

SECOND IDWR/IWRB (AGENCY) RESPONSE TO PUBLIC COMMENTS
DOCKET NO. 37-0101-2101
RULES OF PROCEDURE OF THE IDAHO DEPARTMENT OF WATER RESOURCES
(IDAPA 37.01.01)
August 30, 2021

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1. Comment: Regarding the definition of parties and persons in Rules 2.12 and .13:

Question: Are the proposed definitions of “Party” and “Person” inconsistent with one another? It seems the proposed revision to “Party” is intended to clarify that the agency (IDWR), or other agencies, are not to be “Parties” to informal or formal proceedings. If that is the intent, the definition of “Person” arguably undoes that prior revision by still including “agencies” as “persons” because “persons” are/can be “Parties.”

Agency Response: The term “agency” has been removed from Proposed Rule 2.13 in order to avoid the confusion alluded to in the comment.

2. Comment: Amend Rule 53.01.b as follows :

Unless otherwise provided by statute, rule, order or notice, documents are considered filed on the day emails are sent if emailed by 11:59 p.m. (Mountain Time) or, if not sent by email, when received by the agency. If an email is sent by 11:59 p.m. (Mountain Time), it will be considered filed on that day, unless that date is a Saturday, Sunday or legal holiday, in which case it is deemed filed on the next available business day.

Agency Response: The Agency has made substantial changes to Proposed Rule 53.01. in order to clarify the intent of the rule, address the comment, and to address potential intra-agency issues related to email and online filing and fees.

3. Comment: Amend Rule 100.01 description of informal proceedings as follows:

It seems that the disjunctive “or” should be a conjunctive “and” because one begets the other . . . if there is no formally designating hearing (or presiding) officer, then there is no hearing record. But, if there is a formally designated hearing (or presiding) officer, then there is a hearing record. Thus, it seems more appropriate (to me anyway) to say “. . . without a formally designated presiding officer and hearing record to be preserved . . .” In other words, you can’t have one without the other in IDWR proceedings can you (i.e., I am not aware of a situation where a formal record is created

and kept in the absence of a hearing officer-based proceeding and vice-versa)?”

Agency Response: The Agency accepted the proposed change

4. Comment: Amend Rule 730 (and 720) to add a new sub-section .02 as follows:

Timing. Upon completion of a contested case hearing and the submission of any post-hearing briefing ordered as part of the proceeding, the matter is deemed complete fully submitted. The hearing officer will issue a preliminary order within fifty-six (56) days of completion of the hearing phase unless this timing requirement is waived by the parties or for good cause shown.

Similar to requirements for district judges, and similar to timing requirements imposed upon the agency head under 720.02.e and 730.02.e, it seems that hearing officers should have some expected timeframe in which to issue a decision. This same “timing” clause should also be inserted into Rule 720.

Unfortunately, we’ve experienced ever-increasing lengths of time between hearing and post-hearing briefing completion and decision issuance. In some instances, this time delay has stretched as many as 10-11 months post-hearing. While we appreciate that some matters are particularly complicated and that “good cause” for such delay might exist, lengthy gaps between hearing and decision are problematic. Parties are left having to negotiate issues associated with on-the-ground project delays and hearing officers are, in some instances, likely struggling to issue decisions because of stale recollections of the matter and stale record awareness (i.e., hearing officers have to “remind” themselves and bring themselves back up to speed when working on decisions plagued by significant gaps in time).

We are not necessarily wedded to this proposed language, but think that some timing bookend/goal would be beneficial to parties and hearing officers alike.

Agency Response: The Agency declines to adopt the suggested language, nor insert it into Proposed Rule 720. The agency is well aware of the concern expressed in the comment and is working toward decreasing delays within budgetary and personnel limitations. The most recent agency actions include: hiring a full-time hearing officer coordinator, conducting structured and ongoing hearing officer training and policy development, and closely tracking all protested matters.

