

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE COMPLETION)	
OF THE CHANGE AUTHORIZED IN)	
TRANSFER APPROVAL NO. 71066 IN THE)	PRELIMINARY ORDER
<u>NAME OF FGS FARMS INC.</u>)	RESCINDING TRANSFER

The Department of Water Resources (department) has conducted an investigation of the lands being irrigated under water right 35-2697. Based upon the department's investigation and water right conditions that became part of water right 35-2697 as a result of Transfer No. 71066, the department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Water right 35-2697 was partially decreed in the Snake River Basin Adjudication (SRBA) on January 31, 2002. The water right place of use included 13 irrigated acres in the SWSW of Section 35, T03N, R36E, and 15 irrigated acres in the SESW of the same section. FGS Farms Inc. was listed as the current owner of the right in the SRBA partial decree.

2. In February 2004, FGS Farms filed a transfer (No. 71066) seeking to change the place of use for water right 35-2697. According to the transfer application, pivot corners would be dried up to cover the southern half of a full pivot, with the center of the full pivot to be located in the center of the southwest quarter of Section 35, T03N, R36E. In other words, the transfer proposed drying up pivot corners to cover additional acres to be irrigated in the SESW and SWSW of Section 35.

3. Transfer 71066 was approved on May 1, 2004. Condition 6 stated: "The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval." Condition 5 stated: "Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer." The department's water right records, including the ArcGIS shapefiles associated with water right 35-2697, were updated to reflect Transfer 71066.

4. 2004, 2006, 2009, and 2011 aerial photography indicate that the change contemplated by Transfer 71066 was never accomplished. The pivot with its center located in the center of the southwest quarter of Section 35 does not form a complete circle. The new acres proposed to be irrigated in Transfer 71066 have not been cultivated or irrigated. Further, the pivot corners that were supposed to be dried up as a result of Transfer 71066 have not been dried up. Aerial photography suggests that these acres have continued to be irrigated since 2004.

5. In January 2008, the department sent a letter to FGS Farms, notifying the water user of a possible water rights violation. The letter stated that the pivot corners, which were supposed to be dried up pursuant to Transfer 71066, were being irrigated without a water right. The letter asked FGS Farms to contact the department to find a solution for the unauthorized irrigation. FGS Farms

contacted the department and confirmed that the change proposed by Transfer 71066 was never accomplished. The acres currently being irrigated under water right 35-2697 are the same acres authorized by the 2002 SRBA partial decree. FGS Farms stated that it does not intend to change the irrigated acres and asked that Transfer 71066 be rescinded.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 authorizes the department to approve a transfer application with appropriate conditions. As part of its evaluation process, the department must ensure the change proposed by a transfer application does not constitute an enlargement of the water right(s). In a transfer application seeking to change the place of use of an irrigation water right(s), the irrigated acres authorized under the water right(s) may not be increased. If new acres will be irrigated under the water right(s), an equivalent number of acres must be dried up.

3. The evidence available to the department indicates that the irrigation place of use change proposed by Transfer 71066 was never accomplished. The irrigated acres to be dried up were never dried up. The new acres proposed for development were never cultivated or irrigated.

4. The approval conditions listed in Transfer 71066 stated that the proposed change was to be accomplished within one year, including drying up the acres that were no longer to be irrigated under water right 35-2697. If the conditions of the transfer were not met, the Director could rescind the transfer. Because the changes proposed by Transfer 71066 were never accomplished, Transfer 71066 should be rescinded.

ORDER

IT IS HEREBY ORDERED that Transfer 71066 in the name of FGS Farms Inc. is hereby **RESCINDED**. The elements of water right 35-2697 and the ArcGIS shapefile associated with the right have been returned back to their pre-transfer state, consistent with the 2002 SRBA partial decree.

DATED this 9th day of January, 2012.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF SERVICE

I CERTIFY that on the 10th day of January, 2012, the foregoing Preliminary Order Rescinding Transfer was served upon the following, by certified mail, by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

FGS Farms
c/o Lauralee McFarland
588 North 2600 East
St. Anthony, ID 83445



Sharla Cox
Administrative Assistant

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 35-2697

WATER RIGHT NUMBER: 35-2697

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	FGS FARMS INC C/O LAURALEE MC FARLAND 588 N 2600 E ST ANTHONY, ID 83445 (208)624-4347

Priority Date: 01/10/1962

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	04/01	to 10/31	10.420 CFS	2,324.00 AF
	<u>Total Diversion:</u>		10.420 CFS	2,324.00 AF

Location of Point(s) of Diversion

GROUND WATER	NW1/4SW1/4NE1/4	Sec. 35, Twp 03N, Rge 36E, B.M.
BONNEVILLE County		

Place of Use

IRRIGATION

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
03N	36E	35	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	38.0	13.0	15.0	39.0	40.0	38.0	38.0	581.0

