



Governor Brad Little

Director Mathew Weaver

January 8, 2024

RE: Final Order Revising Water District No. 120

Dear Water Right Holder,

Enclosed please find a copy of the Final Order regarding the above referenced matter. This order revises the boundary of Water District No. 120, American Falls Area (“WD120”) to include ground water rights located between the existing WD120 and the East Snake Plain Aquifer Ground Water Management Area boundaries as shown on the map in Attachment A of the Final Order. The records of the Idaho Department of Water Resources (“IDWR”) show that you own or have an interest in one or more water rights within the existing or revised boundary of WD120.

A public hearing regarding this matter was held in the Blackfoot Performing Arts Center in Blackfoot, Idaho on December 9, 2021. Since then, IDWR has been working through objections to the proposed revision submitted through written testimony after the hearing. Working through the written testimony led to an extended timeframe between the date of the public hearing and issuance of this order.

Also enclosed is an informational sheet that explains options for responding to final orders. Please note that any party subject to the order may file a petition for reconsideration within fourteen (14) days of the service date of the order, which is the date of this letter. The Department will act upon petitions within twenty-one (21) days of their receipt.

Please contact this office or the IDWR regional office in Idaho Falls (208-525-7161) if you have any questions concerning the attached order.

Sincerely,

A handwritten signature in black ink that reads "Brian Ragan". The signature is written in a cursive, flowing style.

Brian Ragan
Water Compliance Bureau

Encl: *Final Order Revising Water District No. 120*
Explanatory Information to Accompany a Final Order

cc: IDWR Eastern Region, Idaho Falls

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

IN THE MATTER OF THE PROPOSED
MODIFICATION OF THE BOUNDARY OF
WATER DISTRICT NO. 120, AMERICAN
FALLS AREA

FINAL ORDER MODIFYING WATER
DISTRICT NO. 120

COURSE OF PROCEEDINGS

The Director (“Director”) of the Idaho Department of Water Resources (“Department”) is authorized to divide the state into water districts for the purpose of distributing water among appropriators under the laws of the State of Idaho. Idaho Code § 42-604 authorizes the Director to create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts as required to properly administer uses of the water resources. The authority to revise or expand the boundaries of water districts applies to those streams, or other water sources including ground water, for which the priorities of appropriation have been adjudicated by court decree. Idaho Code § 42-604 directs that, before entering an order modifying the boundaries of a water district, the Department shall mail notice to each water user in the district describing the proposed action, scheduling the time and place of a hearing on the proposed action, and establishing a time period for submission of written comments.

On November 19, 2021, the Director issued a *Notice of Proposed Action, Public Hearing, and Written Comment Period in the Matter of the Proposed Modification of Water District No. 120, American Falls Area* (“Notice”). In the Notice, the Director proposed modifying Water District 120 (“WD 120”) to include an area (“Expansion Area”) located between the existing WD 120 and Eastern Snake Plain Aquifer Ground Water Management Area (“ESPA GWMA”) boundaries. Both the current WD 120 boundary and the proposed Expansion Area are shown on the map attached hereto as Attachment A. The proposed modification would incorporate all ground water rights in the Expansion Area that are not currently within a water district into WD 120. In addition, ground water rights located within the ESPA GWMA and in a portion of Water District 290 (“WD 290”) that is adjacent to and slightly overlaps with WD 120, were considered for incorporation into WD 120. The Notice also explained that domestic and stockwater ground water rights as defined in Idaho Code §§ 42-111 and 42-1401A(11), and ground water rights administered by the Shoshone-Bannock Tribes and the United States pursuant to the 1990 Fort Hall Indian Water Rights Agreement (“Fort Hall Agreement”) are excluded from administration by WD 120.

The Department conducted a public hearing regarding the proposed modification of WD 120 on Thursday, December 9, 2021, and accepted written comments until December 20, 2021.

