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Department of Water Resources
Eastern Region

Robert L. Harris (ISB #7018)

rharris@holdenlegal.com

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

P.O. Box 50130

1000 Riverwalk Drive, Suite 200

Idaho Falls, ID 83405

Telephone: (208) 523-0620

Facsimile: (208) 523-9518

Attorneys for American Falls Farm LLC and MPH Farms LLC

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER
APPROVAL NO. 81333 IN THE
NAME OF MPH FARMS

PETITION FOR RECONSIDERATION

American Falls Farm LLC (hereinafter "AFF") and MPH Farms LLC (hereinafter "MPH"), by and through their attorney of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits this *Petition for Reconsideration*. AFF and MPH previously submitted a request for a hearing pursuant to Idaho Code § 42-1701A(3). If this *Petition for Reconsideration* is granted, then the request for a hearing will likely be withdrawn because the hearing will not be necessary.

This petition is submitted pursuant to the *Explanatory Information to Accompany a Preliminary Order*, the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), and Rule 11.2(b) of the Idaho Rules of Civil Procedure. AFF and MPH request reconsideration of the Hearing Officer's *Preliminary Order Rescinding Transfer* dated August 3, 2021 issued in the above-entitled matter (the "Preliminary Order"), which was issued by James

Cefalo, the Regional Manager of the Eastern Region of the Idaho Department of Water Resources (“IDWR” or “Department”). The *Preliminary Order* concerns transfer application 81333 (the “Transfer” or simply “81333”). It is unknown at this stage if the matter will be decided by the IDWR Regional Manager (who issued the *Preliminary Order*) or assigned to a separate hearing officer.

A party in this proceeding has a right to petition for reconsideration within 14 days of the issuance of any preliminary order, which in this case is on or before August 17, 2021. Therefore, this *Petition for Reconsideration* is timely.

Even though this is not a petition for judicial review to a reviewing court, the applicable standard of review of an IDWR decision before the Idaho Supreme Court was previously well summarized by the Idaho Supreme Court, and the principles and standards described therein are important considerations by the Regional Manager in his decision on the matters addressed in the *Preliminary Order* at the agency level:

In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act (“IDAPA”), “we review the decision of the district court to determine whether it correctly decided the issues presented to it.” *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). However, we review the agency record independently of the district court’s decision. *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008). A reviewing court “defers to the agency’s findings of fact unless they are clearly erroneous,” and “the agency’s factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.” *A & B Irrigation Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). Substantial evidence is “relevant evidence that a reasonable mind might accept to support a conclusion.” *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (quoting *Pearl v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)).

Idaho Code section 67-5279(3) provides that the district court must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3); *Clear Springs Foods*, 150 Idaho at 796, 252 P.3d at 77. Even if one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67-5279(3).

N. Snake Ground Water Dist. v. Idaho Dep't of Water Res., 160 Idaho 518, 522, 376 P.3d 722, 726 (2016).

As to legal questions, a reviewing court exercises de novo review. *Eden v. State* (In re SRBA Case No. 39576), 164 Idaho 241, 248, 429 P.3d 129, 136 (2018) ("We exercise de novo review over legal questions.").

As explained below, the *Preliminary Order* should be reversed or withdrawn, the result of which is the reinstatement of the approval for the Transfer.

I. FACTUAL BACKGROUND.

On November 21, 2016, MPH submitted the original application for the Transfer. The Transfer originally proposed amendment of three water rights (portions of 35-2306 and 35-8197 and the entirety of 35-8932) for irrigation of a combined place of use of 181.8 acres. The original map for these acres is set forth here:



As described in the *Preliminary Order*, the cover letter accompanying the original Transfer provided:

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. This irrigation application will greatly increase the efficiency of irrigation on this farm and allow an increase of crop production.

Stated another way, the pivot system proposed by MPH was a relatively new type of pivot system where each individual pivot nozzle is equipped with a solenoid that can turn water on and off to each nozzle, as opposed to a standard pivot where all the nozzles emit water if the pump and pivot are running. The VRI system is operated by a computer system after the mapped areas for non-irrigation are inputted in the computer system. See **Exhibit 1** (discussed further below). Accordingly, the VRI pivot system has both computer and mechanical components, neither of which are immune from wear and tear or malfunction.

The original Transfer was protested by the Surface Water Coalition (the “Coalition”), Idaho Ground Water Appropriators, Inc. (“IGWA”), and Aberdeen-Springfield Canal Company (“ASCC”). ASCC withdrew its protest shortly after its protest was filed. The remaining two protestants, the Coalition and IGWA, are hereinafter collectively referred to as “Protestants”.