5. Comment: Amend the language of Rule 730.02.a as follows:

This is a preliminary order of the agency. It can and will become final without further action of the agency unless a party petitions for reconsideration, files exceptions with the agency head, or requests a hearing with the Director pursuant to Section 42-1701A(3), Idaho Code. Filing exceptions to the agency head is not required in order to exhaust administrative remedies.

Agency Response: The Agency accepted the proposed change.

Norman Semanko – Parsons Behle & Latimer

6. Comment: Please consider adding a mediation provision for contested cases. Here is some suggested language:

Mediation. In all contested cases, upon request of one or more parties and with the consent of all parties, the department may assign a mediator. The mediator must be a department hearing officer, other duly authorized agent of the department, or attorney who has received training in dispute resolution techniques or has a demonstrated history of successfully resolving disputes, as determined by the department. A person who mediates in a particular contested case may not participate in a hearing in that case and may not prepare the proposed, recommended or final order in the case. The mediator may not communicate with employees or agents of the department regarding the mediation other than to inform them of the pendency of the mediation and whether the contested case settled."

*Modeled after the Washington Pollution Control Hearings Board Rules of Procedure, WAC 371-08-395.

Agency Response: While the Agency declines to specifically adopt the proposed language, Proposed Rule 101.02 has been amended to specifically refer to mediation. Proposed Rule 610 has also been amended to incorporate the applicability of I.R.E. 507. Parties to mediation may agree to the application of all or part of the 2005 Model Standards of Conduct of Mediators.

Association of Idaho Cities

7. Comment: AIC requests that IDWR notify us and the other stakeholders if any further, substantive changes are made to the current pre-final draft language following the July 7th comment deadline and prior to the July 30th submittal to the Division of Financial Management.

Agency Response: Due to the nature and limitations of the zero-based regulation process, the Agency is instead now submitting its proposed procedural rulemaking notice and text on August 30, 2021, for publication on October 6, 2021.

The Agency will send the Proposed Rule Text to the stakeholder list alongside this response document on or about August 30, 2021.

The Agency will *not* be accepting additional comments from stakeholders related to its sending of the Proposed Rule Text, per se. Rather, after publication of the Notice of Proposed Rulemaking and Proposed Rule Text in the October 6, 2021, administrative bulletin, the Agency will accept additional public comments for twenty-one (21) days – or until October 27, 2021. Additional relevant stakeholder comment may be submitted during this period for consideration by the Agency prior to publication of the Notice of Rulemaking – Adoption of Pending Rule. If changes have been made based on commentary received, IDWR will also publish a pending rule text at the required time.

City of Pocatello

8. Comment: Regarding Rule 2, Definitions:

As a general observation, the definitions of Agency, Hearing Officer and Presiding Officers are unclear about the extent to which these terms overlap or are distinct from each other, creating confusion about whether & how individual provisions in the Rules will apply in a specific proceeding.

Agency Response: The definitions of Agency, Hearing Officer, and Presiding Officer in Proposed Rules 2.1, 2.9, and 2.15 have been modified in an attempt to be more precise.

Additionally, the use of these terms and their corollaries was contextually addressed throughout the entirety of the ruleset. Changes to clarify actors and actions were made to Proposed Rules 200, 204, 353, 355, 521, 523, 527, 550, 604, 700, and 702.

9. Comment: Regarding Rule 2.1, the definition of Agency:

The reference here to presiding officers *appointed by the agency* seems to exclude officials hearing informal proceedings where no presiding officer is formally appointed (see Rule 100.01.). However, this is inconsistent with Strawman 2.0's approach of using the term "the agency" in provisions intended to apply to both formal and informal proceedings, and "presiding officer" in provisions intended only to apply to formal proceedings.

Agency Response: The definition of Agency has been changed, in pertinent part, to “*hearing officer appointed as a presiding officer by the agency.*” The various rules regarding informal and formal proceedings have also been amended in an attempt to better explain the differing stages of contested case proceedings. *See e.g.* Proposed Rules 100-102.

