

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER)
NO. 75147 IN THE NAME OF)
SOUTHEAST IDAHO ENERGY LLC)

**PRELIMINARY ORDER
RESCINDING TRANSFER**

This matter having come before the Idaho Department of Water Resources (“Department”) as a result of an unaccomplished water right transfer, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On March 22, 2004, the Snake River Basin Adjudication Court issued partial decrees for water rights 29-2284 and 29-2301. Water right 29-2284 bore a priority date of March 2, 1949 and authorized the diversion of 4.50 cfs and an annual diversion volume of 3,257.9 acre-feet from ground water for industrial use. Water right 29-2301 bore a priority date of April 24, 1951 and authorized the diversion of 4.00 cfs and an annual diversion volume of 2,895.9 acre-feet from ground water for industrial use. Water rights 29-2284 and 29-2301 were used at the same industrial facility but did not include any combined rate or volume limits.

2. On October 1, 2008, Southeast Idaho Energy LLC (“SEI”) filed Application for Transfer No. 75147, proposing to change the points of diversion and place of use for water rights 29-2284 and 29-2301. The proposed points of diversion and place of use were located approximately 20 miles to the southwest of the then-existing points of diversion and place of use.

3. Application 75147 stated that the water rights would be used at a coal gasification and fertilizer production facility to be constructed at the proposed place of use. Application 75147 described two new ground water wells to be drilled at the proposed place of use.

4. Mike McVay, a hydrologist for the Department, conducted a technical review of the proposed transfer and determined that water rights 29-2284 and 29-2301 should be limited to a combined annual diversion volume of 5,070 to prevent impacts to Snake River water rights. McVay Memo, pages 9-11 (February 2, 2010).

5. The Department approved Transfer 75147 on December 31, 2009. The transfer approval included the following conditions:

Rights 29-2284 and 29-2301 when combined shall not exceed a total diversion rate of 8.5 cfs, a total annual maximum diversion volume of 5,070 acre-feet.

The right holder shall accomplish the change authorized by this transfer within one year(s) of the date of this approval.

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

6. Because the new points of diversion were located within a different administrative basin, the Department assigned new numbers to the water rights. Water right 29-2284 was renumbered as 35-14014. Water right 29-2301 was renumbered as 35-14015.

7. Magnolia Nitrogen Idaho, LLC ("Magnolia") acquired all of the assets of SEI in the fall of 2012, including water rights 35-14014 and 35-14015. Affidavit of Ric Sorbo, CEO of Magnolia (March 13, 2017). Because of financial issues, the industrial facility proposed in Transfer 75147 was never completed. *Id.* The proposed ground water wells were not drilled and no ground water was diverted at the proposed project site. *Id.*

CONCLUSIONS OF LAW

1. The Department has the authority to rescind a prior transfer approval if the conditions of approval are not satisfied.

2. The evidence available to the Department confirms that the changes proposed in Transfer 75147 were never accomplished. SEI and its successor in interest, Magnolia, did not comply with the conditions of Transfer 75147 because the proposed changes were never completed. The Department should rescind Transfer 75147 for failure to comply with the conditions of approval. Water rights 35-14014 (29-2284) and 35-14015 (29-2301) should be returned to their pre-transfer elements and conditions, including removal of the combined annual diversion volume limit.

ORDER

IT IS HEREBY ORDERED that Transfer 75147, approved on December 31, 2009, is **RESCINDED**. The points of diversion and place of use for water rights 35-14014 and 35-14015 shall revert to the locations existing prior to Transfer 75147. The conditions of the water rights shall revert to those existing on the water rights prior to Transfer 75147. Because the water rights are returning to Administrative Basin 29, the water rights should be renumbered to their original water right numbers (29-2284 and 29-2301).

Dated this 12th day of June, 2017.



James Cefalo

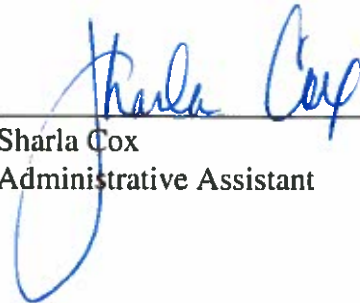
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of June 2017, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER RESCINDING TRANSFER, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

**Power County
c/o Sharee Sprague
543 Bannock Avenue
American Falls, ID 83211**

**Douglas Balfour
230 W Lewis
PO Box 490
Pocatello, ID 83204**



Sharla Cox
Administrative Assistant

6/2/2017

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	POWER COUNTY 543 BANNOCK AVE AMERICAN FALLS, ID 83211 (208) 226-7610

Status: Active

Tributary

GROUND WATER	SESESW	Sec. 12, Twp 06S, Rge 33E,	POWER County
GROUND WATER	NENWNW	Sec. 13, Twp 06S, Rge 33E,	POWER County

			NE				NW				SW				SE				Totals
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06S	33E	12											X	X			X	X	
06S	33E	13	X	X	X	X	X	X	X	X					X	X			

1. T19 Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

IDAHO DEPARTMENT OF WATER RESOURCES
Proof Report

6/2/2017

Water Right 29-2301

Owner Type **Name and Address**
Current Owner POWER COUNTY
543 BANNOCK AVE
AMERICAN FALLS, ID 83211
(208) 226-7610

Priority Date: 4/24/1951

Basis: Decreed

Status: Active

Source **Tributary**
GROUND WATER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
INDUSTRIAL	01/01	12/31	4.000 CFS	2,895.9 AF
	<u>Total Diversion</u>		4.000 CFS	2,895.9 AF

Source and Point(s) of Diversion

GROUND WATER	NWNWNE	Sec. 13, Twp 06S, Rge 33E, POWER County
GROUND WATER	NWNWNW	Sec. 13, Twp 06S, Rge 33E, POWER County

Place Of Use

INDUSTRIAL within POWER County

			NE				NW				SW				SE				Totals
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06S	33E	12											X	X			X	X	
06S	33E	13	X	X	X	X	X	X	X	X					X	X			

Conditions of Approval:

1. T19 Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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, request 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 Rules of Procedure 302 and 303.

FINAL ORDER

The Department 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.