

IDWR/IWRB (AGENCY) RESPONSE TO PUBLIC COMMENTS  
DOCKET NO. 37-0101-2101  
RULES OF PROCEDURE OF THE IDAHO DEPARTMENT OF WATER RESOURCES  
(IDAPA 37.01.01)  
June 15, 2021

## United States Department of the Interior

1. Comment: Proposed Rule 201.02B could create problems for the Office of the Solicitor and other federal legal divisions which have attorneys spread throughout the country and which may rely on non-attorneys, and Native American tribes that may also rely on out-of-state attorneys or non-attorneys.

*Agency Response*: Strawman 2.0 Rule 201.02.b has been amended to address federal and tribal representation.

## Sun Valley Company

2. Comment: If IDWR won't allow email filings, fax filings should not be eliminated.

*Agency Response*: The second preliminary rule draft allows for the use of email for all filings with IDWR while continuing to eliminate fax filings. See Strawman 2.0 Rule 54.01.a.

3. Comment: Why were Rules 500 – 502 (Alternative Dispute Resolution) removed when ADR is a good and worthwhile practice?

*Agency Response*: The Agency agrees ADR is a good and worthwhile practice. Strawman 2.0 Rule 101.01 has been amended to incorporate the potential use of alternative dispute resolution. Rule 100.03 allows for informal proceedings, including ADR, to be used even after the commencement of a formal proceeding.

## Association of Idaho Cities

4. Comment: Proposed changes to the definition of presiding officer and hearing officer.

*Agency Response*: Definitions of presiding officer and hearing officer have been added to the Strawman 2.0 definitional section at Rules 2.8 and 2.14. A hearing officer is a subordinate officer appointed by the agency head with limited delegated authority pursuant to Rules 410 – 413. IDWR believes maintaining the distinction is important because while a hearing officer may also be a presiding officer, an agency head will never be a hearing officer.

5. Comment: Rule 54 should be amended to reflect the definition of presiding officer and the applicable time zone should be clarified.

*Agency Response*: Strawman 2.0 Rule 54.01.a has been amended to allow for email filing with the Department, not with the presiding officer. Mountain Time has been added as the applicable time zone.

6. Comment: The second sentence of Rule 100.03 should be removed or clarified to differentiate between the need for attorney representation during informal proceedings before a formal proceeding is commenced, and the need for attorney representation during informal proceedings conducted after a formal proceeding has commenced.

*Agency Response*: The Agency did not amend Rule 100 in response to the comment. Whether or not attorney representation is required during informal or formal proceedings is governed by Rule 201, which reflects the Department's understanding of *Idaho State Bar Association v. Idaho PUC*, 102 Idaho 672, 637 P.2d 1168 (1981) and subsequent cases.

7. Comment: Rule 201.01.d should be amended to add "officials" to those who can represent an entity during informal proceedings.

*Agency Response*: The Agency made the requested change.

8. Comment: Rule 201.02.c should be amended to add "file" to those actions which can be made by a party or their representative at hearing.

*Agency Response*: The Agency made the requested change.

9. Comment: The distinction between pleadings, notices and motions should be eliminated, and the definitions of these forms of filed and served documents should be clarified.

*Agency Response*: The Agency has adopted the distinction between pleadings and motions contained in Idaho Rule of Civil Procedure 7 and has decided not to eliminate those distinctions.

10. Comment: Rule 300.02 should be amended to add "and Written Motions."

*Agency Response*: The Agency made the requested change.

11. Comment: Rule 414 should be in the definitions section.

*Agency Response*: The Agency made the requested change.

12. Comment: Rule 418 should be added to include ADR in the Rules.

*Agency Response*: See Agency response to Comment No. 3 above.

13. Comment: Rule 520 should be clarified regarding requests for admission.

*Agency Response*: The Agency added requests for admission at Strawman 2.0 Rule 520.01.c.

## City of Pocatello

14. Comment: Consider adding presiding officer and hearing officer to the definitions.

*Agency Response*: See Agency response to Comment No. 4 above.

15. Comment: The Department should consider email filings with a dedicated address.

*Agency Response*: See Agency response to Comment No. 2 above.

16. Comment: The discretion to forego informal proceedings should be expanded to include hearing officers.

*Agency Response*: In common practice before the Agency, a hearing officer will not have been assigned to a proceeding until either informal proceedings have been completed or the agency determines informal proceedings will not be conducted in the first instance. That initial decision sits with the Agency when assessing how to proceed with a contested case, not with a hearing officer. Strawman 2.0 Rule 100.03 has been amended accordingly.

