

The following notes and proposed edits (in redline) are submitted by Chris Meyer (CHM) and Mike Lawrence (MPL) of Givens Pursley LLP (GP) on 5/26/2021. These comments are provided on behalf of SUEZ Water Idaho, which wishes to extend its thanks to the Department for undertaking this important exercise and seeking public comment. CHM, MPL, GP, and SUEZ submit these comments in good faith and without any intention of establishing positions on subjects related to past, present, or future matters.

We strongly support the Department's current plan to issue its own procedural rules, rather than adopt the generic procedural rules of the A.G. with exceptions and additions. The A.G.'s rules are not well suited to IDWR. Indeed, they are themselves dated and in need of revision.

## IDAPA 37 – DEPARTMENT OF WATER RESOURCES

### 37.01.01 – RULES OF PROCEDURE OF THE IDAHO DEPARTMENT OF WATER RESOURCES

#### 000. LEGAL AUTHORITY (RULE 0).

This chapter is adopted under the legal authority of Sections 42-1701A(1), 42-1734(19), 42-1737(c), 42-1805(8), and 67-5206(5), Idaho Code. ( )

#### 001. TITLE AND SCOPE (RULE 1).

01. **Title.** The title of this chapter is "Rules of Procedure of the Idaho Department of Water Resources." ( )

02. **Scope.** This chapter contains the rules of procedure that govern contested case proceedings before the Idaho Department of Water Resources and the Idaho Water Resource Board. These rules do not apply to enforcement actions under Section 42-1701B, Idaho Code. ( )

#### 002. DEFINITIONS (RULE 2).

01. **Agency.** The Department of Water Resources or the Water Resource Board acting within their respective authority to determine contested cases. The term "agency" may include the Director of the Department, the Water Resource Board, or a presiding officer appointed by the agency. ( )

02. **Agency Action.** Agency action means: ( )

a. The whole or part of an order; ( )

b. The failure to issue an order; or ( )

c. An agency's performance of, or failure to perform, any duty placed on it by law. ( )

03. **Agency Head.** The Idaho Water Resource Board or Director of the Department. ( )

04. **Board.** The Idaho Water Resource Board. ( )

05. **Contested Case.** A contested case is any proceeding that results in the issuance of an order, regardless of whether it is contested by another party. A contested case begins when an application, petition, or other document seeking an order is filed (except for a petition for declaratory ruling, as provided in Rule 301). ( )

{CHM Note: This is one of the most counter-intuitive and misunderstood issues in administrative law. A few words will help lawyers and non-lawyers understand what is going on.}

05½. **Contested Matter.** A contested matter is a contested case in which there is also a participant (a party other than the applicant or petitioner).

{CHM Note: Unfortunately, the Idaho Supreme Court has hijacked the term "contested case" and applied

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it to every proceeding leading to an order—even uncontested ones. Thus, need another way of distinguishing between matters that are or are not contested.}

**06. Department.** The Idaho Department of Water Resources. ( )

**07. Director.** The agency head of the Idaho Department of Water Resources. ( )

**071/2. Exceptions.** The term “exceptions” in Idaho Code Section 67-5245 means an appeal to the agency head of a preliminary order issued by a presiding officer who is not the agency head, and may also be referred to as an “appeal.”

**08. License.** The whole or part of any agency permit, license, approval, or similar form of authorization required by law, but does not include a license required solely for revenue purposes. ( )

**09. Order.** An agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons. This would include, by way of example and not limitation, the final approval or denial of a permit application, transfer application, or other application, or a final ruling on a petition (other than a discretionary decision not to entertain a petition for declaratory ruling). ( )

{CHM Note: Almost no one understands what an order is. And few suspect that it includes the mere issuance of a permit when there is no protest. A few extra words to spell that out will go a long way toward educating those appearing before IDWR.}

{CHM Note: Very minor point, but saying “one (1)” is visually and mentally distracting. I am old enough to know that it dates back to a time when people wrote things on typewriters in multiple copies with carbon paper and often made mistakes which might be caught if the two numbers didn’t match. This practice has no modern utility.}

**9½. Participant.** A participant is a person described in Rule 154.

**10. Party.** Each person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, including an applicant, petitioner, or participant. ( )

**11. Person.** Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character. ( )

**12. Petition.** A pleading requesting a modification, amendment or stay of an existing order of the agency, the clarification, declaration or construction of the law administered by the agency, the clarification, declaration or construction of a person’s rights or obligations under law administered by the agency, rehearing of a contested case, or intervention, or to otherwise request the agency take action that will result in the issuance of an order. ( )

**12½. Presiding officer.** An agency board member or members, the agency director, or the hearing officer in a contested case, as described in Rule 414.

{CHM Note: These rules sometime refer the “hearing officer” and sometimes to the “presiding officer.” I can’t discern a reason why. (Compare, for example, Rules 415 and 417.) Shouldn’t virtually all references to hearing officer be changed to presiding officer? If there is some logical departure from that, it would be helpful if the rules would explain why.}

**13. Protest.** A pleading opposing an application or appeal. A protest may also be employed by a person who does not necessarily oppose an application or appeal, but who wishes to obtain or continue party status in order to participate in the proceeding and/or secure the right to appeal. A person who withdraws a protest is no longer a party, but may be a public witness. ( )

{CHM Note: See my comment to Rule 154.}

**14. Response.** A pleading responding to a motion or petition. ( )

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15. **Rulemaking.** The process for formulation, adoption, amendment or repeal of a rule. ( )

16. **Uncontested Matter.** An uncontested matter is a contested case in which there are no participants (parties other than the applicant or petitioner). A contested matter may become an uncontested matter if all participants withdraw or are dismissed.

003. -- 049. (RESERVED)

**050. PROCEEDINGS GOVERNED (RULE 50).**

These rules govern contested cases before the Department and the Board, unless otherwise provided by order of the agency. The Department and the Board through the promulgation of these rules decline to adopt the contested case portions of the "Idaho Rules of Administrative Procedure of the Attorney General," IDAPA 04.11.01.100 through 04.11.01.799. However, the majority of the rules adopted here are consistent with the provisions of the Attorney General Rules. Rulemaking before the Department and the Board shall be governed by the Attorney General Rules, at IDAPA 04.11.01.05 and 04.11.01.800 through 860. ( )

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**051. LIBERAL CONSTRUCTION (RULE 51).**

The rules in this chapter will be liberally construed to ensure just, speedy and economical determination of all issues presented to the agency. The agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest. Unless required by statute, or otherwise provided by these rules, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested cases before the agency. ( )

**052. COMMUNICATIONS WITH AGENCY (RULE 52).**

Unless otherwise provided by statute, rule, order or notice, documents are considered filed when sent by email or, if not sent by email, when received by the agency, not when mailed, or otherwise transmitted. ( )  
{MPL note: Parties can control delivery of documents to the agency, but they cannot control when the documents are actually received by the presiding officer.}

Deleted: All written communications and documents that are filed with the agency in a contested case must be filed with the presiding officer designated by the agency.

