

Wood River Valley and the Silver Creek/Bellevue triangle drainage area. Reasons that water users cited for creation of a separate district are listed in Finding of Fact 24.

16. Testimony was provided opposing the proposed combination of ground water and surface water rights in a water district due to concerns that “conjunctive administration of surface and ground water rights is imminent and is an inherently adversarial process” which will “bleed over into the business of WD37.” Water districts are limited to administration of water rights, including measurement and regulation of diversions. Adversarial tensions between ground water and surface water users resulting from potential conjunctive administration of water rights should not negatively affect water district operations given the limited regulatory scope of the water district and the fact that conjunctive administration is guided by separate processes outlined in the Conjunctive Management Rules (CMR’s) (IDAPA 37.03.11). The Department agrees with the testimony of Kevin Lakey, WD37 watermaster, which notes that decisions regarding conjunctive administration will be made and enforced by the Director. Conjunctive administration will not be resolved within the venues or forums of a combined water district. Moreover, the CMRs have been implemented and mitigation has been successfully implemented within WD130 without disruption to the operations of that water district despite the fact that both surface water and ground water rights are included in the district.<sup>3</sup>

17. Additional testimony suggested that it may be “legally impossible to address potential delivery calls from holders of senior surface water rights and potential mitigation requirements of junior ground water right holders if surface and ground water users are combined in one water district” and that “management and potential administrative conflicts should be explained before combining surface and ground water rights in one district.” This testimony appears to confuse conjunctive administration issues with the narrow and limited regulatory scope of water district operations. Again, conjunctive administration and mitigation has been implemented “legally” in WD130 where surface water and ground water rights coexist. The Department proposed combining ground water rights and surface water rights in one district for the reasons stated in Finding of Fact 13. The Department is statutorily obligated to create or modify water districts largely to provide a regulatory structure to address water distribution problems and minimize potential conflicts. Water districts are not authorized to address potential mitigation requirements of junior ground water right holders but they are authorized to enforce mitigation requirements that may be required pursuant to orders of the Director under the CMRs. Potential mitigation requirements must be addressed by the holders of junior ground water rights working independent from a water district and preferably through a ground water district organized in accordance with chapter 52, title 42, Idaho Code.

18. Witnesses opposed combining ground water rights with surface water rights in a water district because surface water use is significantly more than ground water use in the proposed district and surface water users may out vote ground water users under the alternative method of voting allowed under Idaho Code § 42-605(4). The testimony cited concerns that the interests of ground water users will not be represented “because implementing conjunctive administration in the Big Wood River Basin will be contentious.” The Department notes that voting at annual water district meetings is limited to the adoption of a budget, election of a watermaster and treasurer, selection of an advisory committee and adoption of resolutions related to the operation of the water district. Conjunctive administration issues and decisions will not be subject to voting at annual water district meetings. Moreover, the concern that ground water users will be outvoted or “unrepresented” discounts the fact that about 100 ground water rights have been included in WD37 and WD37M for a number of years. The Department is not aware of complaints or concerns from those ground water users regarding “unrepresented” interests or control by

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<sup>3</sup> WD130 includes ground water rights in the ESPA overlying Basins 36, 37 and 41 and surface water rights from the Thousand Springs area overlying the ESPA and Basins 36 and 37.

surface water users. Additionally, the holders of many ground water rights in the proposed combined water district also hold surface water rights in WD37 or WD37M.<sup>4</sup> It is not clear that the interests of ground water users would be poorly represented when so many ground water users also own surface water rights that are presently administered by WD37/37M.

19. Witnesses opposed the proposed combination of ground water and surface water rights in a water district because ground water users may not be adequately represented on an advisory committee due primarily to the disparity in the amount of water use between surface and ground water users. Idaho law does not vest specific power in an advisory committee. The committee provides advice to the watermaster, the Director and the water users of the water district. The WD37/37M watermaster testified that the WD37/37M advisory committee representation is not based on the amount of water diverted but rather on geographical regions and types of beneficial water use. He added that if a combined district is formed, a steering committee will be selected to recommend, among other things, the organization of an advisory committee. The steering committee concept is consistent with the recommendation made by the Department during its presentation at the public hearing. The WD37/37M advisory committee chairman testified at the public hearing that he was confident that concerns about representation of ground water users on an advisory committee could be addressed. The Department concludes that an advisory committee can be selected that provides adequate representation of all water users in the proposed water district comprised of both surface water and ground water rights.

