

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

IN THE MATTER OF ROTATION)
CREDIT IN WATER DISTRICT 34,)
BIG LOST RIVER BASIN)
_____)

**PRELIMINARY ORDER
SUSPENDING ROTATION
CREDIT IN WATER DISTRICT 34**

The Director (“Director”) of the Idaho Department of Water Resources (“Department”) has direction and control of the distribution of water from all natural water sources within water districts and has adopted rules and regulations for the distribution of water within Water District 34 (“WD 34”) in accordance with chapter 6, Title 42, Idaho Code. The Department, having reviewed the practice of rotation credit¹ in WD 34 with respect to delivery of surface water on the Big Lost River below Mackay Reservoir, finds, concludes, and orders as follows.

FINDINGS OF FACT

1. Only a few ground water wells were present in the Big Lost River Valley prior to 1960. Johnson, G.S., Ralston, D.R., Mink, L.L, *Ground Water Pumping Impacts on Surface Water Irrigation Diversions from Big Lost River* at 18, Idaho Water Resources Research Institute, University of Idaho, Moscow, Idaho, at 18 (1991). Ground water development in the Big Lost River basin grew rapidly in the early 1960’s and again in the early to middle 1970’s. *Id.*

2. Rule 50.04.c. of the Department’s WD 34 Rules states that depletion to the Big Lost River from ground water pumping is estimated to be 13% of average annual pumping and that average annual pumping is estimated at 47,000 acre-feet (“AF”) per year, or a depletion of 6,110 AF per year. IDAPA 37.03.12.050.04(c). The average annual use was estimated by the University of Idaho for the period of 1984 through 1990. Johnson, G.S., Ralston, D.R., Mink, L.L, *Ground Water Pumping Impacts on Surface Water Irrigation Diversions from Big Lost River* at 18, Idaho Water Resources Research Institute, University of Idaho, Moscow, Idaho, at 35-38 (1991).

3. Average annual ground water pumping in WD 34 for 2014 and 2015 was about 102,000 acre-feet.²

4. Starting in 2014 the Department undertook efforts to modernize, update, and augment the computerized accounting programs and practices in WD 34. The Department’s recent water right accounting efforts have led to a detailed review of the computerized

¹ Rule 10.12 of the Department’s WD 34 Rules defines “Rotation Credit” as “water impounded in Mackay Reservoir pursuant to a water right whose source of water is the Big Lost River and which does not include storage as a purpose of use.” IDAPA 37.03.12.010.12.

² Pumping in these years is based on WD 34 data from installed flow meters available in 2014-2015 Watermaster’s Reports.

accounting program code and procedures, WD34 records, Big Lost River Irrigation District records, WD 34 Rules, and the practice of rotation of natural flow water rights into storage.

5. Starting in December 2015, the Department participated in a series of discussions with WD 34 water users and Idaho legislators to address mounting concerns regarding the sufficiency of the water supply in Basin 34.

6. Average annual pumping in WD 34 from 1990 to 2015 more than doubled from 47,000 AF to 102,000 AF. Consequently, river depletions from ground water pumping have at least doubled during the same period. As a result, there is less surface water available in the river for diversion by Big Lost River priority rights.

7. With respect to the practice of rotation credit, General Provision 3 from the *Amended Partial Decree for General Provisions in Administrative Basin 34* states, in pertinent part:

Water rights from the Big Lost River diverted below Mackay Dam and Reservoir may be rotated into storage with the consent of the Big Lost River Irrigation District when such practice improves the efficiency of water use. Such rotation is subject to the following conditions and review and approval by the Director of the [Department].

Final Unified Decree, In re SRBA, Case No. 39576 (Fifth Jud. Dist. Ct. Aug 26, 2014) at Attachment 3.