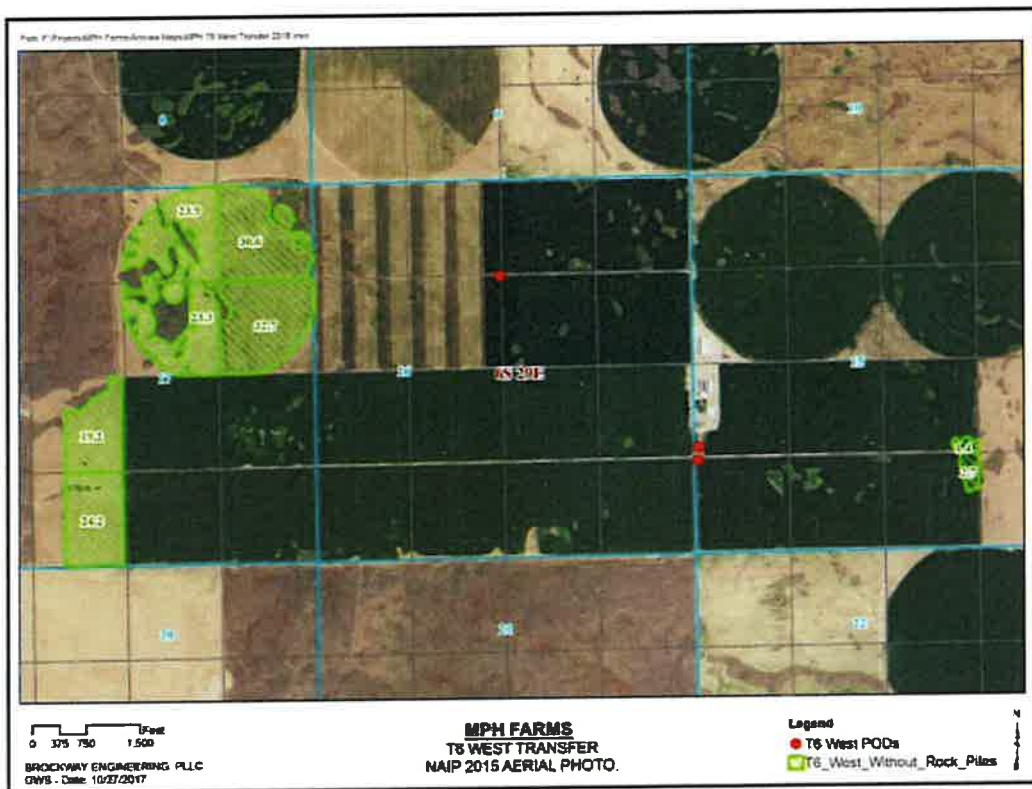
On October 16, 2017, MPH and the Protestants entered into a *Stipulation for Settlement of Protests* (the “Stipulation”) for three transfers, including 81333. The portion of the *Stipulation* specific to 81338 provided:

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**.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.”²
- 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.”

Concerns associated with condition c. set forth above were raised by the hearing officer assigned to the contested case for 81333. These concerns led to an addendum to the *Stipulation* (the “*Addendum*”), dated November 7, 2017, which provided for the following provision, as well as a revised map for the proposed place of use, both of which are set forth here:

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.



As called for in the *Stipulation* and the *Addendum*, an amended application for the Transfer was filed. No additional protests were filed. The Transfer was eventually approved consistent with the *Stipulation* and *Addendum*, and it included the following conditions:

6. 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.
9. 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.
11. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Consistent with these conditions, the VRI system was installed immediately after the approval for 81333 was issued. The pivot associated with 81333 is Pivot 1 on this map:



Additionally, while not related to 81333, VRI systems were also installed for Pivots 2, 3, and 4 identified on the above map. The motivation for installation of the VRI systems on all the pivots was to save operational costs and conserve water as MPH was subject to ground-water-district-imposed volumetric limits on the diversion of water under MPH's water rights as a result of the *Settlement Agreement Entered Into June 30, 2015 Between Participating Members of the Surface Water Coalition and Participating Members of the Idaho Ground Water Appropriators, Inc.* (as amended) (the "Coalition-IGWA Agreement").

On May 19, 2020, MPH conveyed title to certain property and their associated water rights, including the property in Section 17 covered by Pivot 1, to AFF. A *Notice of Change in Water Right Ownership* for the water rights associated with the Transfer was submitted to IDWR on July 6, 2020, and ownership was updated on IDWR's records as a result.

As described in the *Preliminary Order*:

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

Preliminary Order at 3. No IDWR employee, including the referenced agent, contacted any representative of AFF or MPH concerning what was observed on June 30, 2021, to seek information or request any further inspection of the Pivot 1 computer or mechanical systems.¹ Further, as provided in condition no. 9 of the Transfer approval, the watermaster for Water District 120 was not contacted to curtail diversion of water to Pivot 1 because of the alleged noncompliance. Nor was there a complaint or other notice filed by the Protestants or other water

¹ There is no indication or evidence that the IDWR agent inspected or viewed Pivots 2, 3, or 4, which were functioning properly on June 30, 2021.

users to the Department requesting the action taken with the *Preliminary Order*. It therefore appears that the Regional Manager issued the *Preliminary Order* sua sponte.

MPH and AFF have requested a hearing on the *Preliminary Order*. In the alternative to a hearing, and for the reasons set forth below, the *Preliminary Order* should be reversed or withdrawn without a hearing, the result of which is the reinstatement of the Transfer approval.

II. ARGUMENT.

A. The *Preliminary Order* should be withdrawn because the Department failed to follow the mandatory procedures described in Idaho Code § 42-1701B.

Idaho Code § 42-1701B sets forth the procedures followed by the Department, under the Director's authority, in response to information suggesting or indicating there is a violation of use of water under a water right which is inconsistent with the water right's described elements, frequently referred to an "enlargement." There is no statutory definition of enlargement, but the Idaho Supreme Court has defined this term previously:

The term "enlargement" has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. *See* I.C. § 42-1426(1)(a). An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.

Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996).

In this matter, the Regional Manager found an enlargement because of the single instance of observed irrigation of rock piles under Pivot 1: "If the rock pile acres continue to be irrigated in addition to the proposed acres, then the total acres irrigated under the right would be increased, resulting in an enlargement of use under the right." *Preliminary Order* at 3-4.

In a situation where there is information suggesting there could be an enlargement of use under a water right, in the experience of counsel for AFF and MPH, an initial finding or suggestion of an enlargement is that it triggers an initial letter to the water user—an unauthorized water use letter—notifying the water user of the issue and requesting information.

After the unauthorized water use letter is sent, and if no response is received or the information provided by the water user does not provide a basis to stop further investigation, the standard procedures of Idaho Code § 42-1701B(2) mandate issuance of a notice of violation (an “NOV”) which commences a formal process where water use and other information can be obtained by the Department from the water user:

(2) Notice. When the director commences an administrative enforcement action the notice of violation **shall** be served upon the alleged violator in person or by certified mail. The notice of violation **shall** identify the alleged violation and **shall** specify each provision of the designated chapter, rule, permit, condition of approval or order which has been violated. The notice of violation **shall** state the remedy, including any demand to cease and desist, restoration and mitigation measures, and the amount of any civil penalty the director seeks for redress of the violation. Factors the director may consider in seeking the appropriate remedy include the impact of the violation and whether the violation was willful, a repeat violation for which the violator had been given a prior written warning, or the violator has otherwise refused to comply with the department’s lawful directives. The notice of violation **shall** inform the person to whom it is directed of an opportunity to confer with the director or the director’s designee in a compliance conference concerning the alleged violation.

Idaho Code § 42-1701B(2)(emphasis added). Once the NOV is issued, Idaho Code § 42-1701B(3) provides that the water user “may” provide a written response within fourteen (14) days of the NOV and “may” also request a compliance conference with fourteen (14) days.

To the water user, the compliance conference is a valuable component of this process because it allows for the exchange of information, and perhaps even information that resolves a misunderstanding or provides a legitimate explanation concerning the alleged

violation, such as, for example, computer or mechanical failure. This is explained by statute—the compliance conference “**shall** provide an opportunity for the recipient of a notice of violation to explain the circumstance of the alleged violation and, where appropriate, to present a proposal for remedying the damage caused by the violation and assuring future compliance.” (emphasis added). Ultimately, the water user and Department can agree on a “plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement.” *Id.*

Further, from the Department side, a compliance conference allows for the collection of information necessary to evaluate the factors outlined in Idaho Code § 42-1701B(2) to “seek[]the appropriate remedy.” Such factors “include the impact of the violation and whether the violation was willful, a repeat violation for which the violator had been given a prior written warning, or the violator has otherwise refused to comply with the department’s lawful directives.”

The provisions of Idaho Code § 42-1701B are applicable here. The Idaho Supreme Court issued an opinion that describes very well the standards and principles for interpreting a statute (in that case, Idaho Code § 32-719) which standards and principles are applicable here:

The interpretation of a statute is a question of law this Court reviews de novo.” *State v. Smalley*, 164 Idaho 780, 783, 435 P.3d 1100, 1103 (2019).

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body

must be given effect, and the Court need not consider rules of statutory construction.

State v. Dunlap, 155 Idaho 345, 361-62, 313 P.3d 1, 17-18 (2013).

On the other hand, “if the statute is ambiguous, this Court must engage in statutory construction to ascertain legislative intent and give effect to that intent.” *Saint Alphonsus Reg’l Med. Ctr. v. Gooding Cty.*, 159 Idaho 84, 87, 356 P.3d 377, 380 (2015). However, the courts “are not free to rewrite a statute under the guise of statutory construction.” *State v. Doe*, 147 Idaho 326, 329, 208 P.3d 730, 733 (2009).

To ascertain the legislature’s intent, this Court examines the literal words of the statute, the context of those words, the public policy behind the statute, and the statute’s legislative history. [*State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999)]. Courts must construe a statute “under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed.” *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994). Finally, Idaho has recognized the rule of *expressio unius est exclusio alterius*—“where a constitution or statute specifies certain things, the designation of such things excludes all others.” *Local 1494 of the Int’l Ass’n of Firefighters v. City of Coeur d’Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978).

Saint Alphonsus Reg’l Med. Ctr., 159 Idaho at 87, 356 P.3d at 380.

“When the meaning of a statute is unclear, resort may be had to the legislative titles and statutory headings to aid in ascertaining legislative intent.” *Burch v. Hearn*, 116 Idaho 956, 957, 782 P.2d 1238, 1239 (1989). However, “the title of a statute and the heading of a section cannot limit the plain meaning of the text.” *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). “For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.” *Id.* at 529, 67 S.Ct. 1387. Additionally, statutes relating to the same subject matter—or those that are *in pari materia*—must be construed together. *In re Adoption of Doe*, 156 Idaho 345, 350, 326 P.3d 347, 352 (2014). Accordingly, sometimes “[a] reading of the provision in the context of the entire chapter is [] enlightening.” *New Phase Inv., LLC v. Jarvis*, 153 Idaho 207, 210, 280 P.3d 710, 713 (2012).

