

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

IN THE MATTER OF TRANSFER	)	ORDER WITHDRAWING
APPROVAL NO. 81333 IN THE	)	PRELIMINARY ORDER
<u>NAME OF MPH FARMS</u>	)	RESCINDING TRANSFER

On April 5, 2018, the Idaho Department of Water Resources ("Department") issued Transfer Approval 81333, approving changes to water right 35-8932. After an investigation confirming non-compliance with certain conditions on Transfer 81333, the Department issued a *Preliminary Order Rescinding Transfer* on August 3, 2021. American Falls Farm LLC ("AFF"), the current owner of water right 35-8932, filed a Protest and Petition for Hearing on August 13, 2021. The Department granted the Petition for Hearing.

The Department conducted a pre-hearing conference on September 30, 2021 and a status conference on October 22, 2021. Based on statements made by counsel for AFF and information provided by AFF during the conferences, the Department determined that Transfer 81333 should not be rescinded but should be modified to include conditions that will make it easier to verify compliance with the approval conditions in the future. Therefore, the *Preliminary Order Rescinding Transfer* should be withdrawn and replaced with a *Preliminary Order Modifying Transfer Approval*.

ORDER

IT IS HEREBY ORDERED that the *Preliminary Order Rescinding Transfer* issued on August 3, 2021 is WITHDRAWN.

Dated this 25th day of October 2021.



James Cefalo
Regional Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service postage prepaid and properly addressed to the following:

Document Served: Order Withdrawing Preliminary Order Rescinding Transfer 81333

AMERICAN FALLS FARM LLC
1318 DALE ST
RALEIGH, NC 27605

ROBERT L HARRIS
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405-0130

TJ BUDGE
RACINE OLSON NYE & BUDGE
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Christina Henman
Administrative Assistant

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

IN THE MATTER OF TRANSFER	)	
APPROVAL NO. 81333 IN THE	)	PRELIMINARY ORDER
<u>NAME OF MPH FARMS</u>	)	MODIFYING TRANSFER

On November 21, 2016, MPH Farms LLC ("MPH") filed Application for Transfer 81333 ("Application 81333"), proposing to change the point of diversion and place of use for a 23.8-acre portion of water right 35-8197 and a 19.2-acre portion of water right 35-2306. Application 81333 proposed combining the split portions of those rights with water right 35-8932 to irrigate 181.8 acres. Application 81333 also proposed to rearrange the place of use for water right 35-8932 to move irrigated acres off rock outcroppings or rock piles located under a center pivot.

Greg Sullivan from Brockway Engineering prepared Application 81333 for MPH. Sullivan included a cover letter with the application, which stated:

A variable rate irrigation (VRI) pivot package will be installed on the existing pivot that is currently being irrigated by 35-8932. The VRI package will allow the pivot nozzles to be turned off as the pivot travels over rock piles or unproductive soil that has historically been irrigated.

The Department published notice of Application 81333 on December 21 and 28, 2016. The application was protested by A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively the "Coalition"), Aberdeen-Springfield Canal Company ("ASCC") and Idaho Ground Water Appropriators, Inc. ("IGWA"). ASCC withdrew its protest without condition on January 17, 2017.

On October 16, 2017, MPH, the Coalition and IGWA executed a *Stipulation for Settlement of Protests* ("Stipulation"). The *Stipulation* addressed multiple contested cases pending at the time between the parties. The following paragraphs described the settlement of the protests against Application 81333:

1. **81333.** MPH will submit an amended transfer for 81333 to only propose the amendment of the place of use of Water Right No. 35-8932 to (1) shift 43.4 acres from the NE1/4 of Section 17, Township 6S., Range 29E., Boise Meridian, to the NE1/4SW1/4 and SE1/4SW1/4 of said Section 17; and to (2) shift 4.1 acres to the NW1/4SE1/4 and SW1/4SE1/4 of Section 15, Township 6S., Range 29E., Boise Meridian, all as depicted on the map attached hereto as Exhibit 1. The Protestants agree not to protest the amended transfer application for 81333. In addition to other conditions that the Department deems appropriate, the Department shall include the following set of conditions, or conditions substantially in the same

form, in the final order approving 81333 (as amended) and on Water Right No. 35-8932:

a. "Prior to the diversion and use of water under Transfer approval 81333 the right holder shall install and maintain acceptable measuring device(s) at the authorized point(s) of diversion in accordance with Department specifications, or shall obtain an approved variance from the Department to determine the amount of water diverted from power records or to maintain an existing measuring device."

b. "As resources allow, the Department will conduct one or more in-person field examinations of the authorized place of use of this right during the 2018 and 2019 irrigation seasons and thereafter as the Department deems appropriate to verify that the pivot system is not irrigating outside of the authorized place of use of this right, particularly the rock patches that are not authorized to be irrigated."

c. "A representative of any of the original protestants to transfer no. 81333 may request of the right holder an in-person inspection of the pivot system used to irrigate the place of use of this right to verify that the pivot system is not irrigating outside of the authorized place of use of the right, particularly the rock patches that are not authorized to be irrigated. Upon receipt of such request, the right holder shall schedule the inspection to occur at a time when the pivot system will next operate in its normal irrigation rotation where the pivot system will be crossing one or more of the rock patches that are not authorized to be irrigated."

d. "Noncompliance with any condition of this right is cause for the director to issue a notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water."