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**053. IDENTIFICATION OF CASE (RULE 53).**

Communications pertaining to a contested case before the agency should include a reference to the case number or case name. ( )

**054. FILING AND SERVICE OF DOCUMENTS (RULE 54).**

**01. Filing of Documents with the Agency.**

a. All documents filed with the agency by means other than email shall be mailed or delivered to the Department's main office or any of the Department's regional or field offices. See <https://idwr.idaho.gov/contact-us.html> for address and contact information. Documents may be filed by email as an alternative to filing by mail or personal delivery, provided that copies of all emailed documents must also be mailed or hand delivered to the agency unless otherwise authorized by the presiding officer. Documents filed by email shall designate the case number or, if none, other identifying information in the email caption. The agency will not accept filings by facsimile. Documents filed other than by email must be filed during regular business hours of 8:00 am to 5:00 pm (MT) Monday through Friday on the day the document is due. Documents filed by email must be filed by 11:59 p.m. on the day the document is due. ( )

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{CHM/MPL Note: Email should be allowed for filing of all pleadings and other documents in a contested case, even before a presiding officer is assigned. The IPUC allowed email filing during COVID, and evidently it was well-received by the IPUC staff and practitioners. IDWR should establish an address for such filings and perhaps a system for automatic response/confirmation emails. Email filing is necessary if there is no fax filing option. Email filing until midnight on the due date is consistent with practice in Idaho courts.}  
{CHM Note: To avoid inconsistency in use of e-mail and email, we have changed all to "email" which seems to be the more common spelling. We don't care which is used, but consistency is important when searching a rule electronically.}

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count. If the day the act must be done is Saturday, Sunday or a legal holiday, the act may be done on the first day following that is not Saturday, Sunday or a legal holiday. ( )

**056. FEES (RULE 56).**

If submitted by mail or in person, fees paid to the agency may be paid by cash, money order, bank draft or check payable to the agency. Payments in cash, submitted by mail, are wholly at the risk of the remitter, and the agency assumes no responsibility for their loss. Fees may also be paid by credit card or other digital methods, if allowed by the agency. Filings required to be accompanied by a fee are not complete until the fee is paid. ( )

**057. -- 099. (RESERVED)**

**100. INFORMAL AND FORMAL PROCEEDINGS (RULE 100).**

Contested case proceedings before the agency shall be conducted as either informal or formal proceedings. ( )

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**01.** Informal proceedings are proceedings governed by Rules 100 through 101, without a formally designated presiding officer, and with representation according to Rule 201.01. Informal, off-the-record discussions among parties and agency staff aimed at understanding and resolving the issues presented are allowed during informal proceedings. ( )

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{CHM Note: There must be a record even for informal proceedings, because even informal proceedings are subject to judicial review. At a minimum, that record would consist of the application, any other formal submission, and the decision itself. But it need not include any record of the informal discussions.}

**02.** Formal proceedings are proceedings conducted by a presiding officer initiated upon issuance of a Notice of Initial Prehearing Conference and with representation according to Rule 202.02. Unless the formal proceeding has been suspended as provided in Rule 100.03, all substantive communications between or among agency staff (including, but not limited to, agency counsel and the presiding officer) and the parties shall be on-the-record. ( )

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{CHM Note: Both formal and informal proceedings are adjudicative in nature. And both are contested cases.}

{CHM Note: It seems unlikely that formal procedures would be employed in an uncontested matter, but I suppose the agency should have that option.}

**03.** Informal proceedings may be employed in uncontested matters or in the early stages of a contested matter prior to appointment of a presiding officer in an effort to resolve the issues presented. Even after a formal proceeding has been initiated, the agency may suspend the formal proceeding and employ informal proceedings in an effort to resolve the issues presented. ( )

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**101. INFORMAL PROCEEDINGS (RULE 101).**

**01.** An informal proceeding may be commenced by the agency by issuance of a Notice of Informal Proceeding. All parties to a proceeding must attend the initial informal settlement conference, which also may be attended by agency staff. At the conference the parties shall be prepared to discuss the disposition or delayed commencement of the formal proceeding, additional information needs, and the form of additional informal processes, including negotiation, stipulation, or mediation. ( )

**Deleted:** provide for the use of an informal proceeding any time after commencement of a formal proceeding

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**02.** The agency may hold additional informal proceedings which all parties must attend, to assess the continuing likelihood that the informal proceeding will settle or resolve all or a portion of the issues in a proceeding. ( )

**03.** During informal proceedings the agency may stay the proceeding at the request of the applicant or petitioner in an uncontested matter, or upon the stipulation of the parties in a contested matter, when the agency determines that such delay will assist the agency in resolving the proceeding, or when a formal agency moratorium prevents consideration of the matter at issue.

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04. Settlement offers made in the course of informal proceedings are confidential and shall not be included in the agency record of a subsequent formal proceeding. ( )

**102. FORMAL PROCEEDINGS (RULE 102).**

When the agency determines that informal proceedings are unlikely to resolve the matter, a presiding officer will initiate the formal proceeding under Rule 100.02, and Rule 202.02 regarding attorney representation shall apply. ( )

**103. -- 149. (RESERVED)**

**150. PARTIES TO CONTESTED CASES LISTED (RULE 150).**

Parties to contested cases before the agency are called applicants, petitioners, respondents, protestants, or intervenors. On reconsideration or exceptions within the agency parties are called by their original titles listed in the previous sentence. ( )

{CHM Note: We've never understood the reason for having a different procedure and concept for "exceptions" and "reconsideration." Seems this is exactly the sort of lawyerly procedural gobbledygook that the Governor wants us to get rid of. It's not just eliminating pages. It's eliminating pointless distinctions and procedural snafus.}

**151. APPLICANTS (RULE 151).**

Persons who seek any right, license, award or authority from the agency. ( )

**152. PETITIONERS (RULE 152).**

Persons not applicants who seek to modify, amend or stay existing orders or rules of the agency, to clarify or have the agency declare or construe the law administered by the agency or a person's rights or obligations under law administered by the agency, to ask the agency to initiate or rehear a contested case (other than an application), to intervene in a contested case, or to otherwise take action that will result in the issuance of an order or rule. ( )

{MPL Note: revised to match definition of "petitioner"}

**153. RESPONDENTS (RULE 153).**

Persons who file responses to a petition. ( )

**154. PARTICIPANTS (RULE 154).**

Persons who become parties to a contested case by way of (1) filing a protest, (2) intervening, (3) responding to a petition, or (4) being identified in a petition as a third-party subject to the requested ruling. Thus, a participant is any party other than the applicant or petitioner. ( )

{CHM Note: In prior proceedings, we've spent time moving people from "Protestant" to "Intervenor in support" status. This does not seem to accomplish anything of value. Protestants and intervenors come in all shades, and their shade (of support or opposition) may change during the course of the proceeding. Having different labels is unnecessary and confusing.}

{CHM Note: As for item (4) above, Nampa spent money unnecessarily intervening in the Riverside matter because it was not clear whether it needed to do so to obtain party status.}

**155. RIGHTS OF PARTIES AND OF AGENCY STAFF (RULE 155).**

Subject to Rules 558, 560, and 600, all parties and agency staff may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in a contested case before the agency. ( )

**156. -- 199. (RESERVED)**

**200. IDENTIFICATION OF REPRESENTATIVES AND ADDRESS FOR SERVICE (RULE 200).**

The initial pleading of a party (be it application, petition, protest, or motion) must identify the party's representative, if any, and state the mailing address and email address (if any) to be used for service of all documents. If a

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Deleted: Persons who oppose or seek to alter an application and who have a statutory right to contest or seek to alter the right, license, or authority sought by an applicant.

