-33384 that the applicant's right was split from. Evaluation of the right in question shows it was decreed in 2009 and placed into the Water Supply Bank in 2015 where it remained until the end of 2020. Review of aerial photography and remote sensing data at the place of use shows little evidence of irrigation following the release from the supply bank and also during the years between the decree and the initial placement in the Water Supply Bank. If the right had not been used since decreed then the years 2010 through 2014 would represent a 5 year period of non-use, the placement in the Supply Bank in 2015 tolled the 6th year of the forfeiture period but the final year of that period would have resumed in 2021 following the release.

For the application to be approved evidence of irrigation or a valid defense against forfeiture as outlined in Idaho Statutes Title 42 Chapter 2 section 42-223 will be needed.

Thanks,

Aaron

Aaron Olson - Water Resource Agent
Idaho Dept. of Water Resources
2735 W Airport Way
Boise, ID 83705
(208) 605-4629
Aaron.Olson@idwr.idaho.gov

Olson, Aaron

From: Olson, Aaron
Sent: Friday, December 2, 2022 9:37 AM
To: Scanlan, Terry
Subject: RE: AB West Mountain Holdings LLC Application for Permit

Terry,

Thank you for that, could you please send the amended page to the file@idwr.idaho.gov email address? With that those new applications should be ready to go out for advertising at the next cycle.

Thanks,

Aaron

From: Scanlan, Terry <Terry.Scanlan@hdrinc.com>
Sent: Friday, December 2, 2022 8:58 AM
To: Olson, Aaron <on.Olson@idwr.idaho.gov>
Subject: RE: AB West Mountain Holdings LLC Application for Permit

CAUTION: This email originated outside the State of Idaho network. Verify links and attachments BEFORE you click or open, even if you recognize and/or trust the sender. Contact your agency service desk with any concerns.

Aaron,

The 1.96 was a typo. The amount should be 1.92 cfs based on 96c acres at 0.02 cfs/acre. I have attached a corrected page 1 (marked up with signature) and a clean page 1. Thanks for catching my error.

Terry M. Scanlan, P.E., P.G.
D 208-872-9530 M 208-861-4758

hdrinc.com/follow-us

From: Olson, Aaron <on.Olson@idwr.idaho.gov>
Sent: Thursday, December 1, 2022 5:06 PM
To: Scanlan, Terry <Terry.Scanlan@hdrinc.com>
Subject: AB West Mountain Holdings LLC Application for Permit

CAUTION: [EXTERNAL] This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good Afternoon Terry,

I am reaching out today regard to one of the new applications for AB West Mountain Holdings. The amount in cfs requested for item #5 is 1.92 whereas the total amount requested in item #6 is 1.96 cfs. Could you please submit an amendment to this page that clarifies the amounts requested for these items?

Thanks,

Aaron Olson - Water Resource Agent
Idaho Dept. of Water Resources
2735 W Airport Way
Boise, ID 83705
(208) 605-4629
Aaron.Olson@idwr.idaho.gov