



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

March 2, 2016

RE: Preliminary Order Creating Water District No. 161, Mountain Home Area Ground Water Rights

Dear Water Right Holder,

Enclosed please find a copy of the Preliminary Order regarding the above referenced matter. This order creates a new water district for administration of ground water rights in the Mountain Home area as shown on the map in Attachment A of the Preliminary Order. The records of the Idaho Department of Water Resources (Department or IDWR) show that you own or have an interest in one or more ground water rights that are diverted within the new water district.

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

The Department will send a separate notice to water users specifying a date, time and location of the first annual meeting of the water district. The Department anticipates holding the meeting in Mountain Home in about 60 to 90 days. The water users present at the meeting must consider election of a watermaster, selection of an advisory committee and adoption of a budget. IDWR will organize a steering committee of representative water users within the district to assist with preparation for the annual meeting. IDWR is considering scheduling one steering committee meeting prior to the annual meeting. If you are interested in participating in the steering committee, please contact Tim Luke or Rob Whitney, IDWR, at 208-287-4800 or by e-mail at tim.luke@idwr.idaho.gov.

Please contact this office or the IDWR regional office in Boise (208-334-2190) if you have any questions concerning the attached order.

Sincerely,

Tim Luke
Water Compliance Bureau

Encl: *Preliminary Order Creating Water District No. 161
Explanatory Information to Accompany a Preliminary Order*

cc: IDWR Western Region Office
Bruce Smith, Mayfield Townsite LLC
Joseph Twitchell

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE CREATION OF A)
WATER DISTRICT FOR THE)
ADMINISTRATION OF GROUND WATER)
RIGHTS IN ADMINISTRATIVE BASIN 61)
AND A PORTION OF ADMINISTRATIVE)
BASIN 63, MOUNTAIN HOME AREA)
_____)

**PRELIMINARY ORDER CREATING
WATER DISTRICT NO. 161**

The Director (“Director”) of the Idaho Department of Water Resources (“Department”) is required by statute to divide the state into water districts to perform the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). Idaho Code § 42-604 provides the Director with discretion in determining how these mandatory water districts shall be structured, allowing the Director to create new districts, revise existing districts, or even abolish districts, as the Director finds necessary for the efficient distribution of water resources. *Id.* Based upon the record in this matter, the Department finds, concludes and orders as follows:

FINDINGS OF FACT

1. On May 7, 1981, the Department created the Cinder Cone Butte Critical Ground Water Area (“CCBCGWA”) recognizing that “the available resource is limited” and that “localized water level declines are occurring within the aquifer system.” The boundary of the CCBCGWA covers an area of ground water development located northwest of Mountain Home.
2. On November 9, 1982, the Department created the Mountain Home Ground Water Management Area (“MHGWMA”) based on the results of a study indicating “that the anticipated recharge of ground water to the area is exceeded by anticipated ground water discharge.” The MHGWMA boundary covers a fairly large area around Mountain Home and also surrounds the CCBCGWA. Both the MHGWMA and the CCBCGWA, located within the Department’s Administrative Basin No. 61 (“Basin 61”), is shown in the map attached hereto as Attachment A.
3. On August 25, 2014, the Snake River Basin Adjudication (“SRBA”) District Court issued its *Final Unified Decree* for water rights within the Snake River Basin, including water rights in Basin 61 and Administrative Basin No. 63 (“Basin 63”) near Mountain Home.
4. On June 16, 2015, the Department conducted a public information meeting in Mountain Home, Idaho, regarding the potential creation of a new water district to administer ground water rights in the Mountain Home area and/or the potential modification or merger of existing surface water districts in the area to include ground water rights.
5. On December 21, 2015, the Director issued a notice proposing to create a water district pursuant to the provisions of Idaho Code § 42-604. The Department sent the notice by regular U.S. Mail on December 22, 2015, to each holder of a ground water right in the Mountain Home area except ground water domestic and stock water rights as defined under Idaho Code §§ 42-111 and 42-1401A(11). The hearing notice described the district proposed to be established, the reasons for establishing the proposed

district, and the time and place for a hearing to be held on January 12, 2016, concerning creation of the proposed district. The notice also provided a time period within which written comments on the proposed action would be accepted.