Based upon the record in this matter, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On February 19, 2002, the Director created WD 120. *Final Order Creating Water District No. 120* (“*Final Order*”). Pursuant to the *Final Order*, the boundaries of WD 120 were limited to those portions of Administrative Basins 35 and 41 overlying the ESPA¹. Since then, the boundary of WD 120 has been revised three times by the Department. The current boundary is shown on Attachment A.
2. On March 8, 2013, the Director created Water District 290 (“WD 290”). *Preliminary Order Creating Water District 29* (“WD 290 Order”). Pursuant to the WD 290 Order the boundaries of WD 290 were limited to the Bannock Creek Drainage in Departmental Basin 29. WD 290 is adjacent to, and partially overlaps, WD 120. WD 290 includes all state based surface and ground water rights, with the following three exceptions: (1) ground water rights used for domestic and stockwater use as defined in Idaho Code §§ 42-111 and 42-1401A(11), (2) ground water rights located in WD 120 overlying the ESPA, and (3) water rights administered by the United States and/or the Shoshone-Bannock Tribes (“Tribes”) pursuant to the Fort Hall Agreement and as decreed by the Snake River Basin Adjudication (“SRBA”) District Court in its *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* (August 2, 1995) and the *Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, In re SRBA Case No. 39576 (Aug. 13, 2014).
3. On November 23, 2013, the Director issued a preliminary measurement order requiring the installation and maintenance of approved measuring devices on specified diversions in WD 290. *See In the Matter of Requiring Measurement Devices and Controlling Works on Water Diversions in the Bannock Creek Drainage, Water District 290*.
4. All ground water rights claimed in the SRBA and within the proposed Expansion Area have been decreed by the SRBA District Court. The SRBA District Court issued the *Final Unified Decree* for water rights within the Snake River Basin on August 25, 2014.
5. Before issuing the Notice, the Department hosted a public information meeting at the Blackfoot City Hall Council Chambers on February 27, 2020, to inform water users of the intent to modify the WD 120 boundary to include the Expansion Area, and to gather feedback on this proposed action. Notice of this public information meeting was sent to owners of ground water rights located in the proposed Expansion Area and within WD120, including the Tribes. Notice

¹ The ESPA is:

[T]he aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian.

IDAPA 37.03.11.050.

of this public information meeting was not sent to owners of ground water rights used for domestic and stockwater use as defined in Idaho Code §§ 42-111 and 42-1401A(11).

6. On November 19, 2021, the Director sent the Notice. The Notice explained the Department's proposed action for the following reasons:

- The SRBA was completed on August 25, 2014. Idaho law specifies that the Department shall create or revise water districts for the administration of water rights where the water supplies of such rights have been adjudicated. A revised water district is necessary to properly administer ground water uses and rights within the proposed Expansion Area;
- The Director designated the ESPA GWMA on November 2, 2016, which includes both WD 120 and the proposed Expansion Area;
- Ground water in the proposed Expansion Area is hydraulically connected to the ESPA and the Snake River. Ground water withdrawals in the proposed Expansion Area have a depletionary effect on the ESPA and flows in the Snake River;
- Administration of ground water rights in the proposed Expansion Area is required to protect senior water rights in the ESPA and Snake River; and
- It is most efficient to incorporate ground water rights in the proposed Expansion Area into WD 120 rather than a separate water district.

7. On December 9, 2021, commencing at approximately 7:00 p.m. at the Blackfoot Performing Arts Center, Blackfoot, Idaho, the Department conducted a public hearing concerning modification of the WD 120 boundary. Approximately 25 people attended the hearing.

8. At the December 9 public hearing, a Department representative presented on the existing WD 120 boundaries, the proposed revision of WD 120 boundaries, the factual basis for the proposed revision of boundaries, and the ground water rights and uses affected by the proposed water district revision. The presentation confirmed the basis for including the Expansion Area in WD 120.

9. Following the presentation, the Department allotted time for participants to ask questions regarding the proposed water district revision.

10. Persons attending the hearing were given an opportunity to make oral statements for the record. In addition, the Department held the record open through December 20, 2021, to allow the public to submit written comments.

