BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT LICENSE NO. 37-7460 IN THE NAME OF FRANK ASTORQUIA AND/OR JOSEPHINE ASTORQUIA	)	**PRELIMINARY ORDER**

This matter having come before the Department of Water Resources ("the Department" or "IDWR") as a request for a hearing pursuant to Idaho Code § 42-1701A(3), the Department finds, concludes, and orders:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On October 20, 1975, Frank and/or Josephine Astorquia ("the Astorquias") applied to the Department for Permit No. 37-7460 ("permit"). The Department issued the permit on December 5, 1975. The permit authorized the diversion of 6.40 cfs of ground water in Govt. Lot 2, Section 2, Township 6 South, Range 14 East, Boise Meridian, for the irrigation of 320 acres.

2. The permit required the Astorquias to submit proof of beneficial use on or before December 1, 1980.

3. In 1976 the Astorquias drilled a well on their land and began diverting water in connection with the permit. The Astorquias' well was drilled to a depth of 320 feet. It was cased to a depth of only 20 feet. The well bore penetrated water bearing formations from 204 feet to 320 feet below ground surface. The static water level in the well was 221 feet below ground.

4. Idaho Power Company operates a series of hydroelectric dams on the Snake River and its tributaries in Idaho. In the late 1970s, a lawsuit compelled Idaho Power Company to protect its water rights in the Snake River downstream from Milner Dam by opposing new consumptive uses of water that would deplete the flow of the Snake River downstream from Milner Dam. (Astorquias' Exhibits, Tab 4) Beginning in 1977, Idaho Power Company refused to supply electrical power to prospective irrigators in the area where ground water was perceived to contribute to the flow of the Snake River downstream from Milner Dam. The Idaho Public Utilities Commission upheld Idaho Power Company's power connection "embargo" in 1979 and 1980. (Astorquias' Exhibits, Tabs 1, 4, 5, 6, and 7)

5. The Astorquias' permitted point of diversion lies in an area where ground water is tributary to the Snake River downstream from Milner Dam and upstream from Swan Falls Dam.

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6. On September 30, 1980, IDWR sent Astorquias a letter reminding them of the requirement to either submit proof of beneficial use or a request for extension of time to submit proof of beneficial use by December 1, 1980.

7. On December 4, 1980, IDWR sent the Astorquias a letter notifying them that the permit had lapsed pursuant to Idaho Code § 42-218a because the Astorquias had not filed the required proof of beneficial use statement.

8. In January of 1981 the Astorquias submitted a Request for Extension of Time ("extension request") seeking five more years to develop the permitted beneficial use of water. The Astorquias stated in the extension request that 200 acres of land had already been irrigated in connection with the permit. The Astorquias requested the additional time because Idaho Power Company's embargo on new power hookups prevented them from getting enough electrical power to pump water to irrigate the 120 acres they had not yet developed. (July 2, 2002, Affidavit of Frank Astorquia)

9. On January 9, 1981, IDWR reinstated the permit and advanced its priority date to November 26, 1975, pursuant to Idaho Code § 42-218a. Pursuant to Idaho Code § 42-204, IDWR also approved the extension request until January 1, 1984, a term of three additional years.

10. In its cover letter for the reinstatement order, IDWR notified the Astorquias:

> The approval of the extension of time is based upon the moratorium by Idaho Power Company against new power hookups. In order for the Department to consider any ***future*** requests for an extension of time due to the moratorium, it will be necessary for you to submit evidence together with your request that you have applied to Idaho Power Company and have been denied a power hookup. [Emphasis added.]

11. In 1983 Idaho Power Company named the Astorquias, among others, as defendants in a lawsuit intended to protect its rights to use water for power generation at Swan Falls Dam. (Astorquias' Exhibits, Tab 14)

12. On October 31, 1983, IDWR sent the Astorquias a letter reminding them of the requirement to submit proof of beneficial use or a request for extension of time to submit proof of beneficial use by January 1, 1984. The letter stated:

> If you have not fully completed your project, and you or a previous owner of this permit have not received a prior extension of time, you may request an extension of time if the delay is for reasonable cause as provided in Section 42-204, Idaho Code. ***If you have been prevented from proceeding by a government agency or by litigation, more than one extension of time can be granted.*** [Emphasis added.]