Deleted: 155. → INTERVENORS (RULE 156),  
Persons, not applicants, petitioners, respondents, or protestants to a proceeding, who are permitted to participate as parties pursuant to Rules 350 through 354. → ( )  
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representative is identified, service of documents on the named representative is considered valid service upon the party. If an initial pleading is signed by more than one person without identifying a representative for service of documents, the presiding officer may select the person upon whom documents are to be served. ( )

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**201. REPRESENTATION OF PARTIES (RULE 201).**

**01. Representation at Informal Proceedings.** Appearances and representation of parties or other persons at an informal proceeding pursuant to Rules 100 – 101 must be as follows: ( )

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**a.** Natural Person. A natural person may represent himself or herself or be represented by an authorized employee, attorney, or family member, or by a next friend if the person lacks full legal capacity to act for himself or herself. ( )

**b.** A partnership may be represented by a partner, authorized employee, or attorney. ( )

**c.** A corporation may be represented by an officer, authorized employee, or attorney. ( )

**d.** A municipal corporation, local government agency, unincorporated association or nonprofit organization may be represented by an officer, authorized employee, or attorney. ( )

**e.** A state, federal or tribal governmental entity or agency may be represented by an officer, authorized employee, or attorney. ( )

**02. Appearances and Representation at Formal Proceedings.** Following the commencement of a formal proceeding pursuant to Rule 100.02, the representatives of parties shall be as follows: ( )

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**a.** A party who is a natural person may represent himself or herself or be represented by an attorney. ( )

**b.** All other parties shall appear and be represented by an attorney admitted to practice and in good standing in the state of Idaho. ( )

**c.** Only parties or their representatives at hearing are entitled to examine witnesses and make or argue motions. ( )

**202. SERVICE ON PARTIES AND THEIR REPRESENTATIVES (RULE 202).**

From the time a party files its initial pleading in a contested case, that party must serve all documents filed with the agency upon all other parties or their designated representatives unless otherwise directed by order or notice or by the presiding officer on the record. The presiding officer may order parties to serve past documents filed in the case upon parties or their representatives. ( )

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**203. WITHDRAWAL OF PARTIES (RULE 203).**

Any party may withdraw from a proceeding in writing or by confirming the withdrawal on record at a conference or hearing. ( )

**204. SUBSTITUTION OF REPRESENTATIVE -- WITHDRAWAL OF REPRESENTATIVE (RULE 204).**

A party's representative may be changed by notice to the presiding officer and all other parties. The presiding officer may reject the substitution of representative if the substitution would result in an unreasonable delay of the proceeding. Persons representing a party in a proceeding before the agency who wish to withdraw their representation must immediately file a notice of withdrawal of representation and serve that notice on the party represented, the presiding officer, and all other parties. ( )

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**205. STANDARDS OF CONDUCT (RULE 205).**

All persons participating in or attending a contested case proceeding before the agency must conduct themselves in an ethical, courteous, and respectful manner during all phases of the proceeding. The presiding officer may exclude a person from a proceeding who in manner or appearance is disruptive or disrespectful. Disruptive conduct or appearance that is serious in nature may be cause for dismissal of the disrupting party from the proceeding. ( )

**206. -- 209. (RESERVED)**

**210. PLEADINGS LISTED (RULE 210).**

Pleadings allowed in contested cases are applications, petitions, protests, motions, and responses. ( )

**211. -- 219. (RESERVED)**

**220. MOTIONS.**

**01. Motion - Defined.** A "motion" is a request to the agency to take an action in a contested case. ( )

**02. Procedure on Written Motions.**

a. A written motion, affidavit(s) supporting the motion, and briefs supporting the motion, if any, must be filed with the agency and served on the parties. ( )

b. Briefs responding to the motion or affidavits, if any, must be filed with the agency and served on the parties within 14 days of the filing of a motion. ( )

c. The moving party may file a reply brief, which must be filed with the agency and served on the parties within 7 days of the filing of the responsive affidavit(s) or briefs. ( )

d. The moving party must indicate on the face of the motion whether oral argument is desired. ( )

e. If oral argument has been requested on any motion, the presiding officer may grant or deny oral argument by written or oral notice. The presiding officer may limit oral argument at any time. ( )

f. After consulting with the parties, the presiding officer may establish a briefing schedule or number of briefs that departs from that provided in this rule.

~~g. Any exception to the time limits or other modification of the briefing schedule may be granted by the presiding officer for good cause shown. ( )~~

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**03. Motions for Summary Judgment.** Motions for summary judgment may be filed in any contested case. Rules 56(a), (c), (d), (e), and (f) of the Idaho Rules of Procedure, shall apply to such motions before the agency except to the extent modified by order of the presiding officer. ( )

**221. -- 299. (RESERVED)**

**300. FORM AND CONTENT OF PLEADINGS AND WRITTEN MOTIONS (RULE 300).**

**01. Form.** Pleadings should be filed on standard forms created by the agency, if available. Pleadings and written motions not filed on standard forms should include a caption identifying the case at the top of the first page and shall: ( )

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{MPL Note: a party should not be penalized for not filing on a standard form or using a modified version of a standard form.}

a. Be submitted on white, eight and one-half inch (8 1/2") by eleven inch (11") paper printed on one

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side only; ( )

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b. Identify the case name, case number, if applicable, and title of the document; ( )

c. Include the mailing address, telephone number, and email address (if any) of the person(s) filing the document; and ( )

d. Have at least one inch (1") left and top margins. ( )

02. Content of Pleadings. A pleading shall fully state: ( )

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a. The facts upon which it is based, ( )

b. The provision of statute, rule, order or other controlling law upon which it is based, and ( )

c. The relief sought, including any proposed limitation (or the denial) of any right, license, or permit sought in an application. ( )

d. Petitions for declaratory rulings shall state the declaratory ruling that the petitioner seeks. ( )

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301. DECLARATORY RULINGS (RULE 301).

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a. 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.

b. 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.

c. If a contested case is initiated in response to a petition for declaratory ruling, the agency may provide notice thereof in a manner designed to call its attention to persons likely to be interested in the subject matter of the petition, who shall be afforded an opportunity to intervene if they are not already identified as the subject of the petition. ( )

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{CHM Note: Informal proceedings in a declaratory ruling case would be rare, I should think. But I guess the agency should have that option.}

{CHM Note: I believe that item "b" is consistent with the majority view of the law (i.e., that you cannot use a declaratory ruling to collaterally attack a prior decision when you miss the appeal deadline). But that precedent comes mostly from other states. Frankly, I can argue for either result. But one way or the other, this should be spelled out in the regulation, so people don't have to spend \$\$ arguing about it.}

302. DEFECTIVE, INSUFFICIENT OR LATE PLEADINGS (RULE 302). ( )  
Defective, insufficient or late pleadings may be returned or dismissed without prejudice.