20. Witnesses testified that ground water rights in the Upper Wood River Valley and Silver Creek drainage should be placed in a separate water district because several water districts already exist in the ESPA that are composed primarily of ground water rights which provide a good model for ground water administration in the Big Wood River Basin. The Department acknowledges that there are several ESPA water districts that are limited to ground water rights but there is at least one ESPA water district, WD130, which includes both surface water and ground water rights. WD130 was created in 2002 when conjunctive administration of surface water and ground water rights within the district was imminent. Subsequently, conjunctive administration delivery calls have been made and the CMRs have been implemented. WD130 has functioned successfully despite contention among surface water and ground water users in the district. The Department recommends that ground water rights in the Upper Wood River Valley and Silver Creek drainage be combined with WD37 and WD37M because administration of the rights would be more efficient.

21. Witnesses testified that ground water rights in the Upper Wood River Valley and Silver Creek drainage should be placed in a separate water district due to concerns that water district administration costs can't be fairly allocated in a combined district. Specifically, a concern was expressed that ground water users "would wind up bearing a disproportionate cost of water district operations." In accordance with Idaho Code §42-610, water district costs are assessed to individual users based on the amount of water delivered. The WD37/37M advisory committee chairman testified at the public hearing that the current advisory committee members are concerned that surface water users could actually end up paying a disproportionate share of district costs because the costs of measuring the wells may be higher than expected since so many wells are not yet in compliance with the Department's ground water measurement order. The committee chairman testified that the WD37/37M advisory committee wishes to maintain the water district assessment rates. The Department's limited analysis indicates that if the WD37 2013 assessment rate were adopted and applied to both surface water and ground water deliveries in a combined water district, most ground water users would have an

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<sup>4</sup> Assessment records of the UWRWMD and WD37/37M show that about 41% of the water users assessed by the UWRWMD are also assessed by WD37/37M. A majority of the holders of large irrigation ground water rights in the UWRWMD also hold surface water rights in WD37/37M.

assessment that is less than or roughly equivalent to their 2013UWRWMD assessment.<sup>5</sup> While the testimony raised concerns about ground water users bearing a disproportionate share of district costs, no evidence was given to substantiate the concern.

22. Written testimony suggested that suggested the Department should have presented a budget for the proposed combined water district. Chapter 6, title 42, Idaho Code does not require the Department to present a proposed budget when creating a water district, modifying the boundaries of a water district or combining two or more water districts. Rather, Idaho Code § 42-605 requires that the water users at an annual water district meeting must adopt a budget. The Department presented information at the hearing suggesting that a steering committee be formed consisting of affected ground water users and members from the WD37/37M advisory committee to consider a budget that could be presented at the first annual meeting of a combined water district. Department representatives at the public hearing cautioned about the appropriateness of the Director dictating a budget to the users in contrast with the requirements of § 42-605. The Department representative stated at the hearing that the current budgets for WD37/37M were adequate for administration of surface water rights, but the budget needed for administration and on-going measurement of ground water rights might need to be somewhat higher than the 2013 UWRWMD budget. The Department finds that combining the 2013 WD37/37M and UWRWMD budgets and deliveries, or estimate of deliveries for the UWRWMD, would result in an assessment rate that is similar to the 2013 WD37/37M and UWRWMD assessment rates.

23. Witnesses suggested the ground water model for the Upper Wood River and Silver Creek/Bellevue triangle area must be completed before ground water and surface water rights can be combined in a single water district. Again, this testimony appears to confuse conjunctive administration issues with the narrow and limited regulatory scope of water district operations. Completion of a ground water model is not a legal requirement or prerequisite for including both surface water and ground water rights in one water district. The Department has created several water districts in the State that include both surface and ground water rights without having a ground water model completed.

24. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should take the following actions:

- i. Combine WD37 and WD37M into one water district to be designated as WD37;
- ii. Combine ground water rights in the Upper Wood River Valley and the Silver Creek/Bellevue triangle area with surface water rights in a combined WD37 to regulate water rights, and protect senior priority water rights in Basin 37;
- iii. Create a separate water district to administer both surface and ground water rights in the Camas Creek drainage including water rights from WD37A and WD37C to regulate water rights, and protect senior priority water rights in Basin 37; and
- iv. Abolish the UWRWMD.