## J. R. Simplot Co.

17. Comment: All notices should be by hardcopy paper with an option to opt-in to future notifications.

*Agency Response*: Strawman 2.0 Rule 54 has been amended to maintain hardcopy *filing*, but the Department has opted to allow email filing as a coequal alternative.

*Service* of documents on other parties is required to be by hardcopy until and unless alternative email service is authorized by the presiding officer.

18. Comment: Attorney engagement upon commencement of a formal proceeding should not be required.

*Agency Response:* Whether or not attorney representation is required during informal or formal proceedings is governed by Rule 201, which reflects the Department’s understanding of *Idaho State Bar Association v. Idaho Public Utilities Commission*, 102 Idaho 672, 637 P.2d 1168 (1981) and subsequent cases.

## Suez Water Idaho

19. Comment: Suez provided proposed edits and commentary primarily through interlineation of the Agency’s Preliminary Draft Rule V.1 (Strawman 1.0).

*Agency Response:* The Agency will respond to each section containing substantive edits, amendments, or commentary below. However, the Agency did not provide specific responses to the following: (1) number formatting style in the administrative code is dictated by the Office of the Administrative Rules Coordinator and will be maintained as-is; (2) the Department will use “email” as standard spelling throughout the Rule and requisite changes have been made; and (3) final section numbering will be determined in preparation for publication of the proposed rule.

Suez also commented generally on its preference for a stand-alone set of Agency procedural rules versus full or partial adoption of the contested case rules in the Rules of the Office of the Attorney General (IDAPA 04.11.01). This stance is consistent with the survey conducted by the Agency on the issue. The survey showed 100% support for stand-alone Agency procedural rules. The Agency continues to agree.

20. Comment: Rule 2 Definitions:

**05. Contested Case.** A contested case is any proceeding that which 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.}

*Agency Response:* The Agency has decided to maintain the statutory definition (Idaho Code §67-5201(6)) of contested case and has not made Suez’ proposed changes. Suez’s suggested changes would also result in multiple uses of the term “contested,” which may lead to confusion.

21. Comment: Rule 2 Definitions:

**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 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.}



*Agency Response:* The Department declines to adopt the suggested change. Adding what amounts to a definition of "Contested Case Contested Matter" may create more confusion than the use of the statutorily defined contested case already does, which may include both contested cases that are opposed (through protest or intervention) or unopposed. *See also* the Agency's response to Comment No. 19 above.

22. Comment: Add Rule 2 definition:

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."

*Agency Response:* The Department added a new definition of "exceptions," but declines to replace "exceptions" with "appeal." Exceptions is the term used in the Idaho Administrative Procedures Act ("IAPA"), and historically by the Agency, to indicate the review of a recommended or preliminary order by the agency head. The Agency will continue to maintain the distinction between exceptions to the agency head and petitions for judicial review to the district court and avoid any confusion by the addition of the term appeal (which could be utilized in both instances). *See also* Strawman 2.0 Rule 790.

23. Comment: Alter Rule 2 Definition:

**09. Order.** An agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (4) 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.}

*Agency Response:* The Department declines to make the suggested change. The term "order" is defined in the IAPA at I.C. § 67-5201(12). The Department provides explanatory material at the time of issuance of each order that provides this information in context, while the proposed written example provides only general illustration.

24. Comment: Add Rule 2 definition:

9%. Participant. A participant is a person described in Rule 154.

*Agency Response:* The Agency declines to add another type of potential type of actor into the rules.

25. Comment: Alter Rule 2 definition:

**10. Party.** Each person ~~or agency~~ 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. ~~respondent, protestant or intervenor.~~

*Agency Response:* The Agency has removed “agency” from the definition of party in Strawman 2.0 Rule 2, but rejects the addition of “participant.” See Agency response to Comment No. 24 directly above.

26. Comment: Alter Rule 2 definition:

**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.

*Agency Response:* The Department has accepted this suggestion at Strawman 2.0 Rule 2.12.

27. Comment: Add Rule 2 definition:

**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.}

*Agency Response:* A definition for “presiding officer” has been added. See Agency Response Comment No. 4 above.

