

ADMINISTRATOR'S MEMORANDUM

To: Water Allocation Bureau
Regional Offices
Geospatial Technology Section

From: Shelley Keen, ^{SWK}Water Allocation Bureau Chief

Date: June 21, 2021

Subject: Maintaining Records for CREP Agreements Not to Divert

Records No. 12

Purpose

This memorandum establishes IDWR's record-keeping practices for the Conservation Reserve Enhancement Program ("CREP") program to ensure compliance with federal law.

Background

CREP is part of the Conservation Reserve Program operated by the Farm Service Agency ("FSA") of the US Dept. of Agriculture. The Idaho Soil & Water Conservation Commission ("ISWCC") is the State of Idaho's lead agency for CREP. ISWCC's *FY 2020 CREP Annual Performance Report (CEP-68R)* states that the primary benefit of Idaho's CREP program is "the reduction of irrigation groundwater consumptive use."

Idaho operates the CREP program according to the provisions of the *Agreement Between the United States Department of Agriculture Commodity Credit Corporation and the State of Idaho Concerning the Implementation of the Idaho Eastern Snake Plain Aquifer Conservation Reserve Enhancement Program* signed in 2006 ("2006 Agreement"). The 2006 Agreement is currently being revised, and a new agreement ("2021 Agreement") is expected to be completed by July 1, 2021.

In the CREP program, an irrigator receives payment in exchange for agreeing not to divert water to irrigate specific agricultural fields for a period of years.¹ As part of the CREP program, the irrigator enters into a contract with ISWCC. The contract is called an *Agreement Not to Divert* ("ANTD"). IDWR's role in CREP is to verify that the water rights listed in the ANTD are valid, that they have been used for irrigation purposes within the time periods required to qualify for CREP, that they are not leased to the Water Supply Bank, and that they are not being used for mitigation purposes. IDWR communicates its findings back to ISWCC. If ISWCC approves an ANTD and FSA approves the related *Conservation Reserve Program Contract*, the water rights are protected from forfeiture pursuant to Idaho Code § 42-223(1).

¹ Under the 2006 Agreement, the period was 15 years. When the 2021 Agreement is signed, the period is expected to be "not less than 10 years and not more than 11 years."

Security of ANTD/CREP Records and GIS Data

ISWCC maintains the official records for ANTDs. However, to accomplish its role in the ANTD process, IDWR receives and creates ANTD/CREP information in three forms – PDF or Word documents, GIS spatial data, and an Access database.

Federal law [7 USC § 8791(2)] prohibits “the Department of Agriculture, or any contractor or cooperator” from disclosing the following:

- A. Information provided by a participant concerning the “agricultural operation, farming or conservation practices, or the land itself.”
- B. “Geospatial information . . . about agricultural land or operations” related to A.

Under the 2006 Agreement and the 2021 Agreement, the State of Idaho is a cooperator. Idaho Code § 74-104(1), of the Public Records Act, states that records are exempt from public disclosure if they are exempt from disclosure by federal law.

To ensure compliance with the federal statutory requirement, IDWR will adhere to the following record-keeping requirements:

1. IDWR will not include ANTDs or other CREP documentation in water right files or make them available to the public in PDF or other digital formats.
2. IDWR staff members with access to ANTDs and other CREP documentation will be made aware that they are not public documents.
3. IDWR will not make information in the CREP database available from IDWR’s website.
4. IDWR staff members with access to the CREP database will be made aware that it is not public information.
5. Any GIS data related to CREP will not be available from IDWR’s website.
6. IDWR staff members with access to CREP GIS data will be made aware it is not public information.

The Water Rights Section is directed to examine water right records to ensure that no ANTDs, associated maps, or other CREP documents appear online or in paper files available to the public. In addition, the Water Rights Section shall establish a separate filing system for ANTDs and other CREP records. The ANTD/CREP records – whether paper or digital -- shall be clearly labeled as not available to the public.

To prevent transfer or lease of water rights subject to ANTDs, it is important for IDWR staff members to have access to ANTD records on a need-to-know basis. For that purpose, the file for a water right subject to an ANTD will include a brief memo stating only that some documents pertaining to the water right are confidential. The memo may be scanned and made available digitally with the rest of the water right record. IDWR staff members processing water right transfers and leases should check the GIS data to see whether the place of use for the water right(s) is subject to an ANTD. IDWR staff members who need to know the details of an ANTD may consult the separate filing system described above or ask Water Rights Section staff members to review the CREP database or the ANTD records in the confidential files.