10. Comment: Rule 2.15, the definition of presiding officer should be amended as follows:

15. Presiding Officer. One (1) or more members of the agency board, the agency director, or duly appointed hearing officers presiding over a contested case/formal proceeding as authorized by statute or rule. When more than one (1) officer hears a contested case/formal proceeding, they may all jointly be presiding officers or may designate one (1) of them to be the presiding officer.

For the following reasons:

“Revision suggested - as drafted, Rule 002.15 does not actually provide a definition.”

and

“The Rules should specify whether all contested cases have a “presiding officer,” or only formal proceedings.”

and

“Rule 002.15 would be an appropriate place to specify whether “presiding officer” refers only to officials hearing formal proceedings, or to officials hearing any contested case.”

Agency Response: The Agency added a slightly modified version of the proposed change.

11. Comment: Regarding Rule 100.01:

This could be read as stating Rules 100 and 101 are the only provisions governing informal proceedings. However, we understand that all provisions referring to “the agency” (instead of “presiding officer”) apply to informal proceedings as well.

and

This is ambiguous and could mean either a) informal proceedings do not have a presiding officer at all, or b) informal proceedings do have a presiding officer, just not one that is formally designated. This should be clarified because as drafted, Rule 100.01 creates confusion about whether subsequent provisions referring to “presiding officers” will apply to informal proceedings.

Agency Response: Proposed Rule 100 and 101 have been amended to make clear that informal proceedings are conducted by the Agency without a presiding officer. Formal proceedings are conducted by a presiding officer as defined under Proposed Rule 2.15. The language “formally designated” has also been removed.

12. Comment: Regarding Rule 300, but generally applicable:

In certain provisions, Strawman 2.0 replaces “presiding officer” with “the agency,” which we understand is intended to clarify that the given provision applies to both formal and informal proceedings, instead of just formal proceedings.

If reference to “the agency” vs. reference to “the presiding officer” is how IDWR intends to distinguish whether a provision applies to both formal and informal proceedings, a) the Rules should state that explicitly somewhere, and b) IDWR should review all references to “the agency” vs. “the presiding officer” in the Rules and confirm each reference correctly reflects IDWR’s intent about which type of proceeding the specific provision should be read to apply to.

Agency Response: The use of the terms “presiding officer” and “agency” in Strawman 2.0 was not meant to signal whether a provision applies to both formal and informal proceedings, or just to formal proceedings.

Regardless, the Agency undertook a thorough contextual review of the use of these terms which led to the changes referenced in the *Agency Response* to Comment 8 above.

Suez Water Idaho

13. Comment: Regarding Rules 2.8 and 220.02.f:

Given that [exceptions] is now a defined term, the Department may wish to consider eliminating use of the term exceptions in other contexts, notably, Rule 220.02.f (suggested edit: “~~Any exception to the time limits in this rule may be granted by the~~ The presiding officer may issue a scheduling order with different structure and timing than provided in these rules or provide for extensions of time or other adjustments to the scheduling order for good cause shown.”); Rule 603 (suggested edit: “~~Formal exceptions~~ Written objections to rulings admitting or excluding evidence are unnecessary and need not be taken in order to preserve the issue for appellate review.”)

Agency Response: The Agency has changed Proposed Rule 220.02.f and Proposed Rule 603 to address the comment. Also, the practice of noting “exceptions” to evidentiary rulings is arcane and has been removed from Proposed Rule 603 altogether. *See e.g.* I.R.C.P. 46.

14. Comment: Regarding Rule 2.15, the definition of Presiding Officer and Rule 100.01, formal and informal proceedings:

We think it would be helpful to have a clear demarcation of when a presiding officer is appointed. Neither the current nor the proposed rules describe how or when the presiding officer is to be designated. Other things (notably ex parte communications) key off of whether or not a presiding officer is designated. So this is important for parties to understand.

Note, by the way, there is language in Rule 100.01 regarding “a formally designated presiding officer.” This is confusing. Is there such a thing as an “informally” designated presiding officer?

We think it will be simpler and clearer if the appointment of a presiding officer signaled and corresponded to the initiation of the formal proceedings. If an agency staff person is designated to conduct informal proceedings prior to the initiation of formal proceedings, the rules could refer to such a person as an “agency official” (or some such) rather than a “presiding officer.”

Agency Response: The Agency has amended Proposed Rules 102 and 510 so the presiding officer will be identified in the prehearing order initiating formal proceedings. The language regarding “formal” designation of a presiding officer has also been removed. *See also Agency Response to Comment 11 above.*

15. Comment: Regarding Rule 100, Informal and Formal Proceedings, and Rule 101, Informal Proceedings:

The first sentence of Rule 100 says: “Contested case proceedings before the agency shall be conducted as either informal or formal proceedings.” (By the way, perhaps the rule should be re-numbered to give a subsection number to this sentence for purposes of reference.)

This sentence implies that every contested case—including every application, protested or not—will involve either one or the other (informal or formal proceedings). In other words, this sentence suggests that everything that is not a formal proceeding is an informal proceeding. But that conflicts with Rule 101.01 which says that informal proceedings may be commenced by issuance of a Notice of Informal Settlement Conference. If that is the case, what precedes the informal proceeding?

We suggest that Rule 101.01 be revised to say that an informal proceeding is initiated by the filing of an application. In other words, everything prior to formal proceedings are informal proceedings. (This would supersede the provision in Rule 101.01 saying that informal proceedings are initiated by issuance of a notice by the agency. However, retention of the provision requiring attendance at a settlement conference may be useful in protested matters).

If this broad definition of informal proceeding is not what the Department has in mind, then we suggest this be made clear and that a third category of “super informal” agency action be described to address unprotested matters or protested matters prior to the issuance of a Notice of Informal Settlement Conference.

We don’t care which way the Department goes on this; we are just seeking clarity. In sum, it would seem that the rules should either:

- (1) Expand the definition of informal proceedings to include any agency processing of an application, etc. that is not a formal proceeding—i.e., to include uncontested matters.

or

- (2) Describe a third stage or category of agency action that is even more informal—i.e., uncontested matters or the stage prior to the Notice of Informal Settlement Conference.

Agency Response: In response to the comment the Agency extensively amended Proposed Rule 100, Proposed Rule 101, and Proposed Rule 102 to clarify the context, initiation, and application of agency informal and formal proceedings.

16. Comment: Regarding Rule 100, Informal and Formal Proceedings, Rule 101, Informal Proceedings and Rule 102, Formal Proceedings:

Rule 100.03 implies a sequencing in which the agency begins with informal proceedings and then moves permanently to formal proceedings (if no settlement is achieved at the informal stage). We suggest that the rules should provide greater flexibility. Two examples:

- (1) Even after formal proceedings are initiated, the Presiding Officer should be able to call a “time out” and allow the parties to return to informal proceedings in order to engage in off-the-record discussions aimed at settlement. In our view, the agency should have some discretion (at least where the parties stipulate) to allow the Presiding Officer or some other

agency official to be present at and to participate in such discussions (without a transcript or other record). We don't really need a rule to allow the parties to talk to each other. What is valuable and important is to allow the parties to get some informal, non-binding feedback from pertinent agency staff.

- (2) If after formal proceedings are initiated all the Protestants withdraw their protests, the agency should be able fall back into some level of informal proceeding. (As we discussed above, we don't know if that would be deemed an informal proceeding or a third category contested case involving no "proceeding" at all.)

Agency Response: See Agency Response to Comment 15 above and Proposed Rule 100.03.

17. Comment: Regarding Filing and Service of Documents:

We welcome the changes to Rule 53.01, which now allows filing by email from the outset and allows email filing until 11:59 p.m. on the day of the deadline. (By the way, there appears to be some typographical/language problems with the first sentence in 53.01.b.)

We continue to urge the Department to allow service by email from the outset, rather than requiring an order from the presiding officer. We appreciate that not all parties have access to email or wish to use it. It would seem that this could be accommodated by a provision stating that in any party's initial filing they shall either provide an email that may be used for service or elect not to do so. And, once the case is underway, parties should be allowed to "change their mind" by filing a notice (opting in, opting out, or providing a different email address). All of this could be addressed under Rules 53.02 and 53.03.

However, a party who declines to provide an email should not be allowed to serve others by email or to file by email. If they want the benefit of email convenience, they must make that convenience available to others and to the agency.

Agency Response: The Agency has extensively re-written Proposed Rule 53.01 in response to the comments. See also Agency Response to Comment 2 above.

18. Comment: Regarding Rule 220, Motions:

In our comments on Strawman 1, we suggested adding a provision allowing the presiding officer to depart from the briefing set out in the rule. You

rejected this suggestion on the basis that the rule already allows that flexibility. We don't see that it does. We only see a provision in Rule 220.02.f allowing the presiding officer to make an exception to time limits.

We suggest that the presiding officer should be more broadly authorized to order a completely different briefing arrangement—e.g., one that calls for surreply briefs, simultaneous filing of briefs, joint briefs by certain parties, or anything else (perhaps limited to agreement of the parties or perhaps not). Maybe this authority is implicit, but that is not obvious. Indeed, explicitly authorizing changes to time limits, implies that that is the only modification that is authorized. In any event, we see no downside to a more explicit authorization for broad modification to all briefing matters.

We repeat the suggestion for Rule 220.02.f that we made above under Rule 002.08:

~~Any exception to the time limits in this rule may be granted by the~~ The presiding officer may issue a scheduling order with different structure and timing than provided in these rules or provide for extensions of time or other adjustments to the scheduling order for good cause shown.

Agency Response: The Agency declines to make the proposed changes. The Agency views both Proposed Rule 220 *coupled with* Proposed Rule 562 as sufficient to meet the intent of the proposed changes, without being unnecessarily prescriptive.

19. Comment: Regarding Rule 301, Declaratory Relief, the following language should be added:

It is discretionary with the agency whether or not to entertain a petition for declaratory ruling under I.C. §§ 67-5232 or 67-5255. The agency shall timely respond to a petition for declaratory ruling by stating whether it will entertain the petition. If the agency decides to entertain the petition, it shall initiate a contested case and may employ either formal or informal proceedings. Alternatively, if the agency declines to entertain the petition, it may instead initiate its own contested case framing the issue as it deems appropriate.

and

Declaratory rulings should be forward-looking in their applicability, and should not be employed to alter or circumvent prior agency orders on applications or petitions.

Agency Response: The Agency declines to adopt the proposed changes.

20. Comment: Regarding Rule 414, Ex Parte Communications:

Although we are generally comfortable with the approach taken in Strawman 2 on ex parte communications, we think some further clarity would be helpful. Most notably, we think it is important to let people know when the ex parte rules come into play.

We appreciate the Department's concern that this subject is governed by case law with constitutional underpinnings (due process). In our view, however, the direction provided by Idaho courts is pretty clear: Ex parte communication rules apply to quasi-judicial proceedings. *Idaho Historic Preservation Council, Inc. v. City Council of Boise* ("Historic Preservation"), 134 Idaho 651, 8 P.3d 646 (2000).

Strawman 2 provides that formal proceedings are quasi-judicial, while informal proceedings are only "administrative evaluations and processes." Rules 100.01 and 100.02. We think that is a reasonable distinction to draw. Accordingly, we think the Department would be on firm ground by saying that ex parte communication limitations kick in when the proceeding shifts to the formal stage. Likewise, the ex parte communication rules should be lifted if all protests are resolved and the proceeding moves back into an informal proceeding mode with the applicant being the only remaining party.

Garrick Baxter noted during the last Zoom meeting, that there is risk of communications with agency officials prior to the formal stage of a proceeding. Specifically, it could lead to the disqualification of the presiding officer under Rule 411 and Idaho Code § 67-5252. That point is well taken. It is a risk that both parties and agency officials should take into account before they engage in substantive discussions. Perhaps the ex parte communication rule should cross-reference that provision. But the risk of occasional disqualification is not a sufficient reason for an across-the-board ban on all ex parte communication rules outside the formal proceeding stage. The ability to communicate informally with agency staff is too valuable to needlessly throw away. Those informal conversations are critical to the agency's efficient functioning—both for applicants and for the Department.

In our prior comments, we added "other interested person" (i.e., non-party) to the general prohibition against ex parte communications. The Department took that out. Maybe this is a technical quibble, but by taking that out, doesn't that make it permissible for the presiding officer to speak freely with any non-party on substantive matters so long as he or

she later puts a summary in the record? In our view, substantive communications with non-parties should be deemed improper, but subject to cure by putting a summary in the record.

As we read the rule, the prohibition on ex parte communications applies only to the presiding officer. Does this mean that, even during the formal proceeding stage of the case, it is permissible to have substantive ex parte communications with counsel for IDWR and other IDWR staff—even the agency head? Does the rule need to be expanded to include at least the agency head? Further clarity on this would be helpful.

Agency Response: The Agency has attempted to clarify that Proposed Rule 414 applies to presiding officers, which means it applies in formal contested case proceedings. The Agency has also attempted to clarify that “a member of the general public” is also barred from substantive ex parte communications.

21. Comment: Regarding Rule 515, Facts Disclosed Not Part of the Record:

In our prior comments we made two suggestions, one of which IDWR accepted. We think the other suggestion may have been misunderstood. The second suggestion has to do with offers of settlement.

In our view the evidentiary rule regarding offers of settlement is intended to protect the party making the offer (and thereby to encourage such offers). But the party who makes a settlement offer should not be prohibited from offering the settlement offer into the record if he or she chooses. Its content might be found irrelevant, in which case the Presiding Officer may ignore it. But it should not be excluded per se merely because it is a settlement offer.

For example, a party may wish the Department (or a reviewing court) to know that it tried to resolve the issues. This could be relevant, if nothing else, for attorney fee recovery purposes. Parties should be encouraged to wear the white hat by trying to resolve cases. If they do so, they should not be precluded from making a record of it.

Agency Response: The Agency declines to provide for one party submission of offers of settlement. See e.g. I.R.E. 408.

22. Comment: Regarding Rule 720.02, Recommended Orders, Rule 730.02, Preliminary Orders, Rule 740.02, Final Orders, and Rule 790, Persons Who May File a Petition for Judicial Review, all regarding exhaustion:

We agree with provision in Rule 730.02.a of Strawman 2 which expressly states that filing exceptions is not required to exhaust administrative remedies. (By the way, identical provisions should be added to Rules 720.02.a and 740.02.a.)

We would go further and provide that filing a petition for reconsideration or request for hearing under Section 42-1701A(3), Idaho Code, also are optional and not required to exhaust administrative remedies. By the way, with respect to petitions for reconsideration, that appears to be the effect (intended or not) of the Strawman 2 language in Rule 730.02.g (which says that “all administrative remedies shall be deemed exhausted” when the preliminary order becomes final).

We have reviewed Judge Wildman’s decision of 12/14/2015 (*A&B v. IDWR—the Cook case*). Thank you for providing that. As you and others explained in our last Zoom meeting, that decision held that filing exceptions is not required. But it did not speak to reconsideration or requests for hearings under Section 42-1701A(3), Idaho Code. [Footnote omitted]

Even if the reconsideration/request for hearing/exhaustion issue has not been addressed in the case law, we think the statute is quite clear that reconsideration and requests for hearing are not required. Here’s why: First, we acknowledge that exhaustion is jurisdictional. I.R.C.P. 84(n). But that, of course, does not answer the question of what one must do in order to exhaust.

Then we turn to the language of exhaustion in the IAPA: “A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.” Idaho Code § 67-5271(1) (emphasis added). That does not answer the question either. It merely poses the question: What administrative remedies are required under the IAPA?

The IAPA expressly authorizes petitions for reconsideration. Idaho Code §§ 67-5243(3), 67-5245(3), 67-4246(4) &(5), 67-5248(1)(b), 67-5249(g), and 67-5273(2). However, none of these state or even imply that a petition for reconsideration is required. And requests for hearings under Idaho Code § 42-1701A(3) are not included in or referenced in the IAPA. Because they are not required by the IAPA, agencies are free to make them optional. Indeed, agencies are arguably required to make them optional.

The optional nature of a petition for reconsideration is also evident in the IAPA’s provision setting the deadline for judicial review:

A petition for judicial review of a final order or a preliminary order that has become final when it was not reviewed by the agency head . . . must be filed within twenty-eight (28) days of the service date of the final order [or] the date when the preliminary order became final . . . , or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon. . . .

Idaho Code § 67-5373(2) (emphasis added). The fact that the deadline depends on whether or not a petition for reconsideration has been filed must mean that a petition for judicial review is optional. Otherwise, the only deadline would be the one for after disposal of the petition for reconsideration.

Accordingly, we believe the Department can and should resolve this issue by stating that neither exceptions, nor reconsideration, nor requests for hearing are required. We think the cleanest way would be to including the following in Rule 790:

Pursuant to Section 67-5270, Idaho Code, any party aggrieved by a final order of an agency in a contested case may file a petition for judicial review with the district court. Pursuant to Section 67-5271, Idaho Code, a party is not entitled to judicial review of an agency action in district court until that person has exhausted all administrative remedies available with the agency, but a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable in district court if review of the final agency action would not provide an adequate remedy. The filing of exceptions, petitions for reconsideration, and requests for hearing under Idaho Code § 42-1701A(3) are optional and are not required in order to exhaust administrative remedies.

Alternatively, or in addition, similar language could be included in each of the following: Rules 720.02.a, 730.02.a, and 740.02.a.

Agency Response: First, the Agency disagrees language identical to that contained in Proposed Rule 730.02.a regarding exceptions should be added to Proposed Rule 720.02.a and Proposed Rule 740.02.a. Recommended orders under Proposed Rule 720.02.a are not final orders subject to appeal until adopted by the Agency. Final orders under Proposed Rule 740.02 are not subject to exceptions filed with the Agency head.

Next, the Agency agrees regarding the limited scope of Judge Wildman’s decision of December 14, 2015, *A&B v. IDWR*—the *Cook* decision. The filing of exceptions with the Director is optional and is not required to exhaust administrative remedies before the Agency. The permissive language in Proposed Rules 720 and 730 has been maintained.

It is unclear whether a petition for reconsideration is or is not required and the Agency

declines at this time to require it. The permissive language related to petitions for reconsideration has been maintained in Proposed Rules 720 and 730.

For all of the legal and policy reasons enumerated by Judge Wildman in his February 16, 2017, *Pocatello v. IDWR* – the *Pocatello* decision – the Agency considers a hearing pursuant Idaho Code § 42-1701A(3) to be a prerequisite to judicial review. The *Pocatello* Decision states explicitly a hearing is required prior to judicial review under both the plain language of Idaho Code § 42-1701A(3) and the doctrine of exhaustion. Therefore, SUEZ’s proposed changes related to hearings under Idaho Code § 42-1701A(3) are declined.

For the same reasons, the Agency declines to adopt Suez’s proposed addition to Proposed Rule 790.

23. Comment: Amend Rule 740.01, Final Orders, to clarify its provisions as follows:

Definition. Final orders are preliminary orders that have become final-~~under Rule 730 pursuant to Section 67-5245, Idaho Code~~, orders issued by the agency head that were initially issued as recommended or preliminary orders, ~~or orders~~ initially issued by the agency head when acting as the Presiding Officer ~~pursuant to Section 67-5246, Idaho Code~~, or emergency orders, including cease and desist or show cause orders, issued by the agency head pursuant to Section 67-5247, Idaho Code.

Agency Response: The Agency removed reference to Rule 730 but retained references to the Idaho APA as helpful guideposts.