6. The notice proposed creation of a new water district in the Mountain Home area designated as Water District 161 on the map in Attachment A of this order. The proposed Mountain Home area water district boundary includes all of Basin 61 and a portion of Basin 63 along the western boundary of Basin 61. The notice further explained that the proposed water district would include all ground water rights within the proposed water district boundary except for ground water domestic and stock water rights as defined under Idaho Code §§ 42-111 and 42-1401A (11).

7. The Director's notice further explained that creation of the water district is necessary in order to properly administer ground water rights within the proposed water district boundary and to facilitate the measurement and reporting of ground water diversions.

8. The Director's notice also proposed that upon creation of a water district, a meeting of the holders of water rights in the district will be held for the purpose of electing a watermaster and advisory committee.

9. On January 12, 2016, commencing at approximately 6:05 p.m. at the Hampton Inn and Suites, Mountain Home, Idaho, Cindy Yenter, the Department hearing officer in this matter, conducted a public hearing concerning the proposed water district creation. Approximately 100 people attended the hearing.

10. The hearing officer initiated the meeting by explaining the hearing process. Department representative Tim Luke gave a presentation that described the proposed district area, the features and operation of a water district, the reasons for creation of the district, and the water rights and uses proposed to be included in the district. The Department stated the proposed water district would accomplish the following administrative and regulatory duties:

- Measure, record, and monitor ground water diversions as necessary to assure that diversions do not exceed authorized water right diversion limits;
- Administer and deliver ground water rights as necessary in accordance with the prior appropriation doctrine as established by Idaho law;
- Address unauthorized diversions of ground water;
- Facilitate management of water rights. Water district operations and procedures provide a means to assist in maintenance of water right ownership records, maintain water right descriptions such as points of diversion and places of use, and provide watermaster review and comments for water right transfers, water supply bank transactions, and new water right applications.

11. Following the presentation, the hearing officer provided time for hearing participants to ask questions regarding the proposed water district.

12. The hearing officer provided opportunity for persons attending the hearing to make oral statements for the record. In addition, the hearing officer held the record open through January 22, 2016, for written comments.

13. Three (3) individuals testified at the hearing.

14. William Smith testified in opposition to the proposed water district. Mr. Smith holds ground water rights authorizing the irrigation of 2 acres. Mr. Smith testified that he had already paid for his water rights and the state should pay for the water district. Mr. Smith opposes new housing developments which allow pumping from the aquifer without water rights.

15. Billy Wolfe testified on behalf of John and Ann Wind, in favor of the proposed district. The John and Ann Wind Trust holds a ground water right authorizing irrigation of up to 350 acres. Mr. Wolfe operates the property owned by the Winds, and indicates he has already installed flow meters. Mr. Wolfe agreed that administration is inevitable in the future, and testified that flow meter installation and regulation by water districts provides protection to water users and water rights.

16. David Ascuena testified on behalf of Ascuena Farms in favor of the proposed district. Ascuena Farms holds ground water rights authorizing the irrigation of 139 acres. Mr. Ascuena testified that the state is policing and protecting water rights. He urged water users to get involved and help direct the water district. Mr. Ascuena also suggested that some start up expenses such as cost of flow meters, should be subsidized.

17. One individual submitted timely written comments. The individual holds an exempt domestic use ground water right which is not included in the proposed water district. This individual neither expressed support or opposition to the proposed water district but requested receipt of any future correspondence pertaining to the district.