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13. On January 4, 1984, IDWR notified the Astorquias that their permit had lapsed because they had not submitted either a proof of beneficial use statement or an acceptable request for extension of time to submit proof of beneficial use by the deadline of January 1, 1984.

14. On January 23, 1984, the Idaho Public Utilities Commission ended its approval of Idaho Power Company's embargo on new connections for power service to irrigators. (Astorquias' Exhibits, Tab 18)

15. Late in1984, the State of Idaho and Idaho Power Company entered into an agreement, commonly termed "the Swan Falls Agreement", and a contract, commonly termed "the 1180 Contract" resolving the issues that led to the embargo on new power connections. (Astorquias' Exhibits, Tabs 19, 20, and 21)

16. In 1985 IDWR sent letters explaining the terms of the Swan Falls agreement and the 1180 Contract to permit holders affected by them. Because the Astorquias' permit had lapsed, IDWR did not send a letter to the Astorquias.

17. On July 3, 2002, over 18 years after IDWR notified the Astorquias that their permit lapsed, the Astorquias asked IDWR to reinstate the permit. With their July 3, 2002, request for reinstatement, the Astorquias submitted a proof of beneficial use statement, evidence of use on 200 acres, and a statement of reasonable cause for submitting late proof to IDWR. The Astorquias also asserted that the priority date of their permit should not be advanced as required by Idaho Code § 42-218a.2. The Astorquias asserted that their priority date should be November 26, 1975, because the extension request they submitted in 1981 was sufficient notice that they had developed 200 acres of irrigation in connection with the permit by the original deadline for submitting proof of beneficial use.

18. On July 10, 2002, IDWR issued a preliminary order reinstating the permit and advancing its priority date to July 3, 2002, consistent with Idaho Code § 42-218a.2.

19. The Astorquias filed an *Exception to Preliminary Order* asking IDWR not to advance the priority date of the permit. On September 24, 2002, the Director of IDWR issued a Final Order reinstating the permit and advancing its priority date to July 3, 2002. Regarding the priority date issue, the Final Order states in Conclusion of Law No. 5:

> The purpose served by the Department's approval of the January 7, 1981 extension request was to provide additional time for the permit holder to develop the additional 120 acres authorized to be developed under permit no. 37-7460. If the Department had treated the extension request as a submission of proof of beneficial use under the permit, any opportunity for additional development under the permit would have been precluded. The Department cannot now characterize as error its action approving the extension request. To do so would have the effect of treating the January 7, 1981 filing as both an extension request and the submission of proof of beneficial use. The applicable statutes do not provide this option to either the permit holder or the Department.

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20. On October 23, 2002, the Astorquias petitioned the District Court of the Fourth Judicial District to review IDWR's Final Order reinstating the permit.

21. On January 12, 2006, the District Court remanded the appeal of IDWR's Final Order back to IDWR for additional proceedings. However, no further proceedings before the Director were held.

22. In August of 2005 IDWR staff members conducted an examination to confirm the beneficial use of water established in connection with the permit. In November of 2005 IDWR completed a Beneficial Use Field Report recommending issuance of a water right license to the Astorquias for the diversion of 3.06 cfs of ground water, up to an annual volume of 800 acre feet, for the irrigation of 200 acres.

23. At the time of the field examination, the Astorquias' diversion system was comprised of the same motor and pump installed in 1976. The motor and pump had not been reconditioned.

24. The examiner's diversion rate recommendation of 3.06 cfs (1373 gpm) was based on a direct measurement of 2.89 cfs (1297 gpm) taken by IDWR staff, combined with the recollection of Judd Astorquia (the current farm operator) that Idaho Power Company had measured the diversion rate at or around 1375 gpm in 1996. Judd Astorquia attributed recent lower diversion rate measurements to declining ground water levels.

25. On July 6, 2011, IDWR issued Water Right License No. 37-7460 (license) to the Astorquias for the diversion of 3.06 cfs of ground water, up to an annual total of 800 acre feet, for the irrigation of 200 acres.

26. On July 21, 2011, the Astorquias requested a hearing pursuant to Idaho Code § 42-1701A(3) and Rule 730.02.e of the Department's Rules of Procedure (IDAPA 37.01.01) to contest the elements of the license.

27. On March 13, 2012, IDWR conducted a hearing as requested by the Astorquias. Attorney Josephine P. Beeman represented the Astorqiuas at the hearing. Frank Astorquia, Judd Astorquia (son of Frank Astorquia), and Josephine P. Beeman testified at the hearing.