## ORDER

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<sup>5</sup> This was determined by applying the WD37 2013 assessment rate to reported annual water use from certain municipal providers and 2013 water use from several UWRWMD metered ground water irrigation wells. The 2013 minimum assessment rate for the UWRWMD was over \$50 whereas the minimum assessment rate in WD37 and WD37M was only \$40. Given the significantly larger proportion of surface water use in a combined district, many of the smaller ground water users would be subject to a minimum rate assessment not to exceed \$50.

IT IS HEREBY ORDERED that:

1. Water District No. 37 and Water District No. 37M are hereby combined as one water district together with all ground water rights located within the boundaries of the combined water district but outside the boundaries of the ESPA and Water District No. 130 as shown in the map appended hereto as Attachment A, except water rights used for domestic and stock water purposes as defined by Idaho §§ 42-111 and 42-1401A(11) and water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113. The combined water district shall be designated as Water District No. 37, Big and Little Wood Rivers, and shall become effective January 6, 2014. The map attached hereto as Attachment B shows the boundaries of Water District Nos. 37 and 37M prior to the districts being combined pursuant to this Preliminary Order.

2. Water District No. 37 shall include ground water and all streams tributary to the Big Wood River and Little Wood River except Camas Creek and tributaries, and shall exclude Water District No. 37N (Upper Little Wood River and tributaries), Water District No. 37-O (Muldoon Creek and tributaries) and Water District No. 37U (Fish Creek and tributaries), and the lower portion of the Malad River and tributaries downstream and west of the point where the boundary common to Township 6 South and Range 13 East and Township 6 South and Range 14 East crosses the Malad River (approximately where Interstate 84 crosses the Malad River). The map attached hereto as Attachment B shows the locations of Water District Nos. 37-N, 37-O and 37-U.

3. The annual meeting of Water District No. 37 shall be held on January 6, 2014 to elect a watermaster, select an advisory committee, if desired, and set a budget for operating the district. The Director will send a separate notice to the holders of water rights in the water district providing a reminder of the meeting date and announcing the time and location for the meeting.

4. The water users attending the Water District 37 annual meeting shall adopt one budget for administration and measurement of both surface water rights and ground water rights. Ground water rights that are subject to assessment shall be assessed in the same manner as surface water rights and in accordance with the provision of chapter 6, title 42, Idaho Code. In cases where water delivery records do not exist for water rights, the assessments must be based on a reasonable estimate of water use during the previous season or seasons, not exceeding five seasons.

5. Water District No. 37-B is created to include all surface water and ground water rights in the Camas Creek drainage in Basin 37 as shown in the map appended hereto as Attachment A. Water District No. 37A and Water District No. 37C shall be merged with Water District 37-B. Water District 37-B shall exclude water rights used for domestic and stock water purposes as defined by Idaho §§ 42-111 and 42-1401A(11) and water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113. The map attached here to as Attachment B shows the boundaries of former Water District Nos. 37-A and 37-C.

6. As soon as practicable in calendar year 2014, the holders of water rights within Water District No. 37-B shall meet at a date, time and place to be announced by the Director to conduct its annual meeting to elect a watermaster, select an advisory committee, if desired, and set a budget for operating the district.

7. The Director shall issue a separate order requiring the installation of measuring devices and controlling works for surface water right diversions within Water District No. 37-B.

8. The Director shall consider combining all or portions of Water District No. 37-B with Water District No. 37 if Water District No. 37-B does not comply with the provisions of chapter 6, title 42, Idaho Code or if a majority of water users in the water district do not comply with existing or future orders of the Department requiring water measurement devices or controlling works.

9. The watermasters for Water District Nos. 37 and 37-B shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

- a. Measure, collect, and record the diversions under water rights;
- b. Administer and enforce water rights in priority; and
- c. Curtail unauthorized or excessive diversions as necessary (i.e., any diversion without a water right or in excess of the elements or conditions of a water right).
- d. Coordinate delivery by priority of rights that do not enjoy the benefits of any separate administration provisions as decreed in the SRBA.