Total Acres: 581

Conditions of Approval:

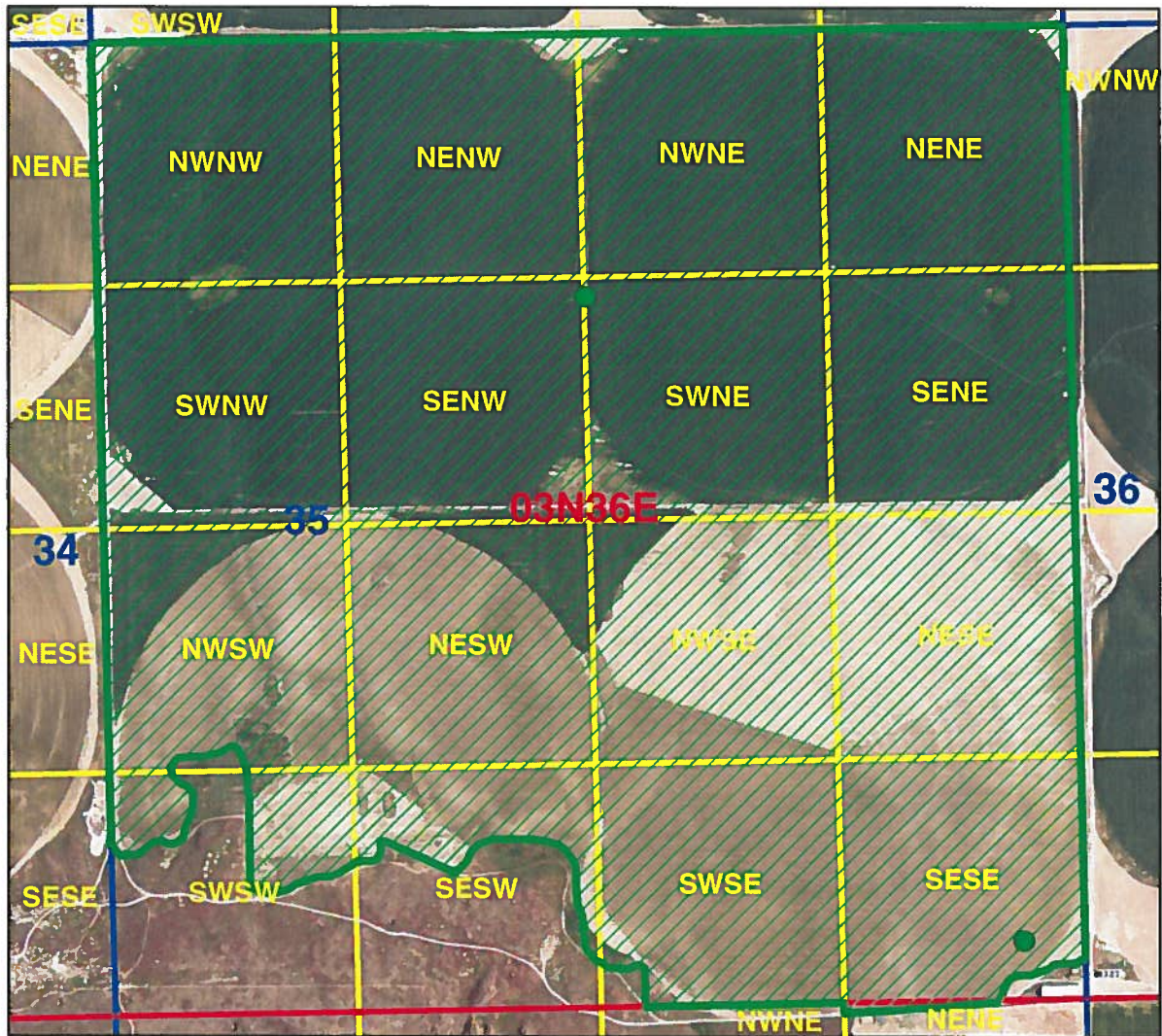
1. T19 Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.
2. R05 Use of water under this right will 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.
3. R64 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.

Comments:

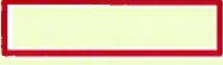
1. psdaggs 5/3/2004 9:36:12 AM Transferred Right
Comment: This is now an approved transfer, transfer number = 71066

2. jcefalo 1/9/2012 Transfer Rescinded
Comment: Changes contemplated by Transfer 71066 were never implemented. Order Rescinding Transfer issued on January 9, 2012.

Water Right 35-2697



Legend

-  Water Right POU
-  Township/Range
-  Sections
-  QQ

0 450 900 1,800
Feet



2011 Aerial Photography

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES

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 within fourteen (14) days after service 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 issuance 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.