

**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 37.02.03.025.02.c and IDAPA 37.02.03.025.06.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 63-33383. 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.