8. Rule 40.02 of the WD 34 Rules also describes the practice of rotation credit, stating, in pertinent part:

02. Water rights that do not include storage as a purpose of use may not be stored. Water rights whose source is Big Lost River with their point of diversion below the Mackay Dam may, however, be rotated for credit when such practice improves the efficiency of water use as contemplated by the Big Lost River Irrigation District's plan of operation subject to the following conditions:

- a. Rotation for credit must be approved by the director as provided by these rules.
- b. Rotation for credit must be pursuant to the Big Lost River Irrigation District's approved plan of operation.

IDAPA 37.03.12.040.02(a-b).

9. To be consistent with General Provision 3 and the WD 34 Rules, therefore, the practice of rotation credit in WD 34 must "be pursuant to the Big Lost River Irrigation District's approved plan of operation," improve "the efficiency of water use," and be "approved by the Director."

10. The Big Lost River Irrigation District's original plan of operation was adopted by the District's Board of Directors on April 1, 1935.³ This plan of operation includes just two references to "rotation" as follows:

It is planned that by this District having the property in and control of the above amount of water, which will be used to furnish a supplemental water supply to lands in the District and now having an insufficient water supply, and the employment of a rotation system of water for irrigation purposes, and the storage of natural flow rights, privately owned, at different times in the said Mackay Dam, the District will be enabled to save and conserve large amounts of water and make a successful project out of one that has heretofore been short of water.

...

The use and control, under proper management, of the reservoir, the dam and the other construction works referred to elsewhere, will make possible the operation of an efficient system of rotation among the users themselves, and thereby further increasing the duty of water and conserving the same.

Minutes of the Adjourned Regular Meeting of Board of Directors of the Big Lost Irrigation District, Butte and Custer Counties, Idaho, April 1, 1935, adopting the Proposed Plan of Operations, Big Lost River Irrigation District, J. Ray Weber, March 30, 1935, Exhibit A, p. 2, 8.

11. The 1935 plan of operations was developed in connection with the Big Lost River Irrigation District's loan application to purchase the Mackay Dam and water rights from the Utah Construction Company, as well as the Company's Carey Act project near Arco. *Id.* at 2-6. The purchase allowed the irrigation district to use the storage water from Mackay Reservoir to supplement lands in the district irrigated with private natural flow rights from the Big Lost River.

12. The Big Lost River Irrigation District's current *Operation Plan for Mackay Dam and Reservoir, 2002*, includes no information about the practice of rotation credit.⁴

³ Available at the Department's WD 34 webpage at: <http://www.idwr.idaho.gov/water-rights/water-districts/active.html>.

⁴ Available at the Department's WD 34 webpage at: <http://www.idwr.idaho.gov/water-rights/water-districts/active.html>.

13. The Big Lost River Irrigation District has reported in recent years that a significant amount of water from Big Lost River natural flow water rights annually rotated to and stored in the Mackay Reservoir remains unused in the reservoir at the end of the year. The irrigation district office reported to the Department the amount of rotation credit remaining in storage at the end of the irrigation season (October 15th) for the following years:

<u>Year</u>	<u>Unused Rotation Credit (AF)</u>
2010	2,668
2011	6,886
2012	14,640
2013	2,308
2014	3,007
2015	2,355

14. The volume content of the Mackay Reservoir at the end of the 2012 irrigation season was 15,600 AF.⁵ According to Big Lost River Irrigation District records,⁶ the unused rotation credit at the end of the 2012 irrigation season was 14,640 AF. Therefore, the 2012 volume of unused rotation credit was 94% of the total reservoir contents at the end of the 2012 irrigation season.