Stipulation at 2 (footnotes excluded).

On November 7, 2017, MPH, the Coalition and IGWA executed an *Addendum to Stipulation for Settlement of Protests* ("Addendum"). The *Addendum* included the following paragraph about Application 81333:

1. **81333.** The Parties agree that condition c under paragraph 1 of the Stipulation for 81333 shall not be included as a condition on the water rights amended by 81333 or in the approval for 81333. However, by contract, MPH and its successors and assigns—as the right holder(s)—agree to be subject to condition c such that a representative of any of the original protestants to transfer no. 81333 may request of the right holder an in-person inspection of the pivot system used to irrigate the place of use of this right to verify that the pivot system is not irrigating outside of the authorized place of use of the right, particularly the rock patches

that are not authorized to be irrigated. Upon receipt of such request, the right holder shall schedule the inspection to occur at a time when the pivot system will next operate in its normal irrigation rotation where the pivot system will be crossing one or more of the rock patches that are not authorized to be irrigated.

On November 21, 2017, MPH filed Amended Application for Transfer 81333 (“Amended Application 81333”), proposing to change the point of diversion and add points of diversion to water right 35-8932. Amended Application 81333 also proposed to change the place of use for water right 35-8932, moving approximately 43.4 acres from pivot corners and from rock piles or rock outcroppings under a center pivot located in the NE1/4 of Section 17, T06S, R29E to irrigate new acres.

The Department published notice of Amended Application 81333 on February 7 and 14, 2018. No additional protests were filed against the application. The Department approved Transfer 81333 on April 5, 2018. The transfer approval included the following conditions:

As resources allow, the Department will conduct one or more in-person field examinations of the authorized place of use for this right during the 2018 and 2019 irrigation seasons and thereafter as the Department deems appropriate to verify that the pivot system is not irrigating outside of the authorized place of use of this right, particularly the rock patches that are not authorized to be irrigated.

Noncompliance with any condition of this right is cause for the director to issue a notice of violation, cancel, or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water.

Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

On May 26, 2020, MPH conveyed water right 35-8932 and its associated place of use to American Falls Farm LLC (“AFF”).

On June 30, 2021, an agent for the Department investigated the acres proposed to be dried up under Transfer 81333. The dried-up acres are within the perimeter of a center pivot located in the NE1/4 of Section 17, T06S, R29E. The agent observed that the center pivot sprinklers did not shut off as the pivot passed over the dried-up acres.

On August 3, 2021, the Department issued a Preliminary Order Rescinding Transfer for non-compliance with Transfer Approval 81333. On August 13, 2021, MPH and AFF filed a *Protest and Petition for Hearing*. The Petition for Hearing was granted by the Department on August 23, 2021.

On September 30, 2021, The Department conducted a pre-hearing conference with MPH, AFF and the protestants to the original transfer application (Coalition and IGWA). The parties were all represented by counsel. MPH and AFF provided information about the variable rate

irrigation system and the source of the malfunction in 2021. MPH and AFF agreed to adjust the irrigation system to prevent future malfunctions.

The Department conducted a status conference on October 22, 2021. During the status conference, the parties, through their attorneys, agreed that Transfer Approval 81333 should be modified to include the following conditions relating to the monitoring and reporting of water use occurring at the proposed place of use for water right 35-8932:

Transfer 81333 removes irrigated acres from rock piles or rock outcroppings under a center pivot located in NE1/4, Sec 17, T06S, R29E. The right holder shall not apply water to the acres dried up under Transfer 81333 unless water rights are acquired or transferred to cover those acres.

Prior to the diversion and use of water under Transfer 81333, the right holder shall install and maintain an acceptable flow meter and data logger on the center pivot in the NE1/4 of Section 17 to record the gallons per minute distributed to the pivot by the variable rate irrigation system on a 15-minute interval.

On or before December 15th in the years 2022, 2023 and 2024, the right holder shall provide the Department a report summarizing the data collected at the pivot flow meter during that year's irrigation season. The data provided should demonstrate that the variable rate irrigation system was functioning properly during the irrigation season. In 2025 and thereafter, the right holder shall provide a report summarizing the data collected only if requested by the Department.