303. AMENDMENTS TO PLEADINGS -- WITHDRAWAL OF PLEADINGS (RULE 303).  
Any pleading may be amended or corrected or any omission to be supplied. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded. A party desiring to withdraw a pleading must file a notice of withdrawal of the pleading and serve all parties with a copy. Unless otherwise ordered by the presiding officer, the notice is effective seven (7) days after filing. ( )

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{MPL Note: there may no presiding officer in informal proceedings, but parties may need to amend an application.}

304. -- 349. (RESERVED)

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**350. PETITIONS TO INTERVENE (RULE 350).**

A person who is not already a party to a contested case and who has a direct and substantial interest in the proceeding may petition for an order granting intervention as a party to the contested case. ( )

{MPL Note: there may no presiding officer in informal proceedings, but someone may want to intervene.}

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**351. FORM AND CONTENTS OF PETITIONS TO INTERVENE (RULE 351).**

Petitions to intervene must comply with Rules 54, 200, and 300. The petition must set forth the name and address of the potential intervenor and must state the direct and substantial interest of the potential intervenor in the proceeding. ( )

**352. TIMELY FILING OF PETITIONS TO INTERVENE (RULE 352).**

Petitions to intervene must be filed at least 14 days before the date set for formal hearing, or by the date of the initial prehearing conference, whichever is earlier, unless a different time is provided by order or notice. Petitions filed after this deadline are considered late and must state a good cause for delay. ( )

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**353. DECIDING PETITIONS TO INTERVENE (RULE 353).**

**01. Timely-Filed Petitions.** If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a contested case and does not unduly broaden the issues, the presiding officer shall grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. ( )

**02. Late Petitions.** The presiding officer may grant late petitions to intervene for good cause shown or may deny or conditionally grant petitions to intervene that are late for failure to state good cause for the late filing, to prevent disruption, to prevent prejudice to existing parties, to prevent undue broadening of the issues, or for other reasons. ( )

**03. Order and Notices Issued Prior to Intervention.** Intervenors are bound by orders and notices entered in the contested case prior to the approval of the petition to intervene. ( )

**354. ORDERS GRANTING INTERVENTION -- OPPOSITION (RULE 354).**

Any party opposing a petition to intervene must file an response within (7) days of its filing. Replies to the response must be filed within seven (7) days of its service. The responses and replies to the proposed intervention must be served on all parties of record and on the person petitioning to intervene. ( )

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**355. PUBLIC WITNESSES (RULE 355).**

A person who is not a party and is not called by a party as a witness who desires to testify at hearing is a public witness. Public witnesses do not have the right to examine witnesses or otherwise participate in the proceedings as parties. Subject to Rules 556 and 558, public witnesses have a right to introduce evidence at hearing by written or oral statements and to offer exhibits at hearing. Public witnesses are bound by scheduling orders issued in a contested case regarding disclosure of expert reports and exhibits prior to the hearing. A person intending to present public witness testimony shall notify the presiding officer in writing at least five days prior to the hearing. The notice shall include the name and address of the witness and the general nature or subject matter of the testimony to be given. If the notice is not given, the public witness testimony will only be allowed at the discretion of the presiding officer upon a finding of good cause. Public witnesses are subject to cross-examination and exhibits offered by public witnesses are subject to objection. Public witnesses have no right to seek reconsideration, file exceptions, or appeal. ( )

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**356. -- 409. (RESERVED)**

**410. APPOINTMENT OF HEARING OFFICERS (RULE 410).**

A hearing officer is a person other than the agency head appointed to hear a contested case on behalf of the agency. Unless otherwise provided by statute or rule, hearing officers may be employees of the agency or independent contractors. Hearing officers may be (but need not be) attorneys. Hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the agency. The appointment of a hearing officer is a public record available for inspection, examination and copying. ( )

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**411. HEARING OFFICERS CONTRASTED WITH AGENCY HEAD (RULE 411).**

Agency heads are not hearing officers, even if they are presiding at contested cases. The term "hearing officer" as used in these rules refers only to officers subordinate to the agency head. ( )

{MPL Note: Please review all references to hearing officers, presiding officers, and agency to ensure accuracy and consistency. For example, in Rule 413.01 below, shouldn't that say "presiding officer" so it applies to the agency head?}

**412. DISQUALIFICATION OF OFFICERS HEARING CONTESTED CASES (RULE 412).**

Presiding officers may be disqualified as provided in Section 67-5252, Idaho Code. ( )

**413. SCOPE OF AUTHORITY OF PRESIDING OFFICERS (RULE 413).**

The scope of presiding officers' authority may be restricted in the appointment by the agency head. ( )

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**01. Scope of Authority.** Unless specified in an order from the agency head, presiding officers have the authority to: ( )

a. Decide petitions to intervene and motions; ( )

b. Schedule cases assigned to the hearing officer, including authority to issue notices of default, of prehearing conference and of hearing; ( )

c. Schedule and compel discovery, when discovery is authorized before the agency, and to require advance filing of expert testimony, when authorized before the agency; ( )

d. Consider stipulations and settlements; ( )

e. Preside at and conduct conferences and hearings, accept evidence into the record, rule upon objections to evidence, rule on dispositive motions, and otherwise oversee the orderly presentation of evidence at hearing in accordance with these Rules; and ( )

f. Issue a written decision for a contested case, including a narrative of the proceedings, findings of fact, conclusions of law, and a recommended or preliminary order. ( )

**02. Limitation.** The hearing officer's scope of authority may be limited from the standard scope, either in general, or for a specific proceeding. Hearing officers can be given authority with regard to the agency's rules as provided in Rule 416. ( )

**414. PRESIDING OFFICER(S) (RULE 414).**

One or more members of the agency board, the agency director, or duly appointed hearing officers may preside at hearing as authorized by statute or rule. When more than one officer sits at hearing, they may all jointly be presiding officers or may designate one of them to be the presiding officer. ( )

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**415. CHALLENGES TO STATUTES (RULE 415).**

A hearing officer in a contested case has no authority to declare a statute unconstitutional. However, when a court of competent jurisdiction whose decisions are binding precedent in the state of Idaho has declared a statute unconstitutional, or when a federal authority has preempted a state statute or rule, and the hearing officer finds that the same state statute or rule or a substantively identical state statute or rule that would otherwise apply has been challenged in the proceeding before the hearing officer, then the hearing officer shall apply the precedent of the court or the preemptive action of the federal authority to the proceeding before the hearing officer and decide the proceeding before the hearing officer in accordance with the precedent of the court or the preemptive action of the federal authority. ( )