28. Comment: Alter Rule 2 definition:

**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.}

*Agency Response:* The Agency declines to adopt the suggested change and instead proposes its own modification of the definition for consistency with Strawman 2.0 Rule 154.

29. Comment: Add Rule 2 definition:

**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.

*Agency Response:* The Agency declines to add the proposed definition. Formally defining “uncontested matter contested case” creates more confusion than clarity. See also Agency Response to Comment No. 19 above.

30. Comment: Amend Rule 50:

**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 ~~in whole~~ 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. ~~Certain provisions of the Attorney General Rules are not adopted or are modified to reflect both the statutory authority of and administrative practice before the Department and the Board.~~ 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. ( )

*Agency Response:* The Agency declines to adopt the suggested changes. This declaration is required by Idaho Code § 67-5206(5)(b) and necessarily describes the proceedings to which these rules apply and why they are being promulgated.

31. Comment: Amend Rule 52:

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

~~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.~~ 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 ~~presiding officer~~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.}

*Agency Response:* The Agency has deleted what was Rule 52 in Strawman 2.0, instead adding language to Strawman 2.0 Rule 54.01.a. See Strawman 2.0 Rule 54.01.a.

32. Comment: Amend Rule 54:

**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. ~~If authorized by the presiding officer, d~~Documents may be filed by ~~e-mail~~ email as an alternative to filing by mail or personal ~~filing~~delivery, ~~provided that copies of all emailed documents must also 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. ~~Documents, including documents filed by e-mail, must be submitted by the close of business (5:00 pm)~~ 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. ( )

{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.}

**Agency Response:** The Agency has revised Strawman 2.0 Rule 54 to address email filing and service. See also Agency Response to Comments No. 2 and 31 in this document.

**02. Service on Parties and Other Persons.**

a. All documents filed with the agency must be sent by mail or-email, or delivered personally to the representatives of each party concurrently with filing the original with the agency. ( )

b. ~~If authorized by the presiding officer, documents that must be sent by mail or delivered personally to the representatives of each party may be served by e-mail as an alternative to service by mail or personal service. It is not necessary to serve copies by mail or personal service if service is completed by e-mail. Email is a required means of service to any party who has provided an email address in its application, petition, or other papers. Parties may serve by email only if they provide an email address allowing other parties and the agency to serve them by email.~~ ( )

{CHM Note: Email service should be automatic, but allow people to “opt out” by not providing an email address. But anyone who “opts out” should not be allowed to serve others by email. If email service is not required, the rules should retain the 3-day “mailbox rule” that is in current Rule 57}

**Agency Response:** Please see Agency Response No. 17 above. Allowing email service will be in the presiding officer’s discretion, depending upon party access to, and use of, email.

**03. Service of Documents by Agency.**

a. The person designated by the agency to serve notices or orders issued by the agency shall serve these documents by regular mail, or by certified mail, return receipt requested, or by personal service on the representatives of each party designated pursuant to these rules. ( )

b. If authorized by the presiding officer, the person designated to serve notices and orders in a contested case may serve those notices and orders by e-mail-email as an alternative to service by mail or personal service. It is not necessary to serve copies by mail or personal service if service is completed by email-e-mail. ( )

**04. Format for Electronic Service.** Documents served by email e-mail must be in Portable Document Format (PDF) and be text searchable. Each email e-mail serving a document cannot be larger than 15 megabytes in size. Documents exceeding 15 megabytes in size may be divided into multiple documents and served in multiple email-e-mails. ( )

**05. Proof of Service.** Every document filed or served must be accompanied by a proof of service similar to the following certificate: ( )

**CERTIFICATE OF SERVICE**

I certify that on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, I sent-served or caused to be served the [*insert title of document*] to the parties by the following method(s):

[*Insert name of party or attorney*]

[*Insert e-mail-email address or mailing address*]

- EmailE-mail
- USPS Mail (postage paid)
- Certified Mail / Return Receipt Requested
- Hand Delivery

*DocumentResponsible for Service*

[Signature of Person Sending]

{CHM Note: The attorney should be allowed to sign the certificate of service even if he or she did not send the mail or emails but relied on his or her assistant to do so.}

**Agency Response:** The Agency accepted the suggested changes to the certificate of service and to the spelling of email throughout Strawman 2.0.