11. No participants at the hearing testified for the record.

12. The Tribes timely submitted written comments expressing the following concerns:

- A. The Tribes stated that the Department has a responsibility to consult with them separately and apart from the Notice process regarding matters which share geographic boundaries with the Tribes. The Tribes assert that the Department did

not act in good faith when considering expansion of WD 120. The Tribes further assert that the Department ignored provisions of the Fort Hall Agreement requiring the Department to work cooperatively with the Tribes or the Intergovernmental Board.

B. The Tribes do not support the Department's proposed action for the following reasons:

- i. Inclusion of portions of WD 120 overlying the ESPA must not interfere with the provisions, nature, scope or spirit of the Fort Hall Agreement and rights decreed and protected under the Fort Hall Agreement.
- ii. The Tribes maintain jurisdiction to implement and administer Tribal water rights within the Fort Hall Reservation. The proposed action may potentially impact Tribal water rights.
- iii. The proposed WD 120 boundary modification does not align with the ESPA GWMA as it pertains to lands on the Fort Hall Reservation that have a Tribal ground water right. Specifically, Tribal ground water right no. 27-11376 is not subject to Department administration and should be excluded from WD 120.
- iv. The proposed WD 120 boundary modification must not interfere with the Tribes' ability to develop and manage future points of diversions for utilization on any Tribal lands pursuant to the Fort Hall Agreement.
- v. The WD 120 boundary modification must ensure that all ground water monitoring be done in compliance with the Agreement. The Tribes further assert that civil regulatory authority is vested with the Tribes within the exterior boundaries of the Fort Hall Reservation and that all monitoring activities will be in cooperation with the Tribes and the State relating to non-Tribal lands.
- vi. The State of Idaho and the Department must respect and adhere to all laws enforced by the Tribes in all business transactions, employment, contracting and land use regulations on the Fort Hall Reservation.

13. No additional written comments were submitted.

CONCLUSIONS OF LAW

Statutory Authorities

1. Idaho law declares that all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho is the property of the state, whose duty it is to supervise

the appropriation and allotment of the water to those diverting the same for beneficial use. *See* Idaho Code §§ 42-101, 42-103, and 42-226.

2. The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602.
3. Idaho Code §§ 42-226 and 42-237a.g., assign the authority and responsibility to the Director for the administration of ground water rights in the State in accordance with the prior appropriation doctrine as established by Idaho law so as to protect prior surface and ground water rights.
4. The Director has responsibility for the direction and control of the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in Chapter 6, Title 42, Idaho Code.
5. Idaho Code § 42-604 authorizes the Director to form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. The Director may also revise the boundaries of a water district, abolish a water district, or combine two (2) or more water districts, by entry of an order, if such action is required to properly administer the users of the water resource.

Response to the Tribes' Written Comments

7. The Department erred when it did not consult with the Tribes separately and apart from the general mailing before sending the Notice to them and other ground water users within WD120 and the Expansion Area. The Department should coordinate with both the Tribes and the United States Bureau of Indian Affairs (“United States”) on future administrative actions that take place on or adjacent to Tribal boundaries.
8. The Department recognizes the Tribes’ sovereignty and jurisdiction over the administration of Tribal water rights that are part of the Fort Hall Agreement. The Department’s Notice stated that “ground water rights administered by the Shoshone-Bannock Tribes and the United States pursuant to the 1990 Fort Hall Indian Water Rights Agreement” are “excluded from administration by WD 120.” The proposed action is consistent with the Fort Hall Agreement.
9. Prior to initiating this proposed action, the Department identified all Tribal water rights subject to administration by the Tribes under the Fort Hall Agreement, including the Tribes’ ground water right no. 27-11376, and excluded them from this proposed action. However, the Department sent notice of the public information meeting described in Finding of Fact No. 5 and notice of the public hearing described in Finding of Fact No. 6 to the Tribes because of their ownership of ground water right no. 27-7000. Water right no. 27-7000 is a State-issued ground water right acquired by the Tribes under State law. The water right authorizes the diversion of

ground water for municipal use at a diversion rate of 0.5 cubic feet per second and a total annual diversion volume of 362 acre feet. One of the wells used by the Tribes to divert water right no. 27-7000 lies within the Expansion Area

10. Article 8.2.6 of the Fort Hall Agreement states:

The state shall administer the distribution of those rights acquired under state law within the Reservation that are not a part of the Fort Hall Agency, Tribal or Fort Hall Indian Irrigation Project water rights.