**416. REVIEW OF RULES (RULE 416).**

When an order is issued by the agency head in a contested case, the order may consider and decide whether a rule of that agency is within the agency's substantive rulemaking authority or whether the rule has been promulgated

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according to proper procedure. ( )

{MPL Note: Aren't rules approved by legislature? Once the rule has been approved by the legislature, what authority does the agency head have to determine whether it is improper?}

**417. EX PARTE COMMUNICATIONS (RULE 417).**

Unless required for the disposition of a matter specifically authorized by statute to be done ex parte, a presiding officer serving in a contested case and a party or other interested person shall not communicate with each other, directly or indirectly, regarding any substantive issue in the contested case, except upon notice and opportunity for all parties to participate in the communication. These restrictions on ex parte communications are applicable in both formal or informal proceedings, unless it is an uncontested matter. The presiding officer may communicate ex parte with a party concerning procedural matters (e.g., scheduling). The presiding officer in a contested matter shall provide to the parties a general summary of any ex parte communications from members of the general public not associated with any party. When a presiding officer or the agency head becomes aware of an ex parte communication regarding any substantive issue from a party or representative of a party in a contested matter, the presiding officer or agency head shall place a copy or written summary of the communication in the file for the case and order the party providing the communication to serve a copy of the communication or written summary upon all parties of record. Repeated violations of this rule shall be cause for the presiding officer to dismiss an action or to dismiss a party from an action. Written communications from a party showing service upon all other parties are not ex parte communications. ( )

{CHM Note: You may not simply exclude ex parte communications from the public. See Idaho Historic Preservation Council, Inc. v. City Council of Boise ("Historic Preservation"), 134 Idaho 651, 8 P.3d 646 (2000).}

{CHM Note: Seems to me that ex parte communications are allowed if the matter is not contested.}

**418. ALTERNATIVE RESOLUTION OF CONTESTED CASES.**

The agency and the Idaho Legislature encourage alternative dispute resolution (ADR). For contested cases, the means of ADR include, but are not limited to, informal proceedings, settlement negotiations, mediation, fact finding, mini-trials, and arbitration, or any combination of them. The agency may use ADR for the resolution of issues in controversy in a contested case if the agency finds that such a proceeding is appropriate. ( )

{MPL Note: Seems like it should be made clear that all forms of ADR should be used, and that the contested case process is flexible enough to incorporate creative forms of ADR.}

**418. -- 509. (RESERVED)**

**510. PURPOSES OF PREHEARING CONFERENCE (RULE 510).**

The presiding officer may by Notice of Initial Prehearing Conference, signed by the officer or by an authorized employee of the agency, commence a formal proceeding pursuant to Rule 100.02. The prehearing conference shall be convened for purposes of formulating or simplifying the issues, obtaining concessions of fact or identification of documents to avoid unnecessary proof, scheduling discovery (when discovery is allowed), arranging for the exchange of proposed exhibits or prepared testimony, limiting witnesses, discussing settlement offers or making settlement offers, scheduling hearings, establishing procedure at hearings, and addressing other matters that may expedite orderly conduct and disposition of the proceeding or its settlement. ( )

**511. ADDITIONAL CONFERENCES (RULE 511).**

The presiding officer may, following the initial prehearing conference, convene additional conferences. Additional conferences will address the topics identified in Rule 510, unless the topics are further defined in the notice of such conference. ( )

**512. NOTICE OF CONFERENCE (RULE 512).**

Notice of the place, date and hour of a conference will be served on all parties at least 14 days before the time set for the conference, unless the presiding officer finds it necessary or appropriate for the notice period to be shortened. Notices must contain the same information as notices of hearing with regard to an agency's obligations under the American with Disabilities Act. ( )

**513. RECORD OF CONFERENCE (RULE 513).**

Conferences may be held on the record or off the record before a presiding officer, according to order or notice. Agreements by the parties to the conference may be put on the record during formal conferences or may be reduced to writing and filed with the agency after formal or informal conferences. ( )

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**514. ORDERS RESULTING FROM CONFERENCE (RULE 514).**

The presiding officer may issue a prehearing order or notice based upon the results of the agreements reached at or rulings made at a conference. A prehearing order will control the course of subsequent proceedings unless modified by the presiding officer for good cause. ( )

**515. FACTS DISCLOSED NOT PART OF THE RECORD (RULE 515).**

Facts disclosed, settlement offers made and all other aspects of negotiation (except agreements reached) in conferences in a contested case are not part of the record unless ordered by the presiding officer upon a stipulation by all parties to a contested case or, in the case of an offer of settlement, upon stipulation of the party making the offer. ( )

**516. -- 519. (RESERVED)**

**520. DISCOVERY IN CONTESTED CASES (RULE 520).**

**01. Kinds of Discovery.** The following kinds of discovery may be authorized by presiding officers in contested cases before the agency: ( )

- a. Deposition through oral examination or written questions; ( )
- b. Written interrogatories; ( )
- c. Requests for production of documents, electronically stored information or tangible things; ( )
- d. Entry upon land or other property for inspection or other purposes; and ( )
- e. Requests for admission.

{MPL Note: Requests for admission can be useful and should not be completely abolished.}

**02. Rules of Civil Procedure.** Unless otherwise provided by statute, rule, order or notice, the scope of discovery is governed by the Idaho Rules of Civil Procedure (see Idaho Rule of Civil Procedure 26(b)). ( )

{MPL Note: This provision needs to be reviewed more closely. Entry upon land (Rule 520.01.d) is not addressed in IRCP 26. Other discovery such as depositions are governed by IRCPs other than Rule 26.}

**521. WHEN DISCOVERY AUTHORIZED (RULE 521).**

No party in a contested case before the agency is entitled to engage in discovery unless the agency issues an order authorizing discovery, or upon agreement of all parties that discovery may be conducted. The presiding officer may provide a schedule for discovery in an order authorizing discovery, but the order authorizing and scheduling discovery need not conform to the timetables of the Idaho Rules of Civil Procedure. The order authorizing discovery may provide that voluminous records need not be served in a discovery response so long as the records are made available for inspection and copying under reasonable terms. A party, upon reasonable notice to other parties and all persons affected thereby, may seek an order compelling discovery in a manner consistent with the provisions of Rule 37(a) of the Idaho Rules of Civil Procedure. The presiding officer may limit the type and scope of discovery. ( )

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**522. RIGHTS TO DISCOVERY RECIPROCAL (RULE 522).**

All parties to a proceeding have a right of discovery of all other parties to a proceeding according to Rule 521 and to the authorizing statutes and rules. ( )

{MPL Note: Compelling discovery is already addressed in Rule 521.}

**Deleted:** The presiding officer may by order authorize or compel necessary discovery authorized by statute or rule.

**523. SUBPOENAS (RULE 523).**

The agency may issue subpoenas upon a party's motion or upon its own initiative. The agency upon motion to quash made promptly, and in any event, before the time to comply with the subpoena, may quash the subpoena, or condition denial of the motion to quash upon reasonable terms. ( )

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**524. STATUTORY INSPECTION, EXAMINATION, INVESTIGATION, ETC. (RULE 524).**