Nelson v. Evans, 166 Idaho 815, 820-21, 464 P.3d 301, 305-07 (2020).

Against these principles, the Idaho Supreme Court has been clear that use of the word “shall” in a statute is a mandatory, not discretionary, requirement. “This Court has interpreted the meaning of the word ‘may’ appearing in legislation, as having the meaning or expressing the right to exercise discretion. When used in a statute, the word ‘may’ is permissive rather than the imperative or mandatory meaning of ‘must’ or ‘shall.’” *Rangen, Inc. v. Idaho Dep’t of Waters Res. (In re Fourth Mitigation Plan)*, 160 Idaho 251, 256, 371 P.3d 305, 310 (2016) (internal citation omitted); *see also Boyd-Davis v. Macomber Law, PLLC*, 157 Idaho 949, 954, 342 P.3d 661, 666 (2015).

The procedures described in Idaho Code § 42-1701B are mandatory because of use of the word “shall” and they do not exempt transfer applications or noncompliance with water right conditions such as those described in the approval of the Transfer. Condition nos. 9 and 11 in the Transfer approval are standard IDWR conditions included in transfer approvals and they embody the principles of the processes described in Idaho Code § 42-1701B. Both conditions provide the Director with “cause” to rescind approval, but inherent in this “cause” requirement is an investigative component with an opportunity for the water right owner to provide information and defend against a rescission order, but also for the Department to collect information necessary for the proper evaluation of factors described above. Without these processes, the “cause” language is meaningless. The water rights conditions would simply provide that observed irrigation of rock patches under Pivot 1 will result in the automatic rescission of the Transfer approval.

The Regional Manager did not send an unauthorized water use letter to either AFF or MPH, nor did he issue an NOV which would have allowed AFF and/or MPH to provide information to the Department and request a compliance conference. This was legal error as

the plain language of Idaho Code § 42-1701B uses the word “shall,” which is a mandatory and unambiguous requirement under Idaho law. And, to the extent there is any conflict with conditions of the Transfer approval relied upon by the Regional Manager, the statutory provisions control. Accordingly, the *Preliminary Order* is procedurally defective and should be reversed or withdrawn on this legal basis alone. Upon withdrawal or reversal, and if determined to be necessary despite the evidence and information provided below, then the Department should follow the procedures described in Idaho Code § 42-1701B.

B. In addition to the foregoing, the *Preliminary Order* is contrary to the plain language of condition nos. 9 and 11 of the Transfer approval.

In addition to the procedural issues associated with the *Preliminary Order* described above, the Regional Manager’s actions taken in the *Preliminary Order* do not comport with the plain language of condition nos. 9 and 11 of the Transfer approval because the rescission is premature, and ultimately, unnecessary. There has been no request for the watermaster for Water District 120 to curtail the diversion as required under condition no. 6, while the Regional Manager appears to have focused solely on the language of condition no. 9. This was legal error.

Conditions contained in a water right are elements of the water rights and are subject to an interpretation analysis. The Idaho Supreme Court has described the appropriate process of interpreting water rights:

When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. [*A&B Irr. Dist. v. Idaho Dep’t of Water Res.*], 153 Idaho [500,] 523, 284 P.3d [225,] 248 [(2012)]. If a decree’s terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. *Cf. Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) (“If a contract’s terms are clear and unambiguous, the contract’s meaning and legal effect are questions of law to be determined from the plain meaning of its own words.”). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf. Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 850, 367 P.3d

228, 245 (2016) (“Where terms of a contract are ‘reasonably subject to differing interpretations, the language is ambiguous....’” (quoting *Clark v. Prudential Prop. and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003))). Whether ambiguity exists in a decree “is a question of law, over which this Court exercises free review.” *Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)).

Water rights are defined by elements. See I.C. §§ 42-1411(2); see also *City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012) (“The elements listed [in section 42-1411(2)] describe the basic elements of a water right.”); *Olson v. Idaho Dep’t of Water Res.*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). Idaho Code sections 42-1411(2) and 42-1411(3) comprise a list of elements that define a water right. Under Idaho Code section 42-1412(6), a water decree “shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable.”

City of Blackfoot v. Spackman, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017) (footnote omitted).

Like statutes, efforts must be made to construe water right conditions pertaining to the same subject matter consistent with one another:

Stated another way, “[s]tatutes pertaining to the same subject are construed, as far as reasonably possible, to be in harmony with one another.”

Another rule with similar import is that statutes which are *in pari materia* are to be “taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions.”

City of Idaho Falls v. H-K Contractors, Inc., 163 Idaho 579, 583, 416 P.3d 951, 955 (2018) (internal citations omitted); see also *State v. Yager*, 139 Idaho 680, 689-90, 85 P.3d 656, 665-66 (2004) (“It is a fundamental law of statutory construction that statutes that are *in pari materia* are to be construed together, to the end that the legislative intent will be given effect.”). And, specific to interpretation of the word “or” in statutes, the *Blackfoot* case is clear that:

Thus, a water decree must either contain a statement of [each element] or incorporate one, **but not both**. *Markel Int’l Ins. Co., Ltd. v. Ereksan*, 153 Idaho

107, 110, 279 P.3d 93, 96 (2012) (“The word ‘or’ ... is ‘[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.’ ”); *In re Snook*, 94 Idaho 904, 906, 499 P.2d 1260, 1262 (1972) (“The word ‘or’ ... is given its normal disjunctive meaning that marks an alternative generally corresponding to ‘either’....”).

