

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

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 80529 IN THE)
NAME OF KIRK JACKSON)

**ORDER WITHDRAWING
TRANSFER APPROVAL**

On November 16, 2015, Kirk Jackson ("Jackson") filed Application for Transfer No. 80529 with the Idaho Department of Water Resources ("Department"). The Department published notice of Application 80529 on December 3 and 10, 2015. Protests were filed by Craig Bloxham ("Bloxham") and Chad & Jane Barnes ("Barnes").

On August 7, 2018, Rob Harris, attorney for Bloxham and Barnes, filed a conditional withdrawal of protest. The Bloxham and Barnes protests were withdrawn contingent upon the transfer approval including a condition on water right 29-14032 requiring Jackson to install an approved side-channel diversion structure that does not inhibit flow in the stream channel.

On August 31, 2018, the Department issued Transfer Approval 80529. The approval included the following condition on water right 29-14032: "The point of diversion authorized under Transfer 80529 shall be a side-channel diversion that does not inhibit flow in the stream channel." ("Condition No. 5")

Transfer Approval 80529 was issued as a Preliminary Order. According to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01), "[a]ny party may file a petition for reconsideration of [a] preliminary order . . . within fourteen (14) days of the service date of [the] order."

On September 10, 2018, Jackson filed a *Protest to Condition on Approval of Transfer* ("Jackson's Petition"). This document will be treated as a petition for reconsideration. Jackson's Petition is timely because it was filed within fourteen days of the issuance of the transfer approval. Jackson's Petition stated:

A side channel diversion without a check for the water will provide us with no access to our water. The water will flow right past our side channel. A side channel will also leave me vulnerable to the possibility of someone digging the ditch down so that the water is below the level of our diversion. I am formally requesting a hearing on omitting Condition No. 5 from my Transfer Approval if the matter cannot be resolved otherwise.

According to Jackson, Condition No. 5 is unacceptable because it will make it impossible for him to divert water. If Condition No. 5 is removed from Transfer Approval 80529, then the terms of Barnes' and Bloxham's withdrawal of protest were not met and the protests are still active.

ORDER

IT IS HEREBY ORDERED that Transfer Approval 80529 is WITHDRAWN. The Department should re-schedule an administrative hearing to resolve the contested case.

Dated this 19th day of September, 2018.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

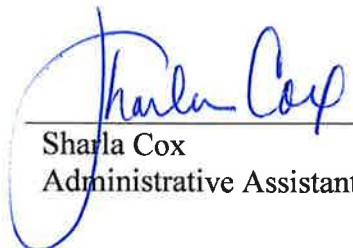
I HEREBY CERTIFY that on this 19th day of September 2018, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Withdrawing Transfer Approval (80529)

Kirk and Debbie Jackson
PO Box 866
Pocatello ID 83204-0866

Craig Bloxham
20862 S Cambridge Rd
Downey ID 83234

Holden Kidwell Hahn & Crapo
Robert L. Harris
PO Box 50130
Idaho Falls ID 83405-0130



Sharla Cox
Administrative Assistant

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.