This rule recognizes, but does not enlarge or restrict, the agency's statutory right of inspection, examination, or investigation. This statutory right of the agency is independent of any right of discovery in formal proceedings and may be exercised by the agency whether or not a person is party to a formal proceeding before the agency. Information obtained from statutory inspection, examination, or investigation, may be used in formal proceedings or for any other purpose, except as restricted by statute or rule. ( )

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**525. FILING AND SERVICE OF DISCOVERY-RELATED DOCUMENTS (RULE 525).**

Parties shall send the presiding officer copies of any notices of deposition or certificates of service stating that discovery requests or responses have been served. Parties shall serve discovery requests and responses on all other parties. Parties shall not serve the presiding officer copies of discovery responses unless it is part of a motion to compel discovery. A motion to compel discovery must be filed within 21 days from the day a discovery response was due or 21 days from the day a deficient response was served on the moving party. ( )

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{MPL Note: Serving discovery requests and responses on all parties can be efficient and lead to less duplicative discovery.}

**526. PREPARED TESTIMONY AND REPORTS (RULE 526).**

Presiding officers may require parties to exchange prepared testimony, expert witness reports or rebuttal reports, prior to the hearing. ( )

{MPL Note: IDWR should consider rules for greater utilization of pre-filed direct testimony like the IPUC, which I understand makes hearings more efficient.}

**527. SANCTIONS FOR FAILURE TO OBEY ORDER COMPELLING DISCOVERY (RULE 527).**

The agency may impose all sanctions recognized by statute or rules for failure to comply with an order compelling discovery, including but not limited to the sanctions listed in paragraphs (A), (B), and (C) of Rule 37(b)(2) of the Idaho Rules of Civil Procedure. ( )

**528. PROTECTIVE ORDERS (RULE 528).**

As authorized by statute or rule, the agency may issue protective orders limiting access to information generated during settlement negotiations, discovery, or hearing. ( )

**529. -- 549. (RESERVED)**

**550. NOTICE OF HEARING (RULE 550).**

Notice of the place, date and hour of hearing will be served on all parties at least 14 days before the time set for hearing, unless the agency finds by order that it is necessary or appropriate that the notice period to be shortened. Notices must comply with the requirements of Rule 551. Notices must list the names of the parties (or the lead parties if the parties are too numerous to name), the case number or docket number, the names of the presiding officers who will hear the case, the name, address and telephone number of the person to whom inquiries about scheduling, hearing facilities, etc., should be directed, and the names of persons with whom the documents, pleadings, etc., in the case should be filed if the presiding officer is not the person who should receive those documents. If no document previously issued by the agency has listed the legal authority of the agency to conduct the hearing, the notice of hearing must do so. The notice of hearing shall state that the hearing will be conducted under these rules of procedure and inform the parties where they may read or obtain a copy. ( )

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**551. FACILITIES AT OR FOR HEARING AND A.D.A. REQUIREMENTS (RULE 551).**

All hearings must be held in facilities meeting the accessibility requirements of the Americans with Disabilities Act, and all notices of hearing must inform the parties that the hearing will be conducted in facilities meeting the accessibility requirements of the Americans with Disabilities Act. All notices of hearing must inform the parties and other persons notified that if they require assistance of the kind that the agency is required to provide under the Americans with Disabilities Act in order to participate in or understand the hearing, the agency will supply that assistance upon request a reasonable number of days before the hearing. The notice of hearing shall explicitly state the number of days before the hearing that the assistance request must be made. ( )

**552. HOW HEARINGS HELD (RULE 552).**

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Hearings may be held in person or by telephone, video or other electronic means, as long as each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place. ( )

**553. CONFERENCE AT HEARING (RULE 553).**

In any proceeding the presiding officer may hold a conference with the parties before hearing or during a recess at the hearing to discuss formulation or simplification of the issues, admissions of fact or identification of documents to avoid unnecessary proof, exchanges of documents, exhibits or prepared testimony, limitation of witnesses, establishment of order of procedure, and other matters that may expedite orderly conduct of the hearing. The presiding officer shall state the results of the conference on the record. ( )

**554. PRELIMINARY PROCEDURE AT HEARING (RULE 554).**

Before taking evidence the presiding officer will call the hearing to order, take appearances of parties, and act upon any pending motions or petitions. The presiding officer may allow opening statements as necessary or appropriate to explain a party's presentation of evidence. ( )

**555. CONSOLIDATION OF PROCEEDINGS (RULE 555).**

The agency may consolidate two or more proceedings for hearing upon finding that they present issues that are related and that the rights of the parties will not be prejudiced. In consolidated hearings the presiding officer determines the order of the proceeding. ( )

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**556. STIPULATIONS (RULE 556).**

Parties may stipulate among themselves to any fact at issue in a contested case by written statement filed with the agency or by oral statement at hearing. A stipulation binds all parties agreeing to it only according to its terms. The presiding officer may regard a stipulation as evidence or may require additional evidence supporting the facts stipulated. The presiding officer is not required to adopt the facts set forth in a stipulation of the parties, but may do so. If the presiding officer rejects a stipulation, they will do so before issuing a final order, and will provide an additional opportunity for the parties to present evidence and arguments on the subject matter of the rejected stipulation. ( )

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**557. ORDER OF PROCEDURE (RULE 557).**

The presiding officer may determine the order of presentation of witnesses and examination of witnesses. ( )

**558. TESTIMONY UNDER OATH (RULE 558).**

All testimony presented in formal hearings will be given under oath. Before testifying each witness must swear or affirm that the testimony the witness will give before the agency is the truth, the whole truth, and nothing but the truth. ( )

**559. PARTIES AND PERSONS WITH SIMILAR INTERESTS (RULE 559).**

If two or more parties or persons have substantially like interests or positions, to expedite the proceeding and avoid duplication, the presiding officer may limit the number of them who testify, examine witnesses, or make and argue motions and objections. ( )

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**560. CONTINUANCE OF HEARING (RULE 560).**

The presiding officer may continue proceedings for further hearing. ( )

**561. ORAL ARGUMENT (RULE 561).**

The presiding officer may set and hear oral argument on any matter in the contested case on reasonable notice according to the circumstances. ( )

**562. BRIEFS -- MEMORANDA -- PROPOSED ORDERS OF THE PARTIES -- STATEMENTS OF POSITION -- PROPOSED ORDER OF THE PRESIDING OFFICER (RULE 562).**

In any contested case, any party may ask to file briefs, memoranda, proposed orders of the parties or statements of position, and the presiding officer may request briefs, proposed orders of the parties, or statements of position. The presiding officer may issue a proposed order and ask the parties for comment upon the proposed order. ( )

**563. -- 599. (RESERVED)**

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**600. RULES OF EVIDENCE -- EVALUATION OF EVIDENCE (RULE 600).**

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any resulting order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

( )

**601. DOCUMENTARY EVIDENCE (RULE 601).**

Documentary evidence may be received in the form of copies or excerpts. Upon request, parties shall be given an opportunity to compare the copy with the original if available.

( )

**602. OFFICIAL NOTICE -- AGENCY STAFF MEMORANDA (RULE 602).**

The presiding officer may take official notice of any facts that could be judicially noticed in the courts of Idaho, of generally recognized technical or scientific data or facts within the agency's specialized knowledge and records of the agency. The presiding officer may ask agency staff to prepare reports or memoranda to be used in deciding a contested case, and all such reports and memoranda shall be officially noticed by the presiding officer. The presiding officer shall notify the parties of specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data. This notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed. Parties must be given an opportunity to contest and rebut the facts or material officially noticed. When the presiding officer proposes to notice agency staff memoranda or agency staff reports, responsible staff employees or agents shall be made available for cross-examination if any party timely requests their availability.

( )

**603. OBJECTIONS -- OFFERS OF PROOF (RULE 603).**

Grounds for objection to the admission or exclusion of evidence must be stated briefly at the time the evidence is offered. Formal exceptions to rulings admitting or excluding evidence are unnecessary and need not be taken. An offer of proof for the record consists of a statement of the substance of the excluded evidence. When a party objects to the admission of evidence, the presiding officer will rule on the objection.

( )

**604. EXHIBITS (RULE 604).**

The agency may assign exhibit numbers to be used by the parties in preparation of proposed exhibits. Exhibits prepared for hearing should ordinarily be typed or printed on eight and one-half inch (8 1/2") by eleven inch (11") white paper, except that maps, charts, photographs and non-documentary exhibits may be introduced on the size or kind of paper customarily used for them. A copy of each documentary exhibit must be furnished to each party present and to the presiding officer, except for unusually bulky or voluminous exhibits that have previously been made available for the parties' inspection. Copies must be of good quality. Exhibits identified at hearing are subject to appropriate and timely objection before the close of proceedings. Exhibits to which no objection is made are automatically admitted into evidence without motion of the sponsoring party.

( )

**605. -- 609. (RESERVED)**

**610. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (RULE 610).**

Settlement negotiations in a contested case are confidential, unless all participants to the negotiation agree to the contrary in writing. Facts disclosed, offers made and all other aspects of negotiation (except agreements reached) in settlement negotiations in a contested case are not part of the record unless ordered by the presiding officer upon a stipulation by all parties to a contested case or, in the case of an offer of settlement, upon stipulation of the party making the offer.

( )

**611. SUGGESTION FOR OR INQUIRY ABOUT SETTLEMENTS (RULE 611).**

Through notice or order or on the record at prehearing conference or hearing, the presiding officer may inquire of the parties in any proceeding whether settlement negotiations are in progress or are contemplated or may invite the parties

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to consider settlement of an entire proceeding or certain issues. ( )

**612. CONSIDERATION OF SETTLEMENTS (RULE 612).**

The presiding officer is not bound by settlement agreements and will independently review any proposed settlement. When a settlement is presented to the presiding officer, the presiding officer will prescribe procedures appropriate to the nature of the settlement to consider the settlement. ( )

**613. -- 649. (RESERVED)**

**650. RECORD FOR DECISION (RULE 650).**

**01. Official Record.** The agency shall maintain an official record for each contested case and (unless statute provides otherwise) base its decision in a contested case on the official record for the case. The record shall include those items described in section 67-5249, Idaho Code, plus all interlocutory orders entered in the contested case and copies all documents officially noticed. ( )

**651. RECORDING OF HEARINGS (RULE 651).**

The agency shall make an audio or video recording of all hearings at the agency's expense. The agency may provide a transcript of the proceeding at its own expense. Any party may have a transcript prepared at its own expense. If the transcript prepared at the expense of a party is deemed by the presiding officer to be the official transcript of the hearing, the party shall furnish the agency a copy of the transcript without charge. ( )

**652. -- 699. (RESERVED)**

**700. NOTICE OF PROPOSED DEFAULT AFTER FAILURE TO APPEAR OR RESPOND (RULE 700).**

If a party fails to appear at the time and place set for hearing, prehearing conference, status conference, or informal settlement conference, or fails to respond to a written information inquiry, the presiding officer may serve upon all parties a notice of a proposed default against the absent or non-responsive party. The notice of a proposed default order shall include a statement that the default order is proposed to be issued because of a failure of the subject party to appear at the time and place set for hearing or prehearing conference, or informal settlement conference or to respond to an information inquiry. The notice of proposed default order shall be served consistent with Rule 54. ( )

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**701. SEVEN DAYS TO CHALLENGE PROPOSED DEFAULT ORDER (RULE 701).**

Within seven (7) days after the service of the notice of proposed default order, the party against whom it was filed may file a written petition requesting that a default order not be entered. The petition must state the grounds why the petitioning party believes that default should not be entered. ( )

**702. ISSUANCE OF DEFAULT ORDER (RULE 702).**

The agency shall promptly issue a default order or withdraw the notice of proposed default order after expiration of the seven (7) day time period to file a petition challenging the proposed default order. If a default order is issued, all further proceedings necessary to complete the contested case shall be conducted without participation of the party in default. All issues in the contested case shall be determined, including those affecting the defaulting party. ( )

**703. -- 709. (RESERVED)**

**710. INTERLOCUTORY ORDERS (RULE 710).**

Interlocutory orders are orders that do not decide all previously undecided issues presented in a proceeding, except the presiding officer may by order decide some of the issues presented in a proceeding and provide that the decision on those issues is final and subject to review by reconsideration, or appeal to the agency head, or judicial review in district court, but is not final on other issues. Unless an order contains or is accompanied by a document containing one of the paragraphs set forth in Rules 720, 730 or 740 or a paragraph substantially similar, the order is interlocutory. The following orders are always interlocutory: orders on motions for summary judgment, orders joining, consolidating or separating issues, proceedings or parties; orders granting or denying intervention; orders scheduling prehearing conferences, discovery, hearing, oral arguments or deadlines for written submissions; and orders authorizing, compelling or refusing to compel discovery. Interlocutory orders may be reviewed by the officer issuing the order

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pursuant to Rules 711, 760, and 770. ( )

**711. REVIEW OF INTERLOCUTORY ORDERS (RULE 711).**

Any party or person affected by an interlocutory order may petition the presiding officer to review the interlocutory order. The presiding officer may rescind, alter or amend any interlocutory order on the presiding officer's own motion, but will not on the presiding officer's own motion review any interlocutory order affecting any party's substantive rights without giving all parties notice and an opportunity for written comment. ( )

**712. CONTENTS OF ORDERS (RULE 712).**

The contents of an order shall comply with Section 67-5248, Idaho Code. ( )

**713. --729. (RESERVED)**

{CHM Note: If you want to eliminate not just pages of rule but pointless lawyerly stuff that is confusing to all (even lawyers), get rid of Recommended Orders. The Director always has a chance to weigh in on a Preliminary Order if he or she wishes to do so. Just because Recommended Orders are authorized by statute doesn't mean you need to use them.}

**730. PRELIMINARY ORDERS (RULE 730).**

**01. Definition.** Preliminary orders are orders issued by a person other than the agency head that will become a final order of the agency unless reviewed by the agency head pursuant to Section 67-5245, Idaho Code. ( )