33. Comment: Amend Rule 100:

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

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

**01.** Informal proceedings are proceedings wholly administrative evaluations and processes governed by Rules 100 through 101, without a formally designated presiding officer, without a record to be preserved for later agency or judicial review, 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. ( )

{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 adjudicative, contested case 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.

( )

{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. Unless otherwise directed by the agency head, informal proceedings will be used in an effort first to attempt to resolve the issues presented. Even after a formal proceeding has been initiated, the agency may also suspend the formal proceeding and employ informal proceedings in an effort to resolve the issues presented provide for the use of an informal proceeding any time after commencement of a formal proceeding. ( )

{CHM Note: We think the agency should be able to bounce back and forth between formal and informal proceedings. I.e., It should be able to take a "time out" for off-the-record settlement talks at any time.}

**Agency Response:** The Agency accepted some of the changes proposed by Suez to Rule 100. See Strawman 2.0 Rule 100. The Agency recognizes there is an administrative record in all contested cases, even if no quasi-judicial hearing is held. However, the Agency disagrees with any implication there is no distinction between administrative and quasi-judicial proceedings. See *Idaho State Bar Association v. Idaho Public Utilities Commission*, 102 Idaho 672, 637 P.2d 1168 (1981) and subsequent cases.

The Agency declines to adopt changes that might increase the cost to parties in informal proceedings by limiting informal interactions with the Department.

Further, the confidentiality of settlement discussions is already dealt with in Strawman 2.0 at Rules 101.04 and 610.

The Agency declines to adopt Suez’s proposed language related to substantive communications in formal proceedings. Suez’s proposed language is too restrictive.

Strawman 2.0 Rule 650 defines what is contained in the official record for contested cases.

Finally, there is already language in Strawman 2.0 providing for the transition between formal and informal proceedings. See Strawman 2.0 Rule 100.03.

34. Comment: Amend Rule 101:

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

01. An informal proceeding may be commenced by the agency by issuance of a Notice of Informal ~~Settlement Conference~~ 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.

*Agency Response:* The Agency declines to adopt Suez’s proposed change and will continue the practice of framing the initial conference as a settlement conference. Agency staff typically conduct these conferences and, therefore, the addition of language related to Department staff participation is unnecessary.

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. ( )

*Agency Response:* The Agency declines to adopt Suez’s addition of the terms “uncontested matters” and “contested matters” in light of the statutorily defined term “contested cases.”

35. Comment: Amend Rule 150:

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.}

*Agency Response:* Exceptions and reconsideration are distinct methods, or types, of administrative level review in the IAPA. The Agency declines to make the proposed

change.

36. Comment: Amend Rule 152:

**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 their rights or obligations under 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"}

*Agency Response*: Other than elimination of the term "rule," Suez's suggested changes have been accepted.

37. Comment: Amend Rule 154:

**154. PROTESTANTS PARTICIPANTS (RULE 154-155).**

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. 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. 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. 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. ( )

*Agency Response*: The Agency declines to make the proposed changes. Use of the terms protestant and intervenor is consistent with Agency practice and the IAPA. Changing all potential parties to "participants" inserts a novel term into well-established roles in Agency contested cases.

38. Comment: Amend Rule 200:

**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 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. ( )

*Agency Response*: Suez's suggested changes have been accepted in Strawman 2.0.

39. Comment: Amend Rule 201:



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

**01. Representation at Informal, ~~Administrative~~ Proceedings.** ~~To the extent authorized or required by law, a~~ Appearances and representation of parties or other persons at an informal proceeding pursuant to Rules 100 – 101~~2~~ must be as follows: ( )

**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 a Formal, ~~Adjudicative~~ Proceedings.** Following the commencement of a formal proceeding pursuant to Rule 100.02, the representatives of parties shall be as follows: ( )

**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. ( )

*Agency Response: Suez's proposed changes have been made to Strawman 2.0 Rule 201.*

**40. Comment:** Amend Rule 202:

**202. SERVICE ON PARTIES AND THEIR REPRESENTATIVES ~~OF PARTIES AND OTHER PERSONS~~ (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.

