

**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>	)	RESCINDING 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 of 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 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 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.

The current owner of water right 35-8932, AFF, had not complied with the conditions of Transfer 81333 because it has continued to irrigate the rock pile acres under the pivot located in the NE1/4 of Section 17, T06S, R29E. Consistent with Transfer 81333, the Department has cause to rescind the transfer approval for failure to comply with the conditions of approval.

The approval of Transfer 81333 represented a departure from the previous practices of the Department. Transferring irrigated acres off of rock piles under a center pivot creates a significant risk of enlargement. 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. The protestants to Application 81333 raised these same concerns about enlargement. The protests were withdrawn and Transfer 81333 was approved based on assurances from the water right holder that the rock pile acres would no longer be irrigated. The right holder has failed to dry up the rock pile acres, resulting in an enlargement of water right 35-8932. Consequently, Transfer 81333 should be rescinded and the elements of water right 35-8932 should be restored to the elements existing prior to Transfer 81333.

ORDER

IT IS HEREBY ORDERED that Transfer 81333 is RESCINDED. The elements of water right 35-8932 shall be changed to those elements existing prior to Transfer 81333.

Dated this 3rd day of August 2021.



James Cefalo
Regional Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August 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, certified with return receipt requested, postage prepaid and properly addressed, to the following:

Document Served: Preliminary Order Rescinding Transfer (81333)

AMERICAN FALLS FARM LLC
1318 DALE ST
RALEIGH, NC 27605

Courtesy copies sent via regular mail to:

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

TJ BUDGE
RACINE OLSON NYE & BUDGE
PO BOX 1391
POCATELLO, ID 83204-1391

TRAVIS THOMPSON
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

8/3/2021

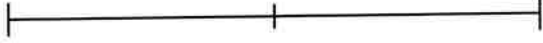
State of Idaho
Department of Water Resources
Water Right 35-8932

29E



-  Point of Diversion
-  Place Of Use Boundary
-  Townships
-  PLS Sections
-  Quarter Quarters

0 1,500 3,000 Feet



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.