**02. Contents.** Every preliminary order must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: ( )

**a.** This is a preliminary order of the agency. It can and will become final without further action of the agency unless, within 14 days of the service date of this order, a party petitions for reconsideration or files an appeal to the agency head or a request for a hearing with the Director pursuant to Section 42-1701A(3), Idaho Code. Filing a petition for reconsideration or an appeal to the agency head is optional and is not required in order to exhaust administrative remedies. ( )

**b.** Any party may file a petition for reconsideration of this preliminary order with the agency within 14 days of the service date of this order. The agency will dispose of the petition for reconsideration within 21 days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code. ( )

**c.** Any party may in writing file an appeal to the agency head to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding within 14 days after: ( )

i. The service date of this preliminary order; ( )

ii. The service date of the denial of a petition for reconsideration from this preliminary order; or ( )

iii. The failure within 21 days to grant or deny a petition for reconsideration from this preliminary order. ( )

d. If any party files an appeal to the agency head to this preliminary order, opposing parties shall have

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Deleted: 720. → RECOMMENDED ORDERS (RULE 720). ¶

Deleted: 01. → Definition. Recommended orders are orders issued by a person other than the agency head that will become a final order of the agency only after review of the agency head (or the agency head's designee) pursuant to Section 67-5244, Idaho Code. → ( ) ¶

→ 02. → Contents. Every recommended order must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: → ( ) ¶

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Deleted: <#> Any party may file a petition for reconsideration of this recommended order with the hearing officer within fourteen (14) days of the service date of this order. The hearing officer issuing this recommended order will dispose of any 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. → ( ) ¶

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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 agency. The agency head may review the preliminary order on its own motion. ( )

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e. The agency head may schedule oral argument in the matter before issuing a final order. The agency head will issue a final order within 56 days of receipt of the written briefs or oral argument, whichever is later, unless extended for good cause. The agency head may hold additional hearings or may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. ( )

f. Pursuant to Section 42-1701A(3), Idaho Code, unless the right to a hearing before the Director or the Board is otherwise provided by statute, any person aggrieved by any action of the Department, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the Department, who is aggrieved by the action of the Department, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the Director to contest the action. The person shall file with the Director, within fifteen (15) days after receipt of written notice of the action issued by the Department, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Department and requesting a hearing. A preliminary order shall not become final if a request for hearing under Section 42-1701A(3) is filed with the Department within the time prescribed for filing a petition for reconsideration. ( )

g. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, all administrative remedies shall be deemed exhausted, and any party aggrieved by the final order or orders previously issued in this case may file a petition for judicial review of 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. ( )

h. A petition for judicial review must be filed within 28 days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of a petition for judicial review does not stay the effectiveness or enforcement of the order under review. ( )

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731. – 739. (RESERVED)

740. FINAL ORDERS (RULE 740).

01. Definition. Final orders are preliminary orders that have become final under Rule 730 pursuant to Section 67-5245, Idaho Code, or orders issued by the agency head 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. ( )

02. Content. Every final order issued by the agency head must contain or be accompanied by a document containing the following, or substantially similar, paragraphs: ( )

a. This is a final order of the agency. ( )

b. Any party may file a petition for reconsideration of this final order within 14 days of the service date of this order. The agency will dispose of the petition for reconsideration within 21 days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5246(4), Idaho Code.

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c. Pursuant to Section 42-1701A(3), Idaho Code, unless the right to a hearing before the Director or the Board is otherwise provided by statute, any person aggrieved by any action of the Department, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the Department, who is aggrieved by the action of the Department, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the Director to contest the action. The person shall file with the Director, within fifteen (15) days after receipt of written notice of the action issued by the Department, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Department and requesting a hearing. This order shall not be subject to judicial review in district court if a request for hearing under Section 42-1701A(3) is filed with the Department within the time prescribed for filing a petition for reconsideration. ( )

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d. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case shall be deemed to have exhausted all administrative remedies and may file a petition for judicial review of this 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. ( )

e. A petition for judicial review must be filed within 28 days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within 21 days to grant or deny a petition for reconsideration, whichever is later. See Section 67-5273, Idaho Code, and Rule 84 of the Idaho Rules of Civil Procedure. The filing of a petition for judicial review does not stay the effectiveness or enforcement of the order under review. ( )

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{MPL Note: The last subsection must address the revisions suggested above, particularly the effect of filing a request for hearing under 42-1701A(3).}

741. -- 750. (RESERVED)

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751. -- 759. (RESERVED)

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**760. MODIFICATION OF ORDER ON PRESIDING OFFICER'S OWN MOTION (RULE 760).**

A hearing officer issuing a recommended or preliminary order may modify the recommended or preliminary order on the hearing officer's own motion within 14 days after issuance of the recommended or preliminary order by withdrawing the recommended or preliminary order or by issuing a substitute recommended or preliminary order. The agency head may modify or amend a final order of the agency (be it a preliminary order that became final because no party challenged it or a final order issued by the agency head itself) at any time before notice of appeal to District Court has been filed or the expiration of the time for appeal to District Court, whichever is earlier, by withdrawing the earlier final order or by substituting a new final order for it. ( )

Deleted: 750. -> ORDER NOT DESIGNATED (RULE 750).  
If an order does not designate itself as recommended, preliminary or final at its release, but is designated as recommended, preliminary or final after its release, its effective date for purposes of reconsideration or appeal is the date of the order of designation. If a party believes that an order not designated as a recommended order, preliminary order or final order according to the terms of these rules should be designated as a recommended order, preliminary order or final order, the party may move to designate the order as recommended, preliminary or final, as appropriate.  
->->-> ( )

761. -- 769. (RESERVED)

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**770. CLARIFICATION OF ORDERS (RULE 770).**

Any party may petition to clarify any order, whether interlocutory, recommended, preliminary or final. Petitions for clarification from final orders do not suspend or toll the time to petition for reconsideration or appeal the order. A petition for clarification may be combined with a petition for reconsideration or stated in the alternative as a petition for clarification and/or reconsideration. ( )

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771. -- 779. (RESERVED)

**780. STAY OF ORDERS (RULE 780).**

Any party may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute. The agency may stay any interlocutory or final order on its own motion.

( )

**781. Attorney Fee Awards (Rule 781)**

Attorney fees may be awarded by the agency to a party in two contexts only: (1) sanctions for discovery abuses pursuant to Rule 527 and (2) where expressly authorized by statute (e.g., I.C. § 12-117).

781. -- 789. (RESERVED)

**790. PERSONS WHO MAY FILE A PETITION FOR JUDICIAL REVIEW (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 and shall be deemed to have exhausted all administrative remedies. Pursuant to Section 67-5271, Idaho Code, 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.

( )

{CHM Note: Is requiring exhaustion really a good idea? Sometimes it is pretty obvious that the agency has made up its mind. Why force the party and the agency to go through the exercise of requesting reconsideration?}

791. -- 799. (RESERVED)

**Deleted:** 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

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