*Agency Response: Suez's proposed changes have been made to Strawman 2.0 Rule 202.*

**41. Comment:** Amend Rule 205:

**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.

*Agency Response: Suez's proposed changes have been made to Strawman 2.0 Rule 205.*

42. Comment: Amend Rule 210:

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

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

*Agency Response: See Agency Response to Comment 9 above.*

43. Comment: Amend Rule 220:

**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.f.](#) Any exception to the time limits [in this rule or other modification of the briefing schedule](#) may be granted by the presiding officer for good cause shown. ( )

*Agency Response: The Agency declines to adopt Suez's proposed amendments as existing Rule 220 provides sufficient discretion to presiding officers to alter or amend briefing schedules.*

**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.](#) ( )

*Agency Response: The Agency declines to adopt Suez's proposed changes as existing Rule 220 provides sufficient discretion to presiding officers to alter or amend briefing schedules, including as to Motions for Summary Judgment.*

44. Comment: Amend Rule 300:

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

**01. Form.** Pleadings ~~must~~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: ( )

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

**Agency Response:** The Agency agrees and has made this change to Strawman 2.0 Rule 300.01.

**a.** Be submitted on white, eight and one-half inch (8 1/2”) by eleven inch (11”) paper printed on one ( )  
(+)side only;

**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 ~~or written motion~~ shall fully state: ( )

**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 ~~orders~~ shall state the declaratory ruling that the petitioner seeks. ( )

**Agency Response:** The Agency accepts Suez’s proposed change from “orders” to “rulings” as a petition for declaratory ruling as the change is consistent with the IAPA. See I.C. § 67-5232.

The Agency declines to adopt the other proposed changes. The Agency sees no reason to separate the threshold generic requirements for both pleadings and motions, without proposing new requirements for one or the other.

45. Comment: Amend Rule 301:

**301. NOTICE OF PETITION FOR DECLARATORY RULINGS (RULE 301).**

**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, tThe agency may provide notice thereof of a petition for declaratory ruling 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. ( )

{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.}

**Agency Response:** The Agency declines to adopt Suez’s proposed changes at this time. The Agency would appreciate additional discussion on this topic.

46. Comment: Amend Rule 302:

**302. DEFECTIVE, INSUFFICIENT OR LATE PLEADINGS (RULE 302).**

Defective, insufficient or late pleadings may be returned or dismissed without prejudice. ( )

**Agency Response:** The Agency declines to adopt Suez’s insertion of “without prejudice” as there are instances (e.g. a denied late-filed protest) where rejection carries consequences similar to a dismissal with prejudice.

47. Comment: Amend Rule 303:

**303. AMENDMENTS TO PLEADINGS -- WITHDRAWAL OF PLEADINGS (RULE 303).**

~~The presiding officer may allow a~~Any pleading ~~may~~to 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. ( )

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

**Agency Response:** The Agency has proposed new language in Strawman 2.0 Rule 303 to address Suez's concern related to informal proceedings.

48. Comment: Amend Rule 350:

**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 ~~from the presiding officer~~ 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.}

**Agency Response:** Proposed change accepted at Strawman 2.0 Rule 350. *See also* Agency Response directly above related to Strawman 2.0 Rule 303.

49. Comment: Amend Rule 353:

**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. ( )

*Agency Response: Suez's proposed change have been accepted at Strawman 2.0 Rule 353.*

50. Comment: Amend Rule 354:

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

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

*Agency Response: Suez's proposed changes have not been accepted. Use of the term "objection" should be maintained here to differentiate between objections to petitions to intervene, which have a unique 7-day period to file an objection, and responses to motions, which carry a 14-day period.*

51. Comment: Amend Rule 355:

**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 (5) 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.](#) ( )

*Agency Response: Suez's proposed change has been added to Strawman 2.0 Rule 355.*

52. Comment: Amend Rule 411:

**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?}](#)

*Agency Response:* The Agency has reviewed all references to hearing officers, presiding officers, agency head, and agency. It believes Strawman 2.0 accurately represents the use of these terms while maintaining the distinctions among them.

Rule 411 has been deleted from Strawman 2.0 as "Hearing Officer" and "Presiding Officer" (as well as preexisting definitions of "Agency Head" and "Agency") have been added to the definitional section, or Strawman 2.0 Rule 2.09 and 2.15.

53. Comment: Amend Rule 413:

**413. SCOPE OF AUTHORITY OF ~~HEARING-PRESIDING~~ OFFICERS (RULE 413).**

The scope of ~~hearing-presiding~~ officers' authority may be restricted in the appointment by the agency [head](#). ( )

**01. Scope of Authority.** Unless specified in an order from the agency [head](#), ~~hearing-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. ( )

*Agency Response:* The Agency declines to adopt Suez's proposed combination of hearing officer and presiding officer. Hearing officers are subordinate officers imbued only with the authority delegated to them by agency heads whereas presiding officers may also be agency heads. This distinction is also maintained in the IAPA. *See e.g.* I.C. § 67-5245(3); and *see also* Agency Response to Comment 4 above.