Failure of the right holder to comply with the conditions of this transfer, including the prohibition on applying water to the rock piles or rock outcroppings under the center pivot in NE1/4, Sec 17, T06S, R29E, is cause for the Director to issue a notice of violation.

ORDER

IT IS HEREBY ORDERED that Transfer 81333 is MODIFIED as shown on the Amended Transfer 81333 issued in conjunction with this order.

Dated this 25th day of October 2021.



James Cefalo
Regional Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service postage prepaid and properly addressed to the following:

Document Served: Preliminary Order Modifying Transfer 81333

AMERICAN FALLS FARM LLC
1318 DALE ST
RALEIGH, NC 27605

ROBERT L HARRIS
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405-0130

TJ BUDGE
RACINE OLSON NYE & BUDGE
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BARKER ROSHOLT & SIMPSON LLP
PO BOX 63
TWIN FALLS, ID 83303-0063

KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY, ID 83318



Christina Henman
Administrative Assistant

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT
TRANSFER NO. 81333

AMENDED

This is to certify that: AMERICAN FALLS FARM LLC
1318 DALE ST STE 100
RALEIGH, NC 27605-1350

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>
35-8932	WR/LICENSE	1/8/1991	3.160 cfs	632.0 af	N/A	158.0	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>
35-8932	NO	YES	YES	YES	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>
35-8932	35-8932	3.160 cfs	632.0 af	N/A	158.0	N/A	N/A	N/A	N/A	N/A
COMBINED TOTALS		3.160 cfs	632.0 af	N/A	158.0		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 25th day of October, 2021.


Regional Manager

Transfer No. 81333

WATER RIGHT NO. 35-8932**As Modified by Transfer No. 81333**

In accordance with the approval of Transfer No. 81333, Water Right No. 35-8932 is now described as follows:

Right Holder: AMERICAN FALLS FARM LLC
1318 DALE ST STE 100
RALEIGH, NC 27605

Priority Date: 1/8/1991

Source: GROUND WATER

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>
IRRIGATION	04/01	to 10/31	3.160 cfs	632.0 af
			3.160 cfs	632.0 af

LOCATION OF POINT(S) OF DIVERSION

GROUND WATER	NWSW	Sec 15 Twp 06S Rge 29E	POWER County
GROUND WATER	SWSW	Sec 15 Twp 06S Rge 29E	POWER County
GROUND WATER	SENW	Sec 16 Twp 06S Rge 29E	POWER County

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06S	29E	15														1.4	2.7		4.1
06S	29E	17	30.6	23.9	23.3	32.7					19.2			24.2					153.9

POU Total Acres: 158.0

CONDITIONS OF APPROVAL

1. Rights 35-7984 and 35-8932 when combined shall not exceed a total diversion rate of 5.92 cfs.
2. Rights 35-7477A, 35-7984 and 35-8932 when combined shall not exceed a total diversion rate of 17.25 cfs.
3. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 120.
4. Upon specific notification of the Department, the right holder shall install and maintain data loggers to record water usage information at the authorized point(s) of diversion in accordance with Department specifications.