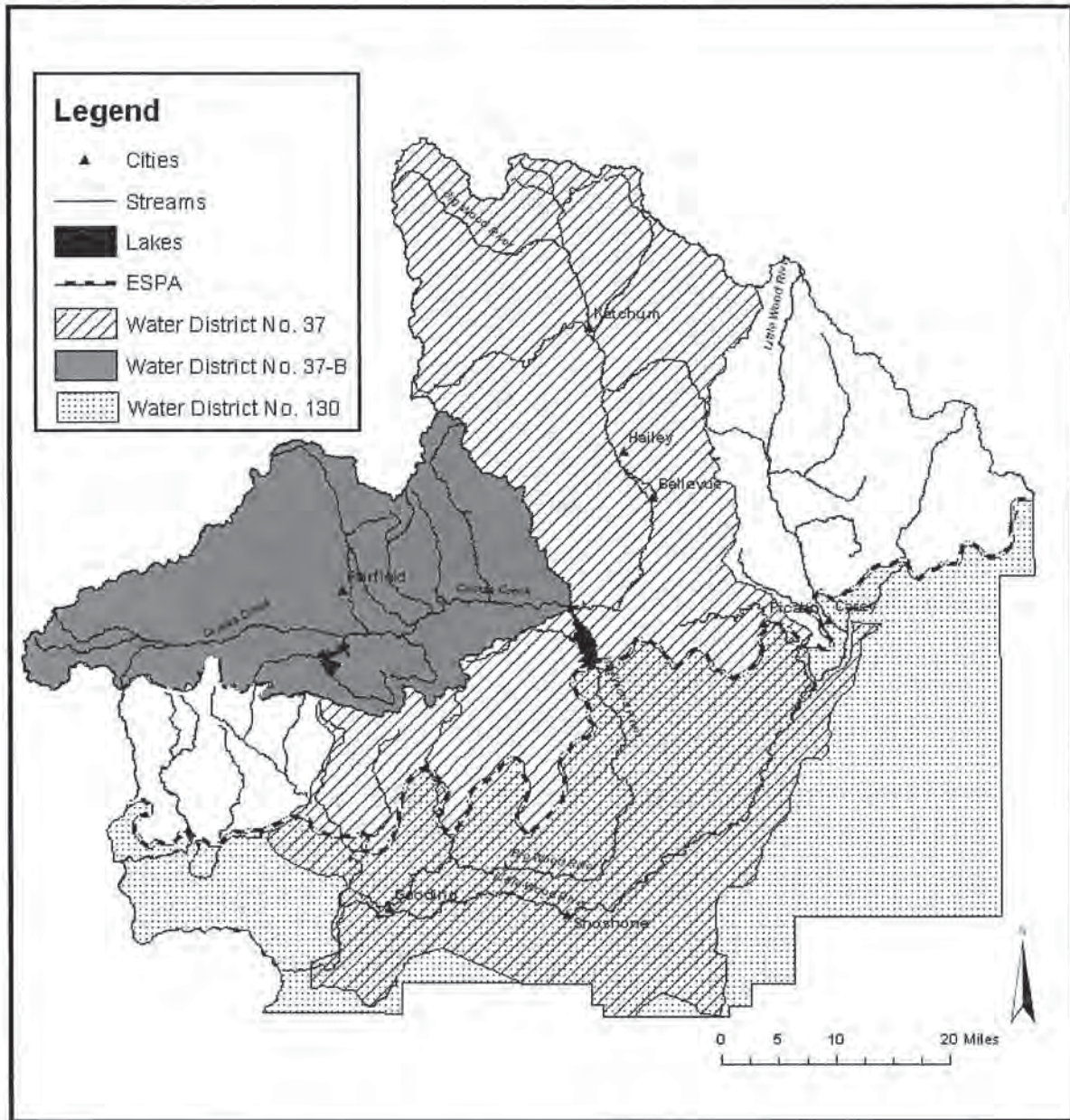
IT IS FURTHER HEREBY ORDERED that:

1. The Upper Wood Rivers Water Measurement District is hereby abolished effective December 31, 2013. The measurement district will continue to operate in accordance with chapter 7, title 42, Idaho Code, until December 31, 2013. The map attached hereto as Attachment B shows the boundaries of the measurement district.