54. Comment: Amend Rule 416:

**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 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?}

**Agency Response:** The Agency has removed this rule from Strawman 2.0. Review of agency rules is governed by IAPA.

55. Comment: Amend Rule 417:

**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 ~~with any party~~, 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. ~~are not required to be reported by this rule. A party to a contested agency proceeding shall not communicate directly or indirectly with the presiding officer or the agency head regarding any substantive issue in the contested case.~~ 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, during a contested case, 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.}

**Agency Response:** The Agency has attempted to address part of Suez's suggestions here at Strawman 2.0 Rule 414.

56. Comment: Amend Rule 418:

**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.}

**Agency Response:** ADR has now been provided for in Strawman 2.0 Rule 101.01.

57. Comment: Amend Rule 515:

**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. ( )

**Agency Response:** The Agency has accepted a portion of Suez’s proposed changes. See Strawman 2.0 Rule 515. However, the Agency declines to provide for one party submission of stipulations. The Agency does not consider this to be a stipulation.

58. Comment: Amend Rule 520:

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.}

**Agency Response:** Requests for admission were added to Strawman 2.0 at Rule 520.01.c.

**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.}

**Agency Response:** Reference to IRCP Rule 26(b) has been removed from Strawman 2.0 Rule 520.02. The Agency views Strawman 2.0 Rule 520 to be generally aligned with IRCP Rule 26, including inclusion of entry upon land, and would need clarification on the comment to further address.

59. Comment: Amend Rule 521:

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

No party in a contested case before the agency is entitled to engage in discovery unless ~~the party moves for an order authorizing discovery and~~ the agency issues an order authorizing ~~the requested~~ 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. ( )



*Agency Response:* Suez's proposed changes have been accepted at Strawman 2.0 Rule 521.

60. Comment: Amend Rule 522:

**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. ~~The presiding officer may by order authorize or compel necessary discovery authorized by statute or rule.~~ ( )

{MPL Note: [Compelling discovery is already addressed in Rule 521.](#)}

*Agency Response:* Suez's proposed changes have been accepted to Strawman 2.0 Rule 521.

61. Comment: Amend Rule 524:

**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, ~~etc.~~ 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, ~~etc.~~, may be used in formal proceedings or for any other purpose, except as restricted by statute or rule. ( )

*Agency Response:* Suez's proposed changes have been accepted at Strawman 2.0 Rule 525.

62. Comment: Amend Rule 525:

**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 ~~twenty-one~~(21) days from the day a discovery response was due or ~~twenty-one~~(21) days from the day a deficient response was served on the moving party. ( )

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

*Agency Response:* Suez's proposed changes have been accepted at Strawman 2.0 Rule 525. The Agency believes this change may prevent duplicative discovery requests and responses, as well as costs, and may also promote administrative efficiency.

63. Comment: Amend Rule 526:

**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.}](#)

*Agency Response:* The Agency considers Strawman 2.0 Rule 526 to provide sufficient discretion to presiding officers to determine whether and how prepared (pre-filed) testimony may be utilized in a contested case. While the Agency appreciates the comparison between pre-filed testimony at the Idaho PUC, the Agency maintains the variation in cases that occur before IDWR and the Board are sufficiently distinct to leave more discretion rather than dictating or describing pre-filed direct testimony in rule.

64. Comment: Amend Rule 556:

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

Parties may stipulate among themselves to any fact at issue in a contested case by written statement filed with the [presiding officer-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. ( )

*Agency Response:* Suez's proposed changes have been accepted at Strawman 2.0 Rule 556.

65. Comment: Amend Rule 602:

**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. ( )

*Agency Response:* Suez's proposed change has been added at Strawman 2.0 Rule 602.

66. Comment: Amend Rule 610:

**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](#). ( )

*Agency Response:* A portion of Suez's proposed changes have been accepted at Strawman 2.0 Rule 610. As with the Agency's response to Suez's proposed changes to Rule 515

above, the Agency declines to provide for one party submission of stipulations.