Water right no. 27-7000 is not a Fort Hall Agency, Tribal, or Fort Hall Indian Irrigation Project water right as described in Article 7 of the Fort Hall Agreement or the *Revised Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, In re SRBA Case No. 39576 (Aug. 13, 2014). Although water right no. 27-7000 is administered by the state, the Department should work collaboratively with the Tribes in its administration as contemplated by Article 8.2.7 of the Fort Hall Agreement.

11. The Tribes and the Department have a long history of cooperatively measuring and monitoring surface and ground water resources on and near the Fort Hall Reservation. This cooperative arrangement is formally recognized in the Memorandum of Agreement (MOA) for Water Measurement and Data Collection Program within the Fort Hall Reservation, which was last renewed in December 2020 by the Department and Tribes. The Tribes and the Department use the data collected under the MOA to carry out their independent and sovereign water resource management responsibilities. The current period of the MOA is from January 1, 2020, through December 31, 2025, and may be extended as mutually agreed to by the parties. The Department is committed to maintaining this valuable partnership with the Tribes. The Department has been developing a second memorandum with the Tribes since July 2022 to address the administration of state-issued water rights within the Fort Hall Reservation boundary. When finalized, the second memorandum will further address many of the Tribes' written comments.

District Revision

12. The Director should not incorporate into WD 120 ground water rights currently administered by and within WD 290. Water District 290 currently administers both ground water rights and surface water rights. The Department previously issued a measurement order for WD 290 which requires the installation and maintenance of approved measuring devices. In addition, ground water right owners in WD 290 also own surface water rights in WD 290. Incorporating their ground water rights into WD120 would result in these water right owners being administered by two watermasters: one watermaster for their ground water rights and another watermaster for their surface water rights. Establishing this dual watermaster administration is not required to properly administer uses of the water resources.

13. Based upon the above statutory authorities and the record in this proceeding, the Director should revise the WD 120 boundary to include the proposed Expansion Area.

Administration of Affected Water Rights

14. The Director concludes WD 120 and its watermaster should administer the affected ground water rights within the proposed Expansion Area in accordance with Idaho law and perform the duties prescribed by Chapter 6, Title 42, Idaho Code, and in accordance with the guidelines, direction, and supervision of the Director.

ORDER

IT IS HEREBY ORDERED that:

1. The southeastern boundary of WD 120 is modified to include the Expansion Area, but exclude that portion of WD 290 within the ESPA GWMA, as shown on the map attached hereto as Attachment A; and
2. All ground water rights located within the Expansion Area as depicted in Attachment A, shall be administered by WD 120, except ground water rights used for domestic and stockwater as defined in Idaho Code §§ 42-111 and 42-1401A(11), and ground water rights administered by the Shoshone-Bannock Tribes and the United States pursuant to the 1990 Fort Hall Indian Water Rights Agreement; and
3. The WD 120 annual meeting is currently held each year on the second Monday of February. The 2024 WD120 annual meeting is scheduled as follows: Monday, February 12, 2024, at 1:00 p.m. in the Bingham County Courthouse, Room 3, located at 501 North Maple, Blackfoot, Idaho.