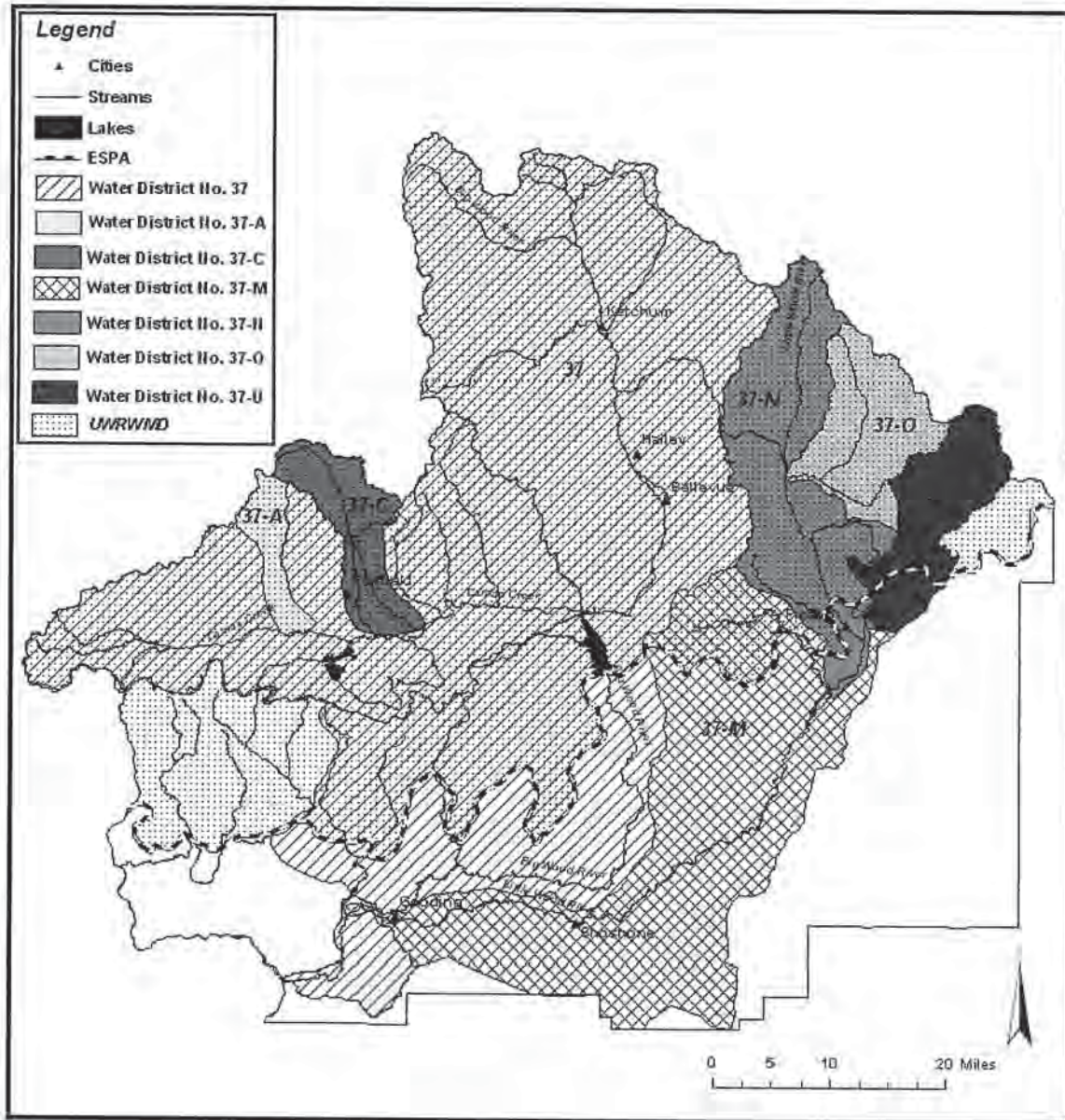
DATED this 17<sup>th</sup> day of September, 2013.

  
Allen Merritt  
Hearing Officer

**ATTACHMENT A**  
**Water District No. 37 and Water District 37-B Pursuant to Preliminary Order**



**Attachment B**  
**Basin 37 Water Districts and Measurement District Prior to Preliminary Order**



## **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:

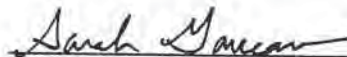
- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19<sup>th</sup> day of September 2013, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho, and posted on the Department's website: [www.idwr.idaho.gov](http://www.idwr.idaho.gov). Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.

Documents served: **Preliminary Order In the Matter of the Proposed Combination of the Water District Nos. 37, 37A, 37C and 37M and the Inclusion of Both Surface Water and Ground Water Rights in the Combined Water District; and in the Matter of Abolishing the Upper Wood Rivers Water Measurement District**



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Sarah Garceau  
Technical Records Specialist  
Idaho Department of Water Resources