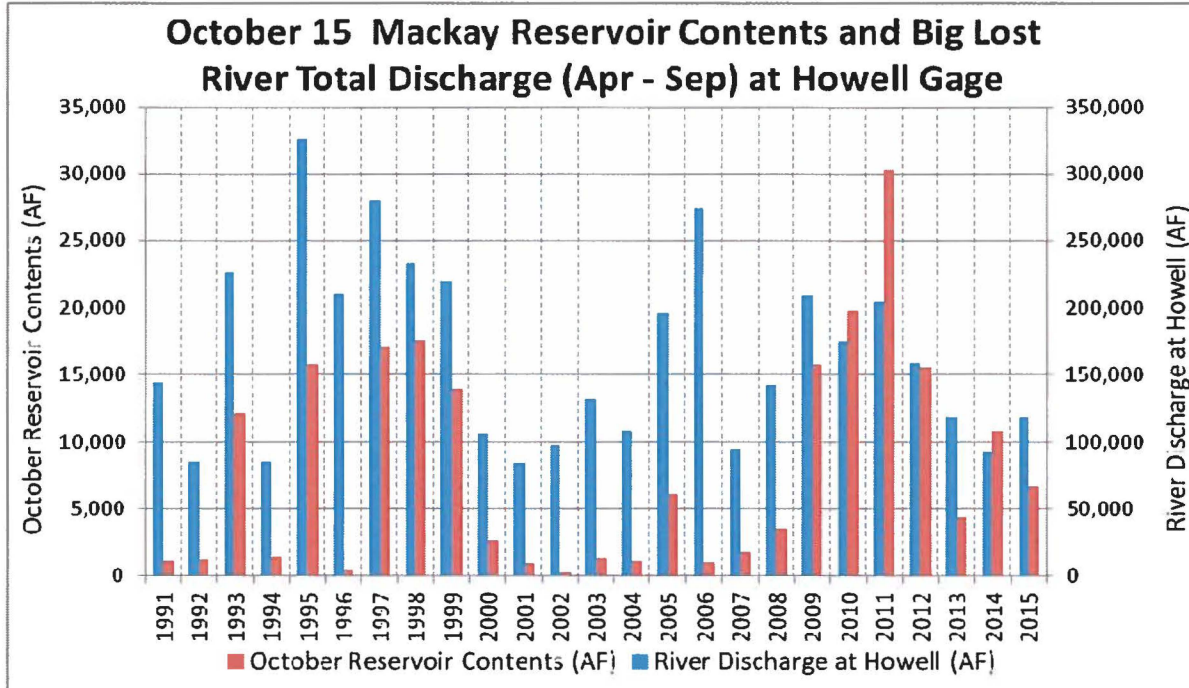
15. Big Lost River Irrigation District records from 2015 show that a total of 4,115 AF of water was rotated to the reservoir during the irrigation season of which 2,355 AF, approximately 57%, remained unused in the reservoir at the end of the irrigation season.

16. Keeping rotation credit in storage through the end of the irrigation season depletes the natural flow of the Big Lost River below Mackay Reservoir, thereby reducing the amount of water available for appropriation by other water users during the irrigation season. For example, leaving 3,000 AF of unused rotation credit in the reservoir, as occurred in 2014, equates to a flow rate of approximately 50 cubic feet per second (“CFS”) diverted for one month that could have been added to the Big Lost River during the irrigation season. This flow and corresponding volume is enough water to irrigate an additional 858 acres per year assuming a field head gate delivery of 3.5 acre-feet per acre and no conveyance losses. Even at 50% conveyance loss, the unused rotation credit is enough water to irrigate an additional 428 acres.

⁵ Data obtained from the United States Geologic Survey for the 13126000 Mackay Reservoir Nr Mackay gaging station.

⁶ Big Lost River Irrigation District water management records are available on the Department’s webpage at: <http://www.idwr.idaho.gov/water-rights/water-districts/active.html>.

17. Data for Mackay Reservoir contents and Big Lost River flow above the reservoir demonstrate a trend of increasing reservoir carryover in recent years. The graph below compares reservoir contents at the end of the irrigation season (October 15) with total irrigation season flow (April through September) in the Big Lost River as measured at the Howell gage station.⁷ Note that end of season reservoir contents over the past seven years are proportionately greater to annual Big Lost River irrigation season flows than the period 1991 through 2008.⁸ The level of carryover in the last seven years has increased during lower runoff years or drier irrigation seasons as compared to the years 1991 to 2008. The increased carryover is due in part to an increase in unused rotation credit.



18. Upon review of the Big Lost River Irrigation District's 2015 end of year storage and rotation credit balances for individual accounts, the Department observed the following:

- a. Some water user accounts had positive rotation credit balances at the end of the irrigation season but no water use (storage water or natural flow water rights) during the irrigation season. The water rotated to the reservoir was not used, nor was it available to any other water user.
 - i. For example, one user on the Munsey Ditch had a positive rotation credit balance of 1,900 inches (75.4 AF) and a storage balance of 3,790 inches (150 AF) but had no canal heading delivery of either natural flow water rights or storage water during the irrigation season.

⁷ River discharge data obtained from the United States Geologic Survey for the 13120500 Big Lost River at Howell Ranch Nr Chilly ID gaging station.

⁸ Mackay Reservoir was purposefully drained in 1996 and 2006 to allow for the repair and maintenance of the dam and primary outlet works.

- b. Some water user accounts had positive rotation credit balances at the end of the irrigation season despite receiving a full delivery of natural flow water in an amount sufficient to meet their total irrigation needs for the season. In such instances, water users rotating natural flow into storage that is not subsequently used during the irrigation season deprive other water users with Big Lost River priority rights from receiving the natural flow water.
 - i. For example, one user on the Beck Ditch had a positive rotation credit balance at the end of the irrigation season of 4,524 inches (180 AF) and no delivery of storage water to either the canal heading or the field head gate. The user has multiple irrigation rights from the Big Lost River, including one senior water right bearing a priority date of April 2, 1884 authorizing diversion of 1.64 CFS and irrigation of a total of 193 acres. The 1884 right was deliverable all season to the Beck Ditch heading according to WD 34 records. The user has no supplemental ground water rights. Review of 2015 aerial imagery shows the user irrigated about 75 acres. The user received a total seasonal field head gate delivery of 5700 inches (226 AF), all from natural flow water rights. Because the user was legally able to divert up to 696 AF of water (1.64 CFS diverted continuously for the entire irrigation season) under the 1884 water right, but only diverted 226 AF, the user received an adequate supply. The 180 AF of rotated water could have been used instead to irrigate additional land authorized by the 1884 priority water right, or if no such need existed, could have been available to satisfy other Big Lost River priority rights.

19. Rotating natural flow water rights from the Big Lost River to the reservoir during the irrigation season diminishes the available flow of water in the river below the reservoir to fill natural flow priority water rights. Review of Big Lost River Irrigation District daily delivery records (ditch rider logs) for July, 2015, shows that Big Lost River natural flow water rights were rotated to the reservoir at an average rate of 10 CFS per day, while deliveries below the reservoir were regulated or limited to water rights with priority dates of May 31, 1884. An additional daily flow of 10 CFS in the river during July could have been used to minimize river conveyance losses or deliver some portion of the next available priority water rights bearing a priority date of June 1, 1884.

CONCLUSIONS OF LAW

1. The effects on the Big Lost River from the doubling of average annual ground water pumping in WD 34 from 1990 to 2015, in addition to recent actions of the Department to update computerized accounting for WD 34, and mounting concerns in WD 34 regarding the sufficiency of the water supply in Basin 34, have led to a Department review of the rotation credit practices in WD 34.

2. The Big Lost River Irrigation District's current *Operation Plan for Mackay Dam and Reservoir* contains no information about the practice of rotation credit. The irrigation district's 1935 plan of operations includes just two references to the concept of "rotation," but lacks specific explanation, criteria, or standards with respect to implementation of the practice of rotation credit. The Big Lost River Irrigation District has no current documentation that

describes or explains the practice of rotation credit in WD 34. Thus, it is impossible for the Department to determine whether the practice of rotation credit in WD 34 is occurring “pursuant to the Big Lost River Irrigation District’s approved plan of operation” in compliance with the WD 34 Rules.

3. The current practice of rotation credit in WD 34, which results in increased river depletions and leaves more than 50% of rotated water unused in the reservoir at the end of the irrigation season, does not “improve the efficiency of water use” as required by General Provision 3 and Rule 40.02 of the WD 34 Rules. The common practice of leaving natural flow water unused in the reservoir at the end of the irrigation season prevents the use of natural flow water by other Big Lost River priority rights, which compromises the efficient use of the total water supply and is contrary to the optimal utilization of the resource.

4. Findings of Fact 18.a.i. and 18.b.i. of this order exemplify that current natural flow rotation practices in WD 34 do not “improve the efficiency of water use” as required by General Provision 3 and Rule 40.02 of the WD 34 Rules. Instead, such practices have resulted in water user accounts having positive rotation credit balances at the end of the irrigation season and no water use (storage water or natural flow water rights) during the irrigation season. Under such circumstances, the water rotated to the reservoir is not used and is not available to other Big Lost River priority rights, which degrades the overall efficiency of water use. Current natural flow rotation practices have also resulted in water user accounts having positive rotation credit balances at the end of the irrigation season despite receiving full delivery of natural flow water in an amount sufficient to meet their total irrigation needs for the season. Under such circumstances, the water users rotating natural flow unnecessarily prevent the use of natural flow water by other Big Lost River priority rights, which degrades the overall efficiency of water use.

5. Because it is impossible for the Department to determine whether the practice of rotation credit in WD 34 is occurring “pursuant to the Big Lost River Irrigation District’s approved plan of operation” in compliance with the WD 34 Rules and the current practice of rotation credit does not “improve the efficiency of water use” as required by General Provision 3 and Rule 40.02 of the WD 34 Rules, the practice of rotation credit should be suspended for the 2016 irrigation season and indefinitely thereafter.

ORDER

IT IS THEREFORE HEREBY ORDERED as follows:

1. The practice of rotation credit in WD 34 is hereby SUSPENDED for the 2016 irrigation season and indefinitely thereafter.
2. The Department may consider approving the practice of rotation credit in any subsequent year if the Big Lost River Irrigation District annually consents to the practice in writing and develops a plan of operation for rotation credit that improves the efficiency of water use.

Dated this 29th day of April 2016.



MAT WEAVER
Deputy Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April 2016, the above and foregoing was served on the following by the method(s) indicated below:

LUCUS YOCKEY
PO BOX 53
MACKAY ID 83251

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

JOEL ANDERSEN
PO BOX 205
MACKAY, ID 83251

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

KENT HARWOOD
BIG LOST RIVER IRR DIST
MACKAY, ID 83251

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

MAX BINGHAM
BIG LOST RIVER IRR DIST
MACKAY, ID 83251

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

HARVEY WALKER
BIG LOST RIVER IRR DIST
MACKAY, ID 83251

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

LARRY JENSEN
BIG LOST RIVER IRR DIST
MACKAY, ID 83251

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

KENT FLETCHER
FLETCHER LAW OFFICE
MACKAY, ID 83318

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email

LYLE SWANK
900 N SKYLINE DR STE A
IDAHO FALLS, ID 83815

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

VERNON ROCHE
5411 OLD CHILLEY RD
MACKAY, ID 83251

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

SHANE ROSENKRANCE
5532 BARTON FLAT RD
MACKAY, ID 83251

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

SHAWN ANDERSON
3650 N 3650 W
MOORE, ID 83255

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

DENNIS MOSS
3286 N 3350 W
MOORE, ID 83255

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

DARRELL LEE MCDONALD
PO BOX 246
ARCO, ID 83213

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

MITCHELL SORENSEN
3871 W 2500 N
MOORE, ID 83255

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

SETH BEAL
2827 N 3375 W
MOORE, ID 83255

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

JIM RINDFEISH
BIG LOST RIVER IRR DIST
MACKAY, ID 83251

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Email



Kimi White

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(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 with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

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, requests 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 IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director 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.