67. Comment: Amend Rule 650:

**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. ( )

*Agency Response:* Suez's proposed changes are not adopted here. The agency, or official, record is defined at I.C. § 67-5249, and already includes interlocutory (intermediate) orders.

68. Comment: Amend Rule 710:

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

Interlocutory orders ~~or intermediate 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 ~~(1)~~ 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 pursuant to Rules 711, 760, and 770. ( )

*Agency Response:* The Agency declines to adopt Suez's proposed deletion of intermediate order as the IAPA defines interlocutory orders as intermediate. See I.C. § 67-5249.

The Agency accepts Suez's proposed change to add a distinction between appeal at the administrative level and at the judicial level.

The Agency declines to accept Suez's suggested change to add orders on motions for summary judgment to the list of interlocutory orders as there are instances when an order on a motion for summary judgment is final and disposes of the case.

69. Comment: Amend Rule 720:

**~~720. RECOMMENDED ORDERS (RULE 720).~~**

{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.}

**~~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: ( )

**a.** This is a recommended order of the hearing officer. It will not become final without action of the agency head. ( )

**b.** 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. ( )

**c.** Any party may in writing support or file exceptions to any part of this recommended order and file briefs in support of the party's position with the agency head or designee on any issue in the proceeding within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty one (21) days to grant or deny a petition for reconsideration from this recommended order. ( )

**d.** If no party files exceptions to the recommended order with the agency head or designee, the agency head or designee will issue a final order within fifty six (56) days after: ( )

**i.** The last day a timely petition for reconsideration could have been filed with the hearing officer; ( )

**ii.** The service date of a denial of a petition for reconsideration by the hearing officer; or ( )

**iii.** The failure within twenty one (21) days to grant or deny a petition for reconsideration by the hearing officer. ( )

**e.** Written briefs in support of or taking exceptions to the recommended order shall be filed with the agency head (or designee of the agency head). Opposing parties shall have fourteen (14) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head or designee 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. ( )

**721. 729. (RESERVED)**

**Agency Response:** The Agency declines to delete reference to recommended orders. The Idaho Water Resource Board must maintain the ability to use recommended orders due to the way it schedules and holds its meetings.

**70. Comment:** Amend Rule 730:

**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 or designee 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 exceptions with 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 fourteen (14) days of the service date of this order. The agency will dispose of the 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. ( )

c. Any party may in writing file exceptions-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 to the agency head (or designee of the agency head) within fourteen (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 twenty-one (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 exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal exceptions. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head or designee. The agency head or designee may review the preliminary order on its own motion. ( )

e. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless extended for good cause. The agency head or designee 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 Director/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/Director, who is aggrieved by the action of the Department/Director, 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/Director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Department/Director 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 ~~twenty-eight (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. ( )

*Agency Response:* The Agency declines to adopt Suez’s proposed insertion of a deadline for petition for reconsideration at Rule 730.02.a as that deadline is already described in Rule 730.02.b.

The Agency declines to adopt Suez’s proposed removal of the term “exceptions” as this term defines an inter-agency appeal from hearing officer or presiding officer to the agency head and is statutorily based. *See e.g.* I.C. § 67-5245(5).

The Agency also declines to remove reference to “designee” in Strawman 2.0 as this allowance is provided for in the IAPA. *See* I.C. § 67-5245(7).

The Agency further declines to adopt Suez’s proposed change from “Director” to “Department” in Rule 730.f. The language used in Strawman 2.0 Rule 730.f is statutorily based and applies to more than simply the Department.

The Agency accepts Suez’s proposed changes to Rule 730.f as it relates to finality of a preliminary order in relation to the filing of a hearing under I.C. § 42-1701A(3). This change has been added to Strawman 2.0 Rule 730.

The Agency has partially accepted Suez’s proposed changes to language related to exhaustion in Strawman 2.0 Rule 730.02.a and 02.g.

71. Comment: Amend Rule 740:

#### 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 ~~fourteen (14)~~ days of the

service date of this order. The agency will dispose of the petition for reconsideration within ~~twenty-one (21)~~ days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5246(4), Idaho Code.

( )

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 ~~Director~~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 ~~Director~~Department, who is aggrieved by the action of the ~~Director~~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 ~~Director~~Department, or receipt of actual notice, a written petition stating the grounds for contesting the action by the ~~Director~~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.

( )

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 ~~twenty-eight (28)~~ days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within ~~twenty-one (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.

( )

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

**Agency Response:** Suez's proposed changