

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

IN THE MATTER OF APPLICATION FOR)	
PERMIT NO. 35-14402 IN THE NAME OF)	PRELIMINARY ORDER
<u>KARL T. COOK OR JEFFREY M. COOK</u>)	ISSUING PERMIT

On August 29, 2014, Karl T. Cook and Jeffrey M. Cook (collectively referred to as the “Cooks”; Jeffrey Cook referred to individually as “Cook”) filed Application for Permit No. 35-14402 with the Idaho Department of Water Resources (“Department”). The application was advertised to the public beginning on October 1, 2014. A joint protest was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company, represented by attorney Paul Arrington; and by American Falls Reservoir District #2 and Minidoka Irrigation District, represented by attorney Kent Fletcher. The Cooks are represented in this contested case by attorney Robert Harris.

A pre-hearing conference was held on December 3, 2014. The parties were unable to resolve the issues of protest at that time and requested that a hearing be held to decide the contested case. An administrative hearing was conducted on April 24, 2015 at the Department’s Eastern Region Office located in Idaho Falls, Idaho. Although the proposed point of diversion is located in Jefferson County, the parties agreed to hold the hearing in Bonneville County. During the hearing, the parties offered testimony and documentary evidence into the record. After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for Permit 35-14402 proposes diverting 5.00 cfs from ground water for the irrigation of 560 acres near Roberts, Idaho (Section 17, T04N, R35E). Ex. 100; Cook Testimony. At the hearing, the Cooks confirmed that they are now seeking a diversion rate of only 3.07 cfs under the proposed permit. Ex. 101, page 4.

2. The proposed point of diversion is an existing ground water well (“existing well”) drilled in 1976 and located in the SESENW of Section 17, T04N, R35E. Ex. 100, page 1. The proposed point of diversion is the only authorized point of diversion for existing water rights 35-7280, 35-7281, 35-13241, 35-14334, 35-14335 and 35-14336 (hereinafter “existing water rights”).

3. The elements of the existing water rights are as follows:

Jeffrey Cook Water Rights

<u>Water Right No.</u>	<u>Rate (cfs)</u>	<u>Volume (afa)</u>	<u>Acre Limit</u>	<u>Total Acres</u>
35-7280	3.13	626.8	156.7	418.0
35-7281	3.73	836.0	209.0	418.0
35-13241	0.86	209.2	52.3	418.0
Combined Limits	3.83 cfs	1633.3 afa	418.0 acres	418.0 acres

Karl Cook Water Rights

Water Right No.	Rate (cfs)	Volume (afa)	Acre Limit	Total Acres
35-14334	1.07	213.2	53.3	142.0
35-14335	1.27	284.0	71.0	142.0
35-14336	0.29	70.8	17.7	142.0
Combined Limits	1.30 cfs	554.4 afa	142.0 acres	142.0 acres

Exs. 103-108.

4. The existing water rights when combined are limited to a diversion rate of 5.13 cfs, an annual diversion volume of 2187.7 acre-feet, and the irrigation of 560 acres. Ex. 101, page 5. The 560 acres described in Application 35-14402 are the same 560 irrigated acres described in the existing water rights. Exs. 100, 103-108.

5. Application 35-14402 includes the following statement: "This application proposes to increase the diversion rate of the point of diversion for [the existing water rights], with **NO INCREASE** in the decreed Diversion Volume so that the period of irrigation can be shortened to accommodate crops." Ex. 100, page 3 (emphasis in the original text). This statement appears to be inconsistent with Cook's testimony that his current crop, timothy grass, has a short root zone and requires less water applied more frequently. Cook Testimony.

6. The Cooks hired Rocky Mountain Environmental Associates, Inc. ("RMEA") to prepare the pending application and provide analysis for this contested case. Cook Testimony. RMEA prepared an expert report in support of the pending application. Ex. 101.

7. The existing irrigation system is comprised of a 700 hp pump diverting water from the existing well for delivery to four large pivots and one small pivot. Exs. 100-102; Cook Testimony. In its current state, the irrigation system diverts ground water at a much higher rate than is authorized by the existing water rights. Ex. 102; Cook Testimony. The existing system diverts ground water at a rate of up to 8.20 cfs, even though the authorized combined diversion rate of the existing water rights is 5.13 cfs. *Id.*

8. The Cooks purchased the property in 2006 and have not made any major changes to the irrigation system during their ownership. Cook Testimony. The Cooks have diverted at a rate in excess of their existing water rights during the entire time they have owned the property. *Id.* By filing the pending application, the Cooks seek to obtain a water right to cover their existing irrigation system, thereby avoiding the expense associated with changing the system. *Id.*

9. The existing water rights authorize the diversion of 5.13 cfs for the irrigation of 560 acres. This equates to 0.009 cfs per acre. If the proposed permit were approved for 3.07 cfs, the Cooks would be authorized to divert 8.20 cfs for the irrigation of 560 acres. This equates to 0.015 cfs per acre.

10. In 2012, the Cooks diverted approximately 1,522.1 acre-feet from the proposed well for irrigation of the proposed place of use. Ex. IDWR 1. This represents the highest annual diversion volume occurring in the last 15 years. *Id.*

11. In 2012, the existing diversion system consumed 1,466,880 kWh of electricity. Ex. IDWR 1. This represents the highest annual power consumption occurring at the existing well in the last 15 years. *Id.* 2012 represents a high water demand year for water users in the Roberts area. Warner Testimony.

12. The instantaneous flow rate and instantaneous power consumption of the pumping system at the existing well was measured in 2007, 2010 and 2013. The following information was collected during those measurements:

Date	GPM	CFS	Demand (kW)	System Running
July 2007	3680	8.20	549	3 pivots, 2 handlines
July 2007	3224	7.18	548	3 pivots (1 endgun off), 2 handlines
July 2010	3661	8.16	543	4 pivots (end guns on)
June 2013	3534	7.87	616	4 pivots + short pivot
Average:	3525	7.85	564	

Ex. 102, page 1.

13. The Cooks currently participate in a program with the power company where the Cooks agree to shut-off the existing pump for 52 hours (approximately 2 days) per year in exchange for a payment from the power company. Cook testified that he would not have participated in the shut-off program if he had been limited to the authorized diversion rate of 5.13 cfs.

14. During the irrigation season, the Cooks turn their pump off (stop irrigating) for harvest, because of weather events (rain, wind, cold), and to perform maintenance on the irrigation system. Cook Testimony.

15. The Cooks' current crop, timothy grass, is cut and harvested twice per year, in mid-summer and late-September. Cook Testimony. Each harvest session takes about 10 days to complete. *Id.* The Cooks generally do not irrigate after the second harvest and rarely irrigate during the month of October. *Id.*

16. Water diverted under the proposed permit will be used for irrigation purposes, which constitutes a consumptive use of water. Warner Testimony. The Cooks propose to mitigate for the proposed permit by adopting a combined annual volume limit for the proposed permit and the existing water rights. See Exhibit 101, page 4. The combined annual volume limit proposed for all of the Cook water rights is intended to ensure that the proposed permit (authorizing an increased diversion rate) will not result in any additional consumptive use on the property. Warner Testimony.

CONCLUSIONS OF LAW / ANALYSIS

1. Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b)

that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5). *See* IDAPA 37.03.08.040.04.

Reduction to Existing Water Rights

3. Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria used to determine whether a proposed use will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

4. "An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director." IDAPA 37.03.08.45.01.a.iv

5. The proposed permit constitutes a consumptive use of water and, without mitigation, would reduce the amount of water available to satisfy water rights from sources hydrologically connected to the Eastern Snake Plain Aquifer.

6. To mitigate for the proposed permit, the Cooks recommend establishing a combined annual volume limit between their existing water rights and the proposed permit. To prevent a reduction to other water rights, the combined annual volume limit must not exceed the historical maximum annual volume diverted under the Cooks' existing water rights.

7. Determining the historical annual volume diverted under the Cooks' existing water rights is a challenge because the Cooks have historically diverted at a rate in excess of the 5.13 cfs authorized by the existing water rights. In order to limit the Cooks' water rights appropriately, and to ensure that diversion under the proposed permit is adequately mitigated, the Department must determine the volume of water the Cooks would have diverted if they had operated within the limits of their existing water rights.

8. RMEA argues that the combined annual diversion volume should be set at 1,522 acre-feet. Ex. 101, page 4. 1,522 acre-feet is the maximum annual volume of water diverted from the existing well in the last 15 years (and includes water diverted at a rate in excess of the existing water rights). Ex. 102.

9. RMEA asserts that if the Cooks were held to their authorized diversion rate of 5.13 cfs, they would divert at that rate for 149 days during the irrigation season (which equates to an annual diversion volume of 1,516 acre-feet). Ex. 101. 149 days of pumping was calculated by taking the Cook's 2014 start-up date and the 2014 shut-off date and assuming non-stop pumping throughout that time period. *Id.* Cook testified that if he were limited to the authorized diversion rate of 5.13 cfs, he would never turn the pump off during the irrigation season.

10. RMEA's calculations and Cook's testimony about never turning the pump off are not consistent with the testimony provided by Cook at the beginning of the hearing. Cook stated that there are times during every irrigation season when he is forced to shut-off the pump due to weather events (rain, wind, cold) or because of maintenance issues. There was no evidence presented that the Cooks will be able to eliminate weather related down time or maintenance issues. RMEA did not attempt to identify days during the 2014 irrigation season, or any other irrigation season, where the Cooks would have shut the pump off – regardless of the authorized pumping rate.

11. The arguments advanced by RMEA in support of a 149-day pumping period are not persuasive. It appears that RMEA made assumptions and performed calculations with the intent of arriving at an annual diversion volume of 1,522 acre-feet, thereby legalizing the Cooks' unauthorized water use and allowing the Cooks to continue forward without any real change in their operation. If the Department were to adopt an annual diversion volume equal to the maximum diversion volume ever recorded under the Cook's ownership of the property (1,522 acre-feet), it would be as though the Cooks existing water rights have always authorized 8.20 cfs

12. A bare assertion by Cook that he would never shut the pump off is not sufficient to establish an appropriate combined annual diversion volume. RMEA provided no data to support 149 days of pumping. In 2014 (the year offered as the basis for the 149-day value), the Cooks only diverted from the existing well for 77 days. Ex. 101, page 6.

13. In the absence of reliable evidence from the Cooks, the Department must calculate an appropriate combined annual diversion volume using the evidence in the administrative record.

14. The maximum water demand at the existing well over the last 15 years occurred in 2012. Ex. 102, page 1. In that year, the Cooks' diversion system consumed 1,466,880 kWh of electricity. *Id.* Assuming an average system power demand of 564 kW, this equates to 2600 hours (or about 108 days) of pumping.

15. Cook testified that he would not have participated in the voluntary shut-off program through the power company if he had been limited to a diversion rate of 5.13 cfs. Cook's testimony on this point was persuasive. According to Roger Warner, the Cooks turn off their pump for approximately 2 days during the irrigation season as part of the power company's program. Therefore, the Cooks would have irrigated an additional 2 days in 2012.

16. Cook also testified that he would have eliminated the down time associated with harvest by planting different crop varieties and staggering his harvest schedule. He testified that his current crop, timothy grass, is cut and harvested twice per year, in mid-summer and in late-September. Each harvest session takes about 10 days to complete. Cook Testimony.

17. Cooks assertion that he would have eliminated the down time associated with the mid-summer harvest (10 days) is persuasive. Cook's assertion that he would have eliminated the down time associated with the late-September harvest is not persuasive. According to Cook, he rarely irrigates after the second harvest and does not generally irrigate in October. Cook Testimony. Cook did not establish that there is a demand for water during or after the second harvest. Therefore, the Cooks would have irrigated an additional 10 days in 2012 if they were able to stagger their harvest schedule.

18. The evidence in the administrative record indicates that the Cooks would have diverted 1,221 acre-feet¹ of ground water in 2012 if they had been limited to a diversion rate of 5.13 cfs (the rate authorized by their existing water rights).

19. If the proposed permit and the Cooks' existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the proposed permit will be fully mitigated. The volume of water diverted under the proposed permit will be offset by a corresponding reduction in the volume pumped under the existing water rights. In combination, the water rights will not exceed the historical annual volume diverted under the existing water rights.

City of Shelley Case

20. The protestants offered exhibits related to Application for Permit No. 27-12155 filed by the City of Shelley ("City") in 2007. Exs. 200-202. The City was seeking a ground water right for municipal use. Ex. 202, page 6. The City's proposed water right was specifically intended to cover peak flow rate demand occurring during the summer months. Ex. 202, page 8. The authorized diversion rate listed on the City's water rights did not cover its actual peak diversion rate. In that proceeding, the City argued that the proposed water use would not result in injury to other water rights as long as the City did not exceed the annual diversion volume limits listed on its existing water rights. Ex. 200, page 2; Ex. 202, pages 12-13.

21. The Department rejected the City's argument and held that any increase in the annual diversion volume "beyond what was reasonably expected under [the City's] existing municipal water rights" would result in a reduction in the quantity of water available under existing water rights. Ex. 202, page 13.

22. Although the Department's Final Order in the City's contested case is applicable to the pending application, it does not prevent consideration or approval of the pending application. An application for permit seeking additional flow rate may be acceptable if the proposed water right and the existing water rights are limited to a combined annual diversion volume equal to or less than the volume which is reasonably expected to be diverted under the existing water rights.

¹ 108 days + 2 days + 10 days = 120 days x 5.13 cfs = 615.6 cfs-days x 1.9835 af/cfs-day = 1,221 acre-feet.

23. In this case, the proposed permit and the existing water rights will be limited to a combined annual diversion volume of 1,221 acre-feet. This represents the maximum volume of water reasonably expected to be diverted under the existing water rights based on historical use.

Enlargement Water Rights

24. Water rights 35-13241 and 35-14336 are enlargement water rights, meaning they do not authorize any additional flow rate. These rights were intended to cover enlargement acres that were added to existing water rights, above and beyond the acre limits described in the existing water rights. Water right 35-13241 authorizes 52.3 enlargement acres. Water right 35-14336 authorizes 17.7 enlargement acres.

25. During the hearing, Kent Fletcher asked Roger Warner from RMEA whether it should be permissible to use historical diversions under enlargement water rights as the basis for new water rights seeking additional flow rate. Although the issue raised by Mr. Fletcher may be a valid concern with this type of application, it is likely not applicable in the current proceeding, given the elements of the Cooks' existing water rights.

26. The diversion rate proposed by the Cooks would bring the total diversion rate of the system up to 8.20 cfs. If the enlargement water rights are excluded from the analysis, water rights 35-7280, 35-7281, 35-14334, 35-14335 and the proposed permit, in combination, would authorize a diversion rate of 8.20 cfs and the irrigation of 490 acres. This equates to 0.017 cfs per acre, which is still less than the standard diversion rate of 0.02 cfs per acre. *See* Idaho Code § 42-202(3).

27. The combined diversion volume adopted (1,221 acre-feet) was calculated based on the authorized diversion rate (5.13 cfs) and expected diversion days (120 days), not on the number of acres irrigated. Therefore, in this contested case, the enlargement water rights are not part of the mitigation calculations and are not needed to offset water use under the proposed permit.

Sufficiency of Water Supply

28. Rule 45.01.b of the Departments Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria for determining whether the water supply is not sufficient for the proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible"

29. The Cooks have satisfied their burden of showing that the water supply is sufficient for the proposed beneficial use. In the past 15 years, the aquifer at the Cooks' property has been able to supply a diversion rate of as much as 8.20 cfs from the existing well and an annual diversion volume of as much as 1,522 acre-feet. Ex. 102.

Good Faith / Speculation

30. Prior to the hearing, the parties stipulated that the good faith/speculation element of Idaho Code § 42-203A(5) is not at issue in this contested case. There is no evidence in the record suggesting that the application was not filed in good faith or that it was filed for delay or speculative

purposes. The proposed place of use and point of diversion are on property owned by the Cooks. The infrastructure needed to divert and beneficially use the water described in the proposed permit has been in place since at least 2006, the year the Cooks purchased the property. Cook Testimony.

Sufficient Financial Resources

31. Prior to the hearing, the parties stipulated that the sufficient financial resources element of Idaho Code § 42-203A(5) is not at issue in this contested case. There is no evidence in the record suggesting that the Cooks do not have sufficient financial resources to complete the proposed project. The infrastructure needed to divert and beneficially use the water described in the proposed permit has been in place since at least 2006, the year the Cooks purchased the property. Cook Testimony.

Local Public Interest

32. The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” (Idaho Code § 42-202B(3))

33. The evidence presented by the protestants was primarily focused on whether the proposed water use would enlarge the water use on the Cook property beyond the expected historical use under the existing water rights. The evidence in the administrative record does not indicate that the proposed permit is not in the local public interest.

Conservation of Water Resources

34. The Cooks met their burden of showing that the proposed use is consistent with the conservation of water resources within the state of Idaho. The proposed project incorporates sprinkler irrigation, a conservative use of water.

Moratorium

35. On April 30, 1993, the Department issued an Amended Moratorium Order (“1993 Moratorium”) restricting “the processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the Eastern Snake Plain Area and all tributaries thereto” 1993 Moratorium, page 4.

36. The 1993 Moratorium applied to all applications proposing a consumptive use of water and included the following provision:

The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium if

- a) Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or
- b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location insignificant consumption of water or mitigation provided by the applicant to offset injury to other water rights.

1993 Moratorium, page 5.

37. The proposed place of use and point of diversion are located within the Eastern Snake Plain Area described in the 1993 Moratorium. Warner Testimony. The proposed permit constitutes a consumptive use of water. *Id.*

38. The Cooks proposal to limit the proposed permit and the existing water rights to the historical annual diversion volume reasonably expected to be pumped under the existing water rights constitutes adequate mitigation for the proposed permit. The appropriate combined annual volume limit is 1,221 acre-feet, as described above. The volume of water diverted under the proposed permit will be offset by a corresponding reduction in the volume pumped under the existing water rights. Application 35-14402 is not barred by the moratorium because mitigation has been provided to offset injury to other water rights.

Summary

Based on the evidence in the administrative record, the Cooks have satisfied their burden of proof for all of the elements set forth in Idaho Code § 42-203A(5). To ensure that the diversion occurring under the proposed permit will not reduce the quantity of water under other existing water rights and is adequately mitigated, Permit 35-14402 and the existing ground water rights on the Cooks' property should be limited to a combined maximum annual diversion volume of 1,221 acre-feet. Because diversion under Permit 35-14402 is mitigated through a reduction in use under existing water rights, the proposed permit is not barred by the 1993 Moratorium.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 35-14402 in the name of Karl T. Cook or Jeffrey M. Cook is APPROVED and Permit 35-14402 is ISSUED with the following elements and conditions:

Priority Date: August 29, 2014

Source: Ground Water

Beneficial Use: Irrigation

Period of Use: 4/1 – 10/31

Diversion Rate: 3.07 cfs

Maximum Annual Diversion Volume: 1,221 acre-feet

Point of Diversion: SE¼ SE¼ NW¼ of Section 17, T04N, R35E, B.M. Jefferson County

Place of Use: 560 acres in Section 17, T04N, R35E, B.M. Jefferson County
(Irrigated Acres per quarter-quarter are described in Permit 35-14402.)

Permit Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **June 01, 2018**.
2. Subject to all prior water rights.
3. Rights 35-7280, 35-7281, 35-13241, 35-14334, 35-14335, 35-14336 and 35-14402 when combined shall not exceed a total diversion rate of 8.20 cfs, a total annual maximum diversion volume of 1,221 af at the field headgate, and the irrigation of 560 acres.
4. To mitigate for the depletion of water resulting from the use of water under this right and to prevent injury to senior water right holders, the right holder shall never exceed the combined annual volume limit included in the conditions for this right.
5. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 120.
6. Prior to diversion of water under this right, the right holder shall install and maintain a totalizing measuring device of a type approved by the Department as a part of the diverting works.
7. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the place of use.
8. This right is for the use of trust water and is subject to review 5 years after the issuance of the permit to determine availability of water and to re-evaluate the public interest.
9. Noncompliance with any condition of this right, including the requirement for mitigation, is cause for the director to issue a notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water.
10. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

Dated this 15th day of May, 2015.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on this 15th day of May 2015, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed, to the following:

Document Served: Preliminary Order Issuing Permit (35-14402)

Holden Kidwell Hahn & Crapo
Robert L. Harris
PO Box 50130
Idaho Falls ID 83405-0130

Barker Rosholt & Simpson
Paul Arrington
195 River Vista Place, Suite 204
Twin Falls ID 83301-3027

Fletcher Law Office
W. Kent Fletcher
PO Box 248
Burley ID 83318-0248



Sharla Cox
Administrative Assistant

Courtesy Copy Sent via Regular Mail to:

Karl T. Cook or Jeffrey M. Cook
703 West 7th South
Rexburg, ID 83440

Rocky Mountain Environmental Associates
482 Constitution Way, Suite 303
Idaho Falls, ID 83402

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.