28. Ground water levels fluctuate over time with changes in natural and artificial recharge rates and changes in discharge rates. In the general vicinity of the Astorquias' point of diversion, ground water levels declined approximately 5 to 15 feet from 1980 to 2008.

ANALYSIS

The Astorquias expressed two issues at hearing:

- First, the Astorquias seek to challenge the three-year extension of time to submit proof of beneficial use granted back in 1981. The Astorquias state that if they had been granted a five

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year extension instead of the three-year extension, they would have had until 1986 to submit proof of beneficial use for the permit. The Astorquias believe that if they had until 1986 to submit proof of beneficial use, IDWR would have sent them notice of the possibility that the permit could have been continued under the Swan Falls Agreement and that this notice would have caused them to submit a timely proof of beneficial use statement. The Astorquias assert that it was arbitrary and capricious for IDWR to limit their extension to three years. The Astorquias request that IDWR remedy its action by restoring the November 26, 1975, priority date for the license. As for the assertion made in 2002 that the priority date of the permit should not be advanced because the 1981 extension request should serve as a proof of beneficial use statement for a 200-acre portion of the permit, Astorquias' attorney stated in the hearing, "This is a separate legal argument from the argument that was made at the time a petition was filed to reinstate the permit."

- Second, the Astorquias assert that IDWR should issue the license for a diversion rate of up to 0.02 cfs per acre, or 4.00 cfs total. The Astorquias assert that declining ground water levels and years of wear and tear on the diversion system caused them to have a diminished diversion capacity by the time IDWR arrived to conduct a field inspection in 2005.

Priority Date Issue

In 1981 Idaho Code § 42-204.4 (now Idaho Code § 42-204.5) granted IDWR discretion to approve an extension of time to submit proof of beneficial use "not exceeding five (5) years." The phrase "not exceeding five (5) years" limits only the upper range of the possible extension period, not the lower range. According to the Astorquias, they were the only permit holders affected by Idaho Power Company's embargo on new power hookups to receive fewer than either five years or the requested number of years in which to submit proof of beneficial use. The Astorquias assert that IDWR acted arbitrarily and capriciously when it required them to submit proof of beneficial use for their permit within three years instead of the requested five years.

The Astorquias' argument fails for four reasons. First, the challenge to the issuance of the three-year extension of time is not timely. Under Idaho Code § 42-1701A, the time to appeal the decision of the department was back in 1981. The agency decision that the Astorquias are now seeking to undo is over 30 years old. It is not reasonable to challenge, nor is it reasonable to expect an agency to revisit, a decision made so long ago.

Second, even if the Astorquias were to be allowed to challenge the decision from 30 years ago, they bear the burden to show they were singled out and treated differently based on a distinction that fails the rational basis test. In *Terrazas v. Blaine County ex rel. Bd. of Comm'rs*, 147 Idaho 193, 207 P.3d 169 (2009), the Idaho Supreme Court stated that an arbitrary or capricious act by an agency is one that proves a party has "intentionally been singled out and treated differently based on a distinction that fails the rational basis test." In the Court's words, the party that has been singled out and treated differently has been made a "class of one." The Astorquias assert they were singled out because all the other permit holders who requested extensions of time in Administrative Basin 37, the location of the Astorquias' water use, during the time of Idaho Power Company's embargo on new power connections received either five additional years, the

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maximum allowed, or the amount of time requested. The Astorquias received neither five years nor the amount of time requested. The review of permits in Basin 37 is a sufficient peer group to conclude that the limitation of the Astorquias to three years additional development time was not typical. However, the Astorquias may not be a "class of one" because the evidence presented did not cover the entire area in which permit holders received extensions because of the Idaho Power Company embargo.

Moreover, the Court's definition in *Terrazas* includes the "rational basis test" in its standard for determining an arbitrary or capricious act. The Astorquias have not shown that IDWR failed to act rationally when approving their extension request. The Astorquias ask the Hearing Officer to conclude that because other users received longer periods of time to submit proof of beneficial use, the Department must not have acted rationally when addressing the Astorquias' request. There are other possibilities. One possibility is that the Department granted a three-year extension because the Astorquias had lost about three years of development time due to the Idaho Power Company embargo. The record contains no evidence to support this hypothesis; it is just a possibility. However, it underscores the problem with such after-the-fact attempts to challenge agency decisions made so long ago. Given the length of time that has gone by, we can only speculate why the extension of time to submit proof of beneficial use was granted for only three years. While the Astorquias have presented evidence that their three-year extension was not typical, they have not provided evidence that there was no rational basis for the extension limit.

Third, the Astorquias' arguments fail because even if IDWR had granted a five-year extension instead of three, there is no guarantee the Astorquias would have complied with that deadline.

Finally, the Astorquias were not harmed by the limitation of their extension to only three years. The Astorquias assert that if their extension request had been granted for five years, they would have had further notification of opportunities to submit proof of beneficial use or develop more water use in accordance with their permit. However, IDWR did not foreclose the opportunity for the Astorquias to get an additional extension of time when it approved the first extension for only three years. Both the 1981 cover letter and the 1983 notice from IDWR to the Astorquias explain that another extension might have been possible had the Astorquias requested one. In 1981, Idaho Code § 42-204.1 allowed for an extension equal to the time lost if work on the permitted water use was delayed by litigation that would bring the permit holder's title to the water into questions. Since the Astorquias were named as defendants in the Idaho Power Company lawsuit in 1983 precisely because they owned the permit, the Astorquias could have made a strong argument in 1983 that under Idaho Code § 42-204.1 they should have been entitled to another extension of time to submit proof of beneficial use. Despite communications from IDWR, the Astorquias made no attempt until 2002 to either submit proof of beneficial use or secure an additional extension of time. IDWR properly notified the Astorquias of their options. The Astorquias bear the responsibility for not submitting proof of beneficial use or seeking another extension of time to submit proof of beneficial use.

Diversion Rate Issue

The Astorquias also assert that they should have received a greater diversion rate than licensed.

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According to the Astorquias, ground water levels in their well have declined since the well was first drilled and water was first diverted from it for irrigation in the late 1970s. Declining ground water levels require a pumping plant to work harder and, all else being equal, the ability to divert ground water declines. The Astorquias also assert that years of wear and tear on their diversion system have diminished their ability to divert water. The Astorquias assert that had IDWR granted an additional five years to develop beneficial use instead of only three years, they would have submitted proof of beneficial use earlier in time. Earlier proof would have likely meant an earlier field examination to confirm beneficial use. An earlier field examination would have found higher ground water levels and a newer diversion system. The Astorquias assert that when ground water levels were higher and their diversion system was newer, they were able to divert ground water at a faster rate than the 3.06 cfs licensed by IDWR. The Astorquias assert that the limited diversion rate is harmful to them because it limits their agricultural production to lower value crops.

The Department must issue a license for the beneficial use of water that occurred during the authorized development period for the permit. The authorized development period ended when the Astorquias' extension expired on January 1, 1984. Astorquias submitted proof of beneficial use in 2002, which assured that the Department's field examination would not occur until at least 18 years had elapsed since the authorized development period and 25 or more years has elapsed since the Astorquias' irrigation system was new. Because it is difficult for the Department to ascertain after 2002 exactly what may have occurred so many years ago, Astorquias bear a significant responsibility for providing information necessary for such a review. Astorquias presented information on this topic to the Department on three occasions.

In 2002 when the Astorquias sought reinstatement of their permit, Frank Astorquia submitted an affidavit attesting that he began using "approximately 1800 gallons per minute (approximately 4.0 cfs)" after the well was completed in 1976. This affidavit also says water levels remained stable in the Astorquias' well for 27 years. Along with the affidavit, the Astorquias also provided a "Pump Estimate and Order" from Layne Pumps in Twin Falls as evidence that their irrigation system was designed to produce 1800 gpm (4.01 cfs). The design was for a deep well turbine pump driven by a 125 horsepower electric motor to lift water to the surface against 248 feet of total dynamic head. The Astorquias did not submit a pump curve, which might have contained additional useful information about the system design. The total dynamic head of 248 feet was likely estimated from a static water level in the well of 225 feet, plus a few feet of drawdown and a few feet of friction losses. It does not appear that the well pump had to also pressurize the irrigation system. Although the Layne Pumps estimate does not mention a booster pump, evidence indicates that once water was lifted to the ground surface, the sprinkler irrigation system was pressurized by a booster pump. Given these design parameters, to pump 4.0 cfs of water the Astorquias' pumping system would have had to be 90% efficient, which is extremely unlikely, if not impossible. Based on Department experience and knowledge of research on the subject, a "wire to water" efficiency of 70% would be more likely for a pumping system like the one employed by the Astorquias. It is very likely that the Astorquias' efficiency did not exceed 75%, even when the pumping system was new. Applying a 75% efficiency estimate to the Layne Pumps design indicates an approximate diversion rate of 3.33 cfs. Even so, relying on design parameters can be misleading. Field conditions do not always match design conditions. For