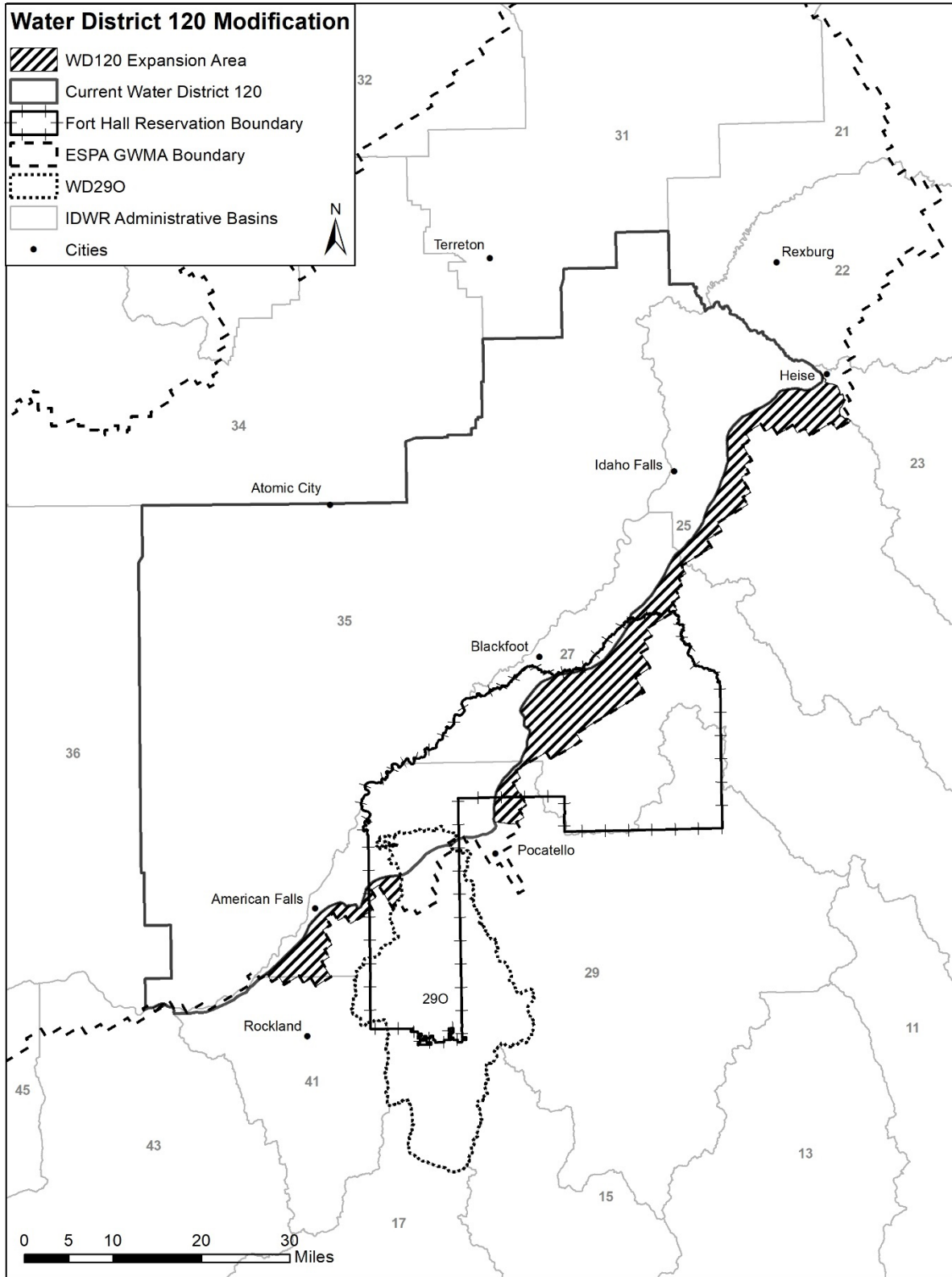
At the 2024 annual meeting, the holders of ground water rights within WD 120, including the Expansion Area, shall elect a watermaster and an advisory committee, and set a budget for operating the district. Due to the timing of the issuance of this order, the holders of ground water rights located in the Expansion Area shall not be subject to WD 120 assessments determined for the 2024 water district operating budget; and
4. The Director shall issue a separate order requiring the installation of approved measuring devices for ground water diversions located within the Expansion Area.

DATED this 3rd day of January 2024.



MATHEW WEAVER
Director

ATTACHMENT A



EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) 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.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **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 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.