18. One entity, Mayfield Townsite, LLC (“Mayfield”), submitted timely written comments. Mayfield owns two ground water right permits with points of diversion within the proposed water district boundary. Mayfield’s points of diversion are located just north of the Basin 61 boundary and just outside the MHGWMA. Mayfield opposes inclusion of its rights in the proposed water district. Specifically, Mayfield objects to inclusion of its water right permits in the district “because such an action could seriously jeopardize Mayfield’s project ...without any justification.” Mayfield noted that it had “invested substantial sums in its planning efforts and making certain its points of diversion were outside long established boundaries associated with ground water that could be subject to the type of regulation that might be proposed for Basin 61. Mayfield specifically avoided Basin 61 because of the problems associated with its management.” Mayfield further stated that the proposed water district boundaries “were arbitrarily set without regard to the rights and interests of Mayfield and other water right holders.”

CONCLUSIONS OF LAW

1. Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. *See* Idaho Code §§ 42-101, 42-103, and 42-226.

2. The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602 et seq.

3. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. Idaho Code § 42-604 mandates the Director form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). Efficient distribution of water, in accordance with the legislative mandate, requires that IDWR implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversight which allows for consistent planning by water users. *Id.* The creation of a water district for ground water rights in Basin 61 and a portion of Basin 63 near Mountain Home is necessary for the reasons set forth in Finding of Fact 10 and for the efficient administration of water rights in general.

5. Pursuant to Idaho Code § 42-604, adjudication of water rights is a prerequisite for the establishment of a water district. All of the ground water rights claimed in the SRBA and within Basins 61 and 63 have been partially decreed by the SRBA District Court. The SRBA District Court issued the *Final Unified Decree* for water rights within the Snake River Basin on August 25, 2014.

6. Idaho Code § 42-227 provides that a water right permit may be issued but shall not be required for appropriation of ground water for domestic and stock water purposes as defined under Idaho Code § 42-111.

7. Idaho Code § 42-233a authorizes the Director to designate a critical ground water area, which “is defined as any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin.”

8. Idaho Code § 42-233a further provides that “the Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a critical ground water area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the Director determines there is sufficient ground water.”

9. Idaho Code § 42-233a also states that the Director may modify the boundaries of a critical ground water area upon conducting a public hearing followed by publication of notice that describes the reason for the proposed boundary modification.

10. Idaho Code § 42-233b authorizes the Director to designate a ground water management area, which “is defined as any ground water basin, or designated part thereof, which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area.”

11. Idaho Code § 42-233b further provides that “the Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a ground water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the Director determines there is sufficient ground water.”

12. Both Idaho Code §§ 42-233a and 42-233b state that the Director may require all water right holders within a critical ground water area or a ground water management area to “report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.”

13. Administration is required for both surface water rights and ground water rights. Most surface water rights in the Mountain Home area and Basin 61 are already included in an existing water district, whereas most ground water rights in the basin are not included in a water district. The hearing notice and hearing record in this matter show that one of the reasons the Department proposes creation of the water district is to facilitate the measurement and reporting of ground water diversions that are subject to administration under the proposed water district.

14. The oral testimony by Mr. Smith in opposition of the proposed water district related to the cost of operating the water district and costs that individual water users may incur as a result of formation. Mr. Smith indicated that he “has already paid for his water right.” It is true that there are costs involved with obtaining and developing a water right. These costs are different from the costs of running a water district and paying a watermaster. Water District assessments are necessary to fund the water district. Idaho Code §§ 42-612 provides that assessments to water users are based on the actual diversions made by each user. Because Mr. Smith’s right is a small right authorizing irrigation of less than 5 acres, his assessment will be minimal.

15. Mr. Smith’s testimony against development in the Mountain Home area was not within the scope of the hearing and therefore is not addressed in this order.

16. The written comments from Mayfield speculate that the inclusion of its Basin 63 ground water rights in the proposed water district may subject its rights “to the type of regulation that might be proposed for Basin 61.” Mayfield did not specify the “type of regulation” that may occur in Basin 61, but implies that inclusion of its rights in the proposed water district means that its rights may be included in the MHGWMA or CCBCGWA, and therefore subject to all future regulatory requirements the Director may establish for those designated management areas.