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example, drawdown in the well during pumping may be more than anticipated. Consequently, the Department relies heavily on direct measurements of the diversion rate for confirming beneficial use in large irrigation systems like the Astorquias'.

In 2005 when the Department conducted its field examination to confirm beneficial use, the field examiner actually found the Astorquias to be diverting 2.89 cfs. The examiner recommended a higher diversion rate than he actually found based on Judd Astorquia's recollection that the diversion rate had been reliably measured by Idaho Power Company at around 3.06 cfs (the licensed rate) during the 1990s. The examiner's recommendation of 3.06 cfs is reasonable because it is based on knowledge of a credible measurement that seemed to indicate a decline that could be attributable to some ground water level fluctuation combined with system wear and tear.

In 2012, hearing testimony indicated the Astorquias pumped 4.00 cfs when their irrigation system was new and before ground water levels had declined, possibly as much as 40 feet. The Astorquias suggested at the hearing that the hearing officer review ground water level data that may be available in the Department's records. Department staff members have evaluated water level changes from 1980 to 2008 in the vicinity of the Astorquias' point of diversion. The data show a ground water level decline of approximately 5 to 15 feet in that time. Starting with the Layne Pumps design and applying a 15 foot decline in ground water levels and a 70% "wire to water" efficiency yields an estimated diversion rate of 2.93 cfs, which is very close to the 2.89 cfs measurement reported by the field examiner.

Based on the evidence presented, it is improbable that the Astorquias' diversion system was ever capable of producing 4.0 cfs. It is likely that some decline in ground water levels, combined with system wear and tear, resulted in some diminished pumping capacity for the Astorquias. A small percentage change is most likely. The field examiner's adjustment from the measured 2.89 cfs up to 3.06 cfs was reasonable, but it reflects system conditions after the authorized development period. A diversion rate as high as 3.33 cfs might have been achieved when the Astorquias' diversion system was brand new during the authorized development period. The licensed diversion rate should be adjusted to 3.33 cfs.

CONCLUSIONS OF LAW

1. The Astorquias' challenge to the length of the 1981 extension of time to submit proof of beneficial use is not timely pursuant to Idaho Code § 42-1701A. Since the Astorquias did not challenge the extension at the time it was issued, they cannot challenge it now. Even if the Astorquias were able to challenge the extension now, they have not shown that they were intentionally singled out and treated differently based on a distinction that fails the rational basis test. Their argument is not based on actual information, but rather on speculation and conclusions drawn from actions that happened over 30 years ago. Finally, even if they had been granted an extension to five years, the Hearing Officer is not convinced that it would have made a difference. IDWR did not prevent the Astorquias from submitting proof of beneficial use at an earlier date or seeking even more time to develop a beneficial use of water in connection with their permit. The Astorquias bear the responsibility for failing to

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protect the priority date of their water right by either submitting proof of beneficial use at an earlier time or seeking additional time to submit proof of beneficial use.

2. The Astorquias are entitled to a diversion rate of 3.33 cfs.

ORDER

Issuance of Water Right License No. 37-7460 with a priority date of July 3, 2002, is **AFFIRMED**.

The diversion rate authorized by Water Right License No. 37-7460 should be **INCREASED** to 3.33 cfs.

Dated this 23rd day of May, 2012.

Shelley W. Keen

Shelley W. Keen
Hearing Officer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of May, 2012, I caused a true and correct copy of the foregoing Preliminary Order to be served on the following parties by the indicated methods:

Frank Astorquia Josephine Astorquia 1725 E 1800 S Gooding, ID 83330	☒ U.S. Mail, Certified, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email
Josephine P. Beeman 409 West Jeffereson Street Boise, ID 83702 (208) 331-0954 (Facsimile)	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☒ Facsimile ☐ Email

Jean Hersley
Technical Records Specialist

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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.

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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.