City of Blackfoot v. Spackman, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017) (footnote omitted) (emphasis added).

The *Preliminary Order* sets forth condition nos. 6, 9, and 11 of the Transfer approval but is not specific as to whether one, two, or all of these conditions were the legal basis for rescinding the Transfer approval. Based on the interpretation principles described above, these three conditions must be construed to be consistent with one another as far as reasonably possible as they deal with the same subject matter. Otherwise, they are inconsistent, and that would trigger a separate analysis as to which provision controls. Based on the plain language of these conditions, however, they can be reasonably construed together.

Condition no. 9 provides that if the water right (35-8932) is within a water district, the remedy for noncompliance is curtailment of diversion and use of water by Pivot 1. Condition no. 9, with emphasis, provides:

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.**

The plain language of this provision provides that the Director must first request administration from the applicable watermaster “if the right is included in a water district.” This makes perfect sense because the Director is the authority in water administration consistent with water right elements and the watermasters are under his supervision. Idaho Code § 42-602 (with our emphasis) provides:

The **director of the department of water resources shall** have direction and control of the distribution of water from **all natural water sources** within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The **director of the department of water resources shall** distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-604 specifically allows the Director to create “water districts” staffed with state-employed watermasters and deputy watermasters. When this is done, “[e]ach water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators.” Idaho Code § 42-604; *see also Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969) (The watermaster is a ministerial officer.).

Accordingly, the Director has ample authority to curtail the alleged enlarged use of 35-8932 through Water District 120 to resolve the enlargement. And condition no. 11 can be construed to be consistent with condition no. 9 as no. 11 is a backstop and measure of last resort in the event AFF refuses to shut off Pivot 1 upon watermaster request, or if the watermaster refuses to do his job and curtail Pivot 1.

Accordingly, the Regional Manager’s actions taken in the *Preliminary Order* do not comport with the plain language of condition nos. 9 and 11 of the Transfer approval because the *Preliminary Order* was issued without a request for watermaster involvement. There has been no request for the watermaster for Water District 120 to curtail the diversion as required under condition no. 6, nor evidence that the Water District 120 watermaster has been unable or unwilling to curtail 35-8932. With watermaster involvement, we believe Pivot 1 would be

curtailed, and the *Preliminary Order* would be unnecessary. As a result, for these additional reasons, the *Preliminary Order* should be reversed or withdrawn.

C. In addition to and/or in the alternative to the foregoing, there is insufficient “cause for the Director to rescind approval” of the Transfer as a factual matter.

Both condition nos. 9 and 11 provide the Director with “cause” to rescind approval of the Transfer, but inherent in this “cause” requirement is an investigative component with an opportunity for the water right owner to provide information and defend against a rescission order, but also for the Department to collect information necessary for the proper evaluation of factors described in Idaho Code § 42-1701B(2). Without these processes, the “cause” language is meaningless. The water rights conditions would simply provide that observed irrigation of rock patches under Pivot 1 will result in the automatic rescission of the Transfer approval.

On the question of good cause, “[t]here is no bright-line test in determining whether good cause exists. ‘[W]hether legal excuse has been shown is a matter for judicial determination based upon the facts and circumstances in each case.’” *Harrison v. Bd. of Prof’l Discipline of the Idaho State Bd. of Med.*, 145 Idaho 179, 183, 177 P.3d 393, 397 (2008) (internal citation omitted). Generally, the “standard of what constitutes good cause is the standard of reasonableness as applied to the average man or woman, and not to the supersensitive.” *Ullrich v. Thorpe Elec.*, 109 Idaho 820, 823, 712 P.2d 521, 524 (1985) (addressing “good cause” in the employment context) (citations and internal quotation marks omitted).

A single observed instance of a pivot system that appears to be non-compliant, without further information or contact with AFF representatives, or others charged with oversight of the operation of Pivot 1, that results in the Transfer being rescinded fails to consider the facts and circumstances associated with computer and mechanical systems that these systems can

malfunction or fail. A reasonable time to bring the systems back in compliance is inherent in historic water administration in Idaho, such as with meter installation where time is given to bring meters into compliance. The malfunction of the VRI system is no different than a meter, mandated for installation by IDWR, suffering a mechanical or computer failure. In that instance, IDWR practice is not to curtail water use, but to work with the water user to fix the situation. The same practice based on the same policy considerations should apply here.

If information had been sought from AFF, MPH, or the current lessee of the property, Lance Funk Farms, before issuance of the *Preliminary Order*, there is important evidence worthy of consideration. On June 30, 2021—the date of the IDWR agent’s site visit—the VRI computer system malfunctioned and the VRI system was not operating properly. The result was that all of the nozzles were open and emitting water. Darren Watt is the manager of the lessee that operates Pivot 1. The VRI system was repaired by Double M Ag & Irrigation from American Falls (“Double M”) shortly after June 30. As evidenced by these two recent photos, the Pivot 1 VRI system is currently functioning properly:





It is our understanding that the green associated with the weeds on the rock piles observed on June 30 was considered by IDWR to be further evidence of irrigation. However, the green weeds in the photos, Kochia weeds, stay green because of a deep tap root and will stay green if these weeds are close to any humidity from nearby irrigated lands. See <https://www.nwcb.wa.gov/weeds/kochia>. While some water was put on the rock piles on June 30 due to computer malfunction, the presence of green Kochia weeds is not necessarily reliable evidence of frequent irrigation of these rock piles.