17. Mayfield’s objection to the inclusion of its Basin 63 ground water rights in the proposed water district because it may be subject to “the type of regulation” that may occur in the Basin 61 ground water management areas is without merit. Mayfield is confusing water district authorities with the authorities related to ground water management areas and critical ground water areas. This order creates a water district only. The Department has not proposed to modify the boundaries of either the MHGWMA or the CCBCGWA to include Mayfield’s ground water rights. Idaho law requires both public notice and a public hearing before modifying the boundaries of a critical ground water area or ground water management area. The Department has not sent notice or held a hearing regarding modification of either the MHGWMA or the CCBCGWA. Thus, this order does not make Mayfield subject to regulation under the ground water management area regulatory requirements.

18. Mayfield also seems to suggest that because its water rights are within the administrative boundary for Basin 63, its water source is hydraulically disconnected from the ground water in Basin 61. The suggestion that the ground water source for Mayfield's water right permits is hydraulically separate from the ground water in Basin 61 is contrary to the data provide in the contested case proceeding on Mayfield's application for permit. *See Consolidated Hearing for Water Right Applications Along the I-84 Corridor between Boise and Mountain Home.*¹ While Mayfield's points of diversion are in Basin 63, just north of the Basin 61 boundary line, the administrative basin line does not represent an underground barrier or physical ground water boundary line, and is not justification for excluding Mayfield from the water district.

19. The Department outlined the reasons for creating the water district at the January 12, 2016, public hearing and in the public hearing notice dated December 22, 2015. Department staff explained at the public hearing the reasons for including a portion of Basin 63 in the proposed water district boundary. Department staff explained at the public hearing that the proposed water district boundary includes a small portion of Basin 63 because the ground water rights in that area of Basin 63 are very proximal to ground water rights in Basin 61 and the Mountain Home area. The ground water rights in Basin 63 near Mountain Home are much further away from other ground water rights in Basin 63 that may be included in a water district created at some future date. The Department proposed inclusion of the Basin 63 ground water rights near Mountain Home in the proposed Mountain Home area water district because it is more efficient to administer those rights in a Mountain Home area water district rather than a separate, smaller water district limited to just a few water rights in the Mayfield area or a larger district that includes rights located further away such as the Boise Valley area. The Department was not arbitrary in proposing the boundary of the Mountain Home area water district.

20. Based upon the above statutory authorities, upon the adjudication of ground water rights by the SRBA District Court, and upon the record in this proceeding, the Director should create a water district to administer and regulate ground water rights and protect senior priority water rights in the proposed water district.

ORDER

IT IS HEREBY ORDERED that:

1. Water District No. 161 is created to include all ground water rights in Basin 61 and that portion of Basin 63 as shown in the map appended hereto as Attachment A, except ground water rights used for domestic and stock water purposes as defined by Idaho Code §§ 42-111 and 42-1401A (11).

2. The holders of ground water rights within Water District No. 161 shall hold its first annual meeting at a date, time, and place to be announced by the Director to elect a watermaster, select an advisory committee, if desired, and set a budget for operating the district.

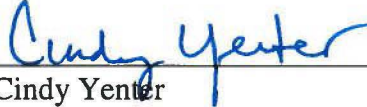
¹ http://idwr.idaho.gov/news/Issues/EADA_2012/

3. The watermaster for Water District No. 161 shall distribute water in accordance with Chapter 6, Title 42 Idaho Code, and guidelines, direction, and supervision provided by the Director. Watermaster duties shall include, but not be limited to, the following:

- a. Measure, collect, and record the diversions of water pursuant to ground water rights;
- b. Administer and enforce ground 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).