Transfer No. 81333

WATER RIGHT NO. 35-8932

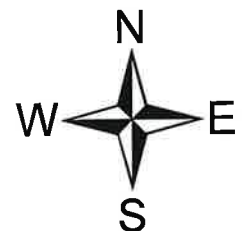
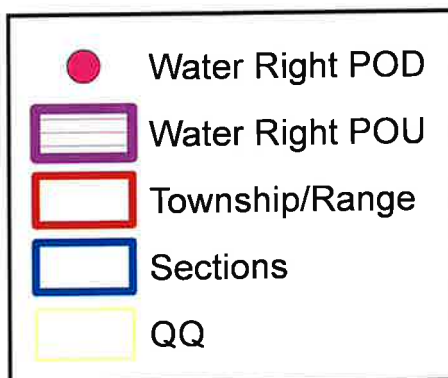
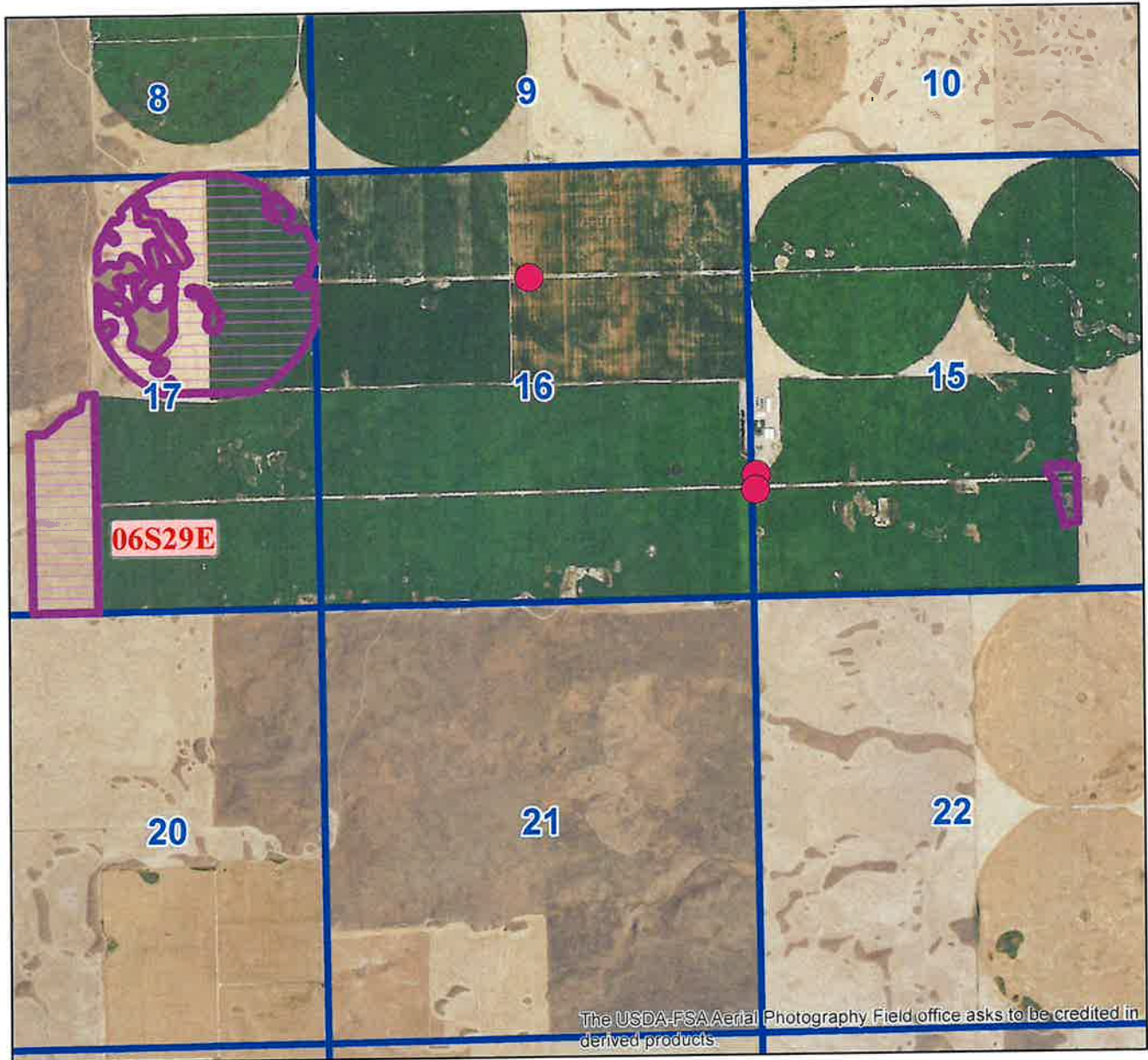
As Modified by Transfer No. 81333

CONDITIONS OF APPROVAL

5. Prior to the diversion and use of water under Transfer approval 81333, the right holder shall install and maintain acceptable measuring device(s) at the authorized point(s) of diversion in accordance with Department specifications, or shall obtain an approved variance from the Department to determine the amount of water diverted from power records or to maintain an existing measuring device.
6. Transfer 81333 removes irrigated acres from rock piles or rock outcroppings under a center pivot located in NE1/4, Sec 17, T06S, R29E. The right holder shall not apply water to the acres dried up under Transfer 81333 unless water rights are acquired or transferred to cover those acres.
7. Prior to the diversion and use of water under Transfer 81333, the right holder shall install and maintain an acceptable flow meter and data logger on the center pivot in the NE1/4 of Section 17 to record the gallons per minute distributed to the pivot by the variable rate irrigation system on a 15-minute interval.
8. On or before December 15th in the years 2022, 2023 and 2024, the right holder shall provide the Department a report summarizing the data collected at the pivot flow meter during that year's irrigation season. The data provided should demonstrate that the variable rate irrigation system was functioning properly during the irrigation season. In 2025 and thereafter, the right holder shall provide a report summarizing the data collected only if requested by the Department.
9. Failure of the right holder to comply with the conditions of this transfer, including the prohibition on applying water to the rock piles or rock outcroppings under the center pivot in NE1/4, Sec 17, T06S, R29E, is cause for the Director to issue a notice of violation.
10. This right is for the use of trust water, and it is subject to review 20 years after August 2, 1991 to re-evaluate the availability of trust water for the authorized use and to re-evaluate the public interest criteria for reallocating trust water.
11. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above.
12. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
13. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Attachment to Transfer Approval 81333

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



Date: 10/25/2021

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.