As described above, the VRI system has been installed on AFF's other pivots. The installation and operation of these VRI systems is relevant to reconsideration of the *Preliminary Order* because their operation demonstrate a collective plan to operate these systems consistent with the approval order for 81333 and to conserve water to meet ground water district diversion limitations imposed under the *Coalition-IGWA Agreement*. Pivot 2's VRI system is operational as evidenced by this recent photo:



Pivot 3's VRI system is operational as evidenced by this recent photo:



Pivot 4's VRI system is operational as evidenced by this recent photo:



Attached as **Exhibit 1** herein is a printout summary of the information from Double M that is inputted into the computer system of the VRI system. As shown, the rock piles are mapped out and designated as an “obstacle” in the computer program which then communicates with the solenoids to shut off the individual nozzles when those nozzles on the pivot come to the rock pile. This system is similar to the communication that occurs with a pivot end gun, and, as any farmer will tell you, there are times when there is a problem with the computer

communicating with the end gun to shut it off—the result of which is watering of roads or neighboring ground.

The VRI system was installed after the approval for 81333 was issued. If necessary, AFF welcomes a follow-up visit by IDWR staff to view and inspect Pivot 1 to verify that it is now operating as intended. Based on the foregoing, there is insufficient cause for the Regional Manager to rescind the Transfer, and the *Preliminary Order* should be reversed or withdrawn.

III. CONCLUSION.

The Regional Manager did not follow the mandatory procedures set forth in Idaho Code § 42-1701B. Further, the *Preliminary Order* is contrary to the plain language of condition nos. 9 and 11 of the Transfer approval. Finally, there is insufficient “cause for the Director to rescind approval” of the Transfer as a factual matter. For these reasons, the *Preliminary Order* should be reversed and/or withdrawn, the result of which is reinstatement of the Transfer approval.

DATED this 17th day of August, 2021.



Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2021, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: PETITION FOR RECONSIDERATION

ORIGINAL TO: James Cefalo
Regional Manager, Idaho Department of Water Resources
900 N. Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov

ATTORNEYS AND/OR INDIVIDUALS SERVED:

TJ Budge
RACINE OLSON NYE & BUDGE
P O Box 1391
Pocatello, ID 83204
tjb@racinelaw.net

- ☐ Mail
- ☐ Hand Delivery
- ☒ Email
- ☐ iCourt

Travis Thompson
BARKER ROSHOLT & SIMPSON LLP
P O Box 63
Twin Falls, ID 83303-0063
tlr@idahowaters.com

- ☐ Mail
- ☐ Hand Delivery
- ☒ Email
- ☐ iCourt

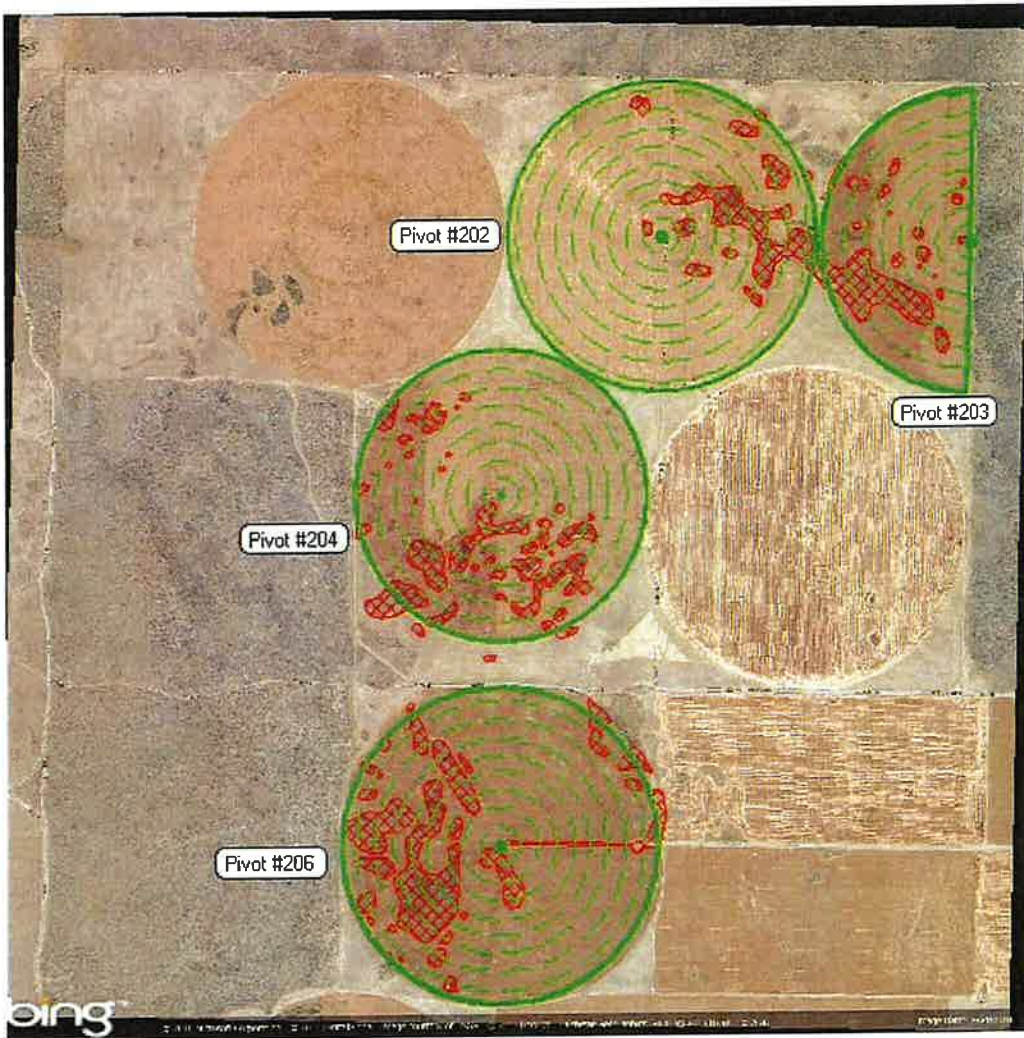
Kent Fletcher
FLETCHER LAW OFFICE
P O Box 248
Burley, ID 83318
wkf@pmt.org

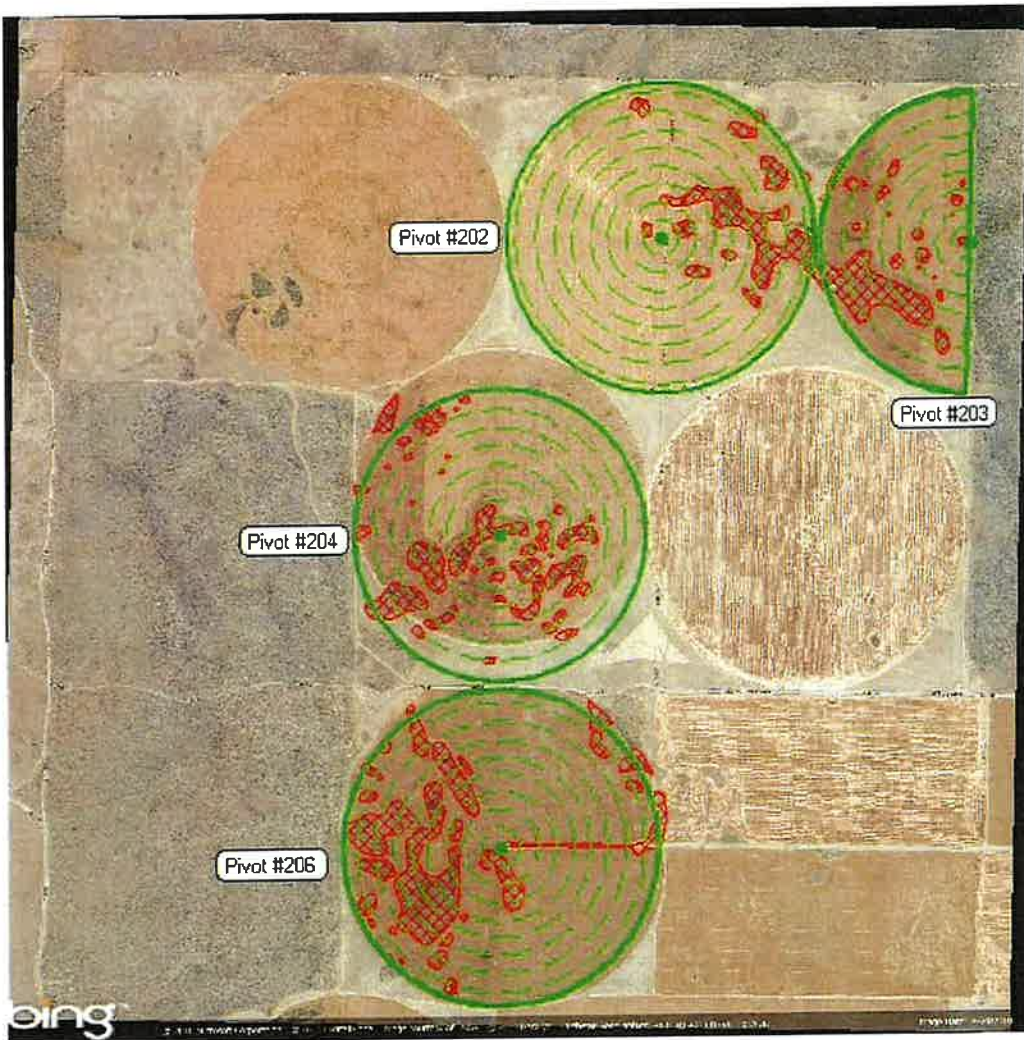
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Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