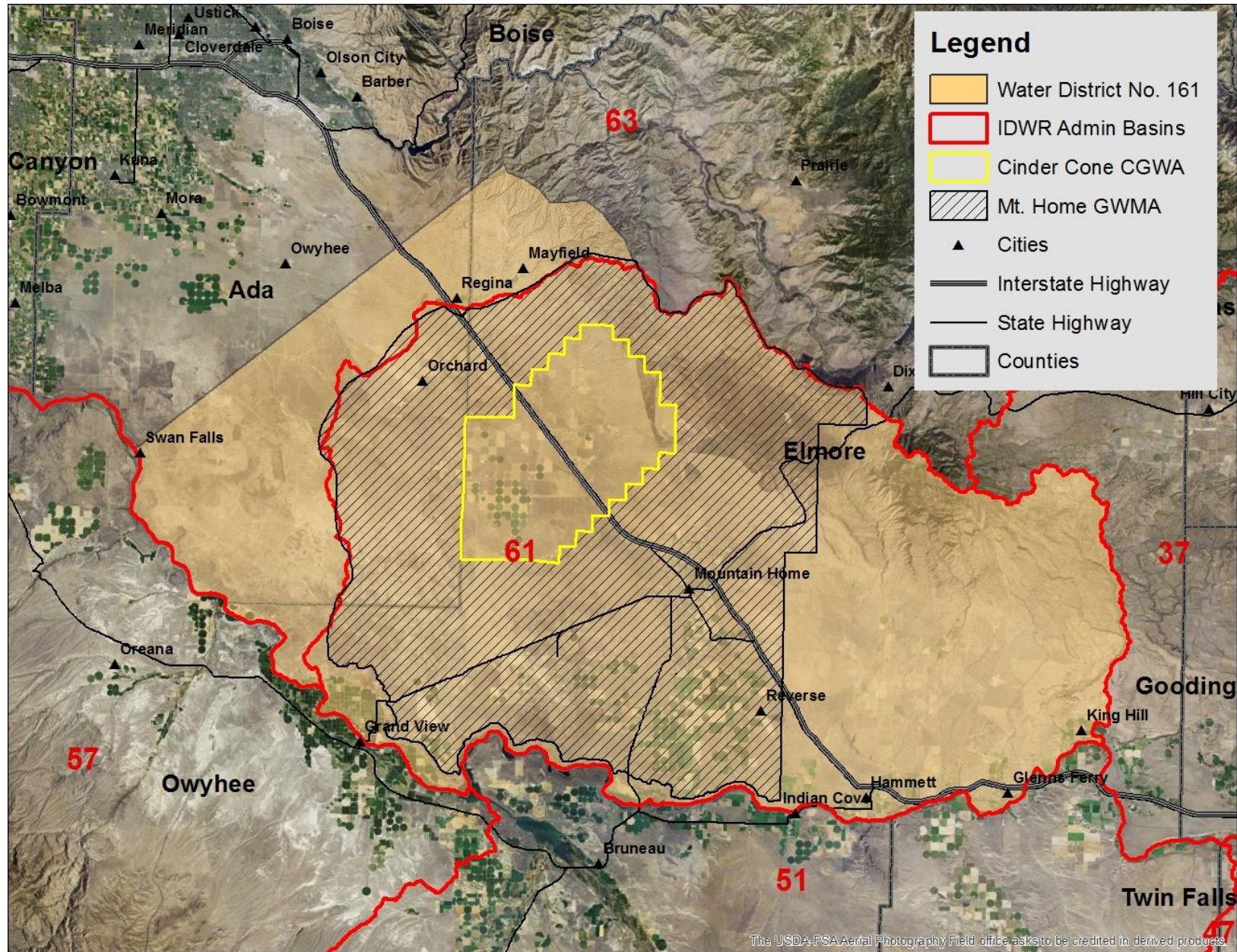
4. The Department shall issue a separate order requiring the installation of measuring devices and controlling works for water right diversions within Water District No. 161.

DATED this 29 day of February 2016.


Cindy Yenter
Hearing Officer

ATTACHMENT A

Water District No. 161



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March 2016, 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. 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.



Sarah Shaul
Technical Records Specialist
Idaho Department of Water Resources

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.