EXHIBIT 1





MPH Rock Pile Obstacle's

Obstacle #1	0.24 Acres	Pivot #206	Obstacle #57	14.79 Acres	#202/#203
Obstacle #2	1.15 Acres	Pivot #206	Obstacle #58	0.28 Acres	Pivot #202
Obstacle #3	0.86 Acres	Pivot #206	Obstacle #59	0.18 Acres	Pivot #202
Obstacle #4	0.24 Acres	Pivot #206	Obstacle #60	0.41 Acres	Pivot #202
Obstacle #5	1.36 Acres	Pivot #206	Obstacle #61	0.49 Acres	Pivot #202
Obstacle #6	0.6 Acres	Pivot #206	Obstacle #62	0.18 Acres	Pivot #202
Obstacle #7	0.26 Acres	Pivot #206	Obstacle #63	0.11 Acres	Pivot #202
Obstacle #8	0.39 Acres	Pivot #206	Obstacle #64	1.12 Acres	Pivot #202
Obstacle #9	0.14 Acres	Pivot #206	Obstacle #65	0.52 Acres	Pivot #202
Obstacle #10	13.04 Acres	Pivot #206	Obstacle #66	0.12 Acres	Pivot #202
Obstacle #11	0.06 Acres	Pivot #206	Total Acres #202	18.2 Acres	Pivot #202
Obstacle #12	0.03 Acres	Pivot #206			
Obstacle #13	0.02 Acres	Pivot #206	Obstacle #67	0.42 Acres	Pivot #203
Obstacle #14	0.06 Acres	Pivot #206	Obstacle #68	0.23 Acres	Pivot #203
Obstacle #15	0.5 Acres	Pivot #206	Obstacle #69	0.03 Acres	Pivot #203
Obstacle #16	0.9 Acres	Pivot #206	Obstacle #70	0.2 Acres	Pivot #203
Obstacle #17	0.25 Acres	Pivot #206	Obstacle #71	0.04 Acres	Pivot #203
Obstacle #18	0.29 Acres	Pivot #206	Obstacle #72	0.16 Acres	Pivot #203
Obstacle #19	0.18 Acres	Pivot #206	Obstacle #73	0.01 Acres	Pivot #203
Obstacle #20	0.95 Acres	Pivot #206	Obstacle #74	0.09 Acres	Pivot #203
Obstacle #21	2.19 Acres	Pivot #206	Obstacle #75	0.02 Acres	Pivot #203
Obstacle #22	0.37 Acres	Pivot #206	Obstacle #76	0.2 Acres	Pivot #203
Obstacle #23	1.7 Acres	Pivot #206	Obstacle #77	0.06 Acres	Pivot #203
Obstacle #24	0.11 Acres	Pivot #206	Obstacle #78	0.02 Acres	Pivot #203
Obstacle #25	0.05 Acres	Pivot #206	Obstacle #79	0.19 Acres	Pivot #203
Obstacle #26	0.18 Acres	Pivot #206	Obstacle #80	0.26 Acres	Pivot #203
Total Acres #206	26.12 Acres	Pivot #206	Obstacle #81	0.16 Acres	Pivot #203
			Obstacle #82	0.01 Acres	Pivot #203
Obstacle #27	0.16 Acres	Pivot #204	Obstacle #83	0.01 Acres	Pivot #203
Obstacle #28	0.54 Acres	Pivot #204	Obstacle #84	0.08 Acres	Pivot #203
Obstacle #29	2.44 Acres	Pivot #204	Obstacle #85	0.42 Acres	Pivot #203
Obstacle #30	2.1 Acres	Pivot #204	Obstacle #86	0.81 Acres	Pivot #203
Obstacle #31	2.53 Acres	Pivot #204	Obstacle #87	0.45 Acres	Pivot #203
Obstacle #32	0.04 Acres	Pivot #204	Obstacle #88	0.24 Acres	Pivot #203
Obstacle #33	0.11 Acres	Pivot #204	Obstacle #89	0.53 Acres	Pivot #203
Obstacle #34	0.16 Acres	Pivot #204	Obstacle #90	0.4 Acres	Pivot #203
Obstacle #35	0.09 Acres	Pivot #204	Obstacle #91	0.09 Acres	Pivot #203
Obstacle #36	1.67 Acres	Pivot #204	Total Acres #203	5.13 Acres	Pivot #203
Obstacle #37	0.18 Acres	Pivot #204			
Obstacle #38	0.17 Acres	Pivot #204			
Obstacle #39	1.72 Acres	Pivot #204	Total Project Acres:	Pivot #206	26.12
Obstacle #40	1.05 Acres	Pivot #204		Pivot #204	14.74
Obstacle #41	0.03 Acres	Pivot #204		Pivot #202	18.2
Obstacle #42	0.44 Acres	Pivot #204		Pivot #203	5.13
Obstacle #43	0.23 Acres	Pivot #204		Total	64.19
Obstacle #44	0.12 Acres	Pivot #204			
Obstacle #45	0.02 Acres	Pivot #204			

MPH Rock Pile Obstacle's

Obstacle #46	0.24 Acres	Pivot #204
Obstacle #47	0.21 Acres	Pivot #204
Obstacle #48	0.14 Acres	Pivot #204
Obstacle #49	0.07 Acres	Pivot #204
Obstacle #50	0.03 Acres	Pivot #204
Obstacle #51	0.04 Acres	Pivot #204
Obstacle #52	0.05 Acres	Pivot #204
Obstacle #53	0.02 Acres	Pivot #204
Obstacle #54	0.02 Acres	Pivot #204
Obstacle #55	0.02 Acres	Pivot #204
Obstacle #56	0.1 Acres	Pivot #204
Total Acres #204	14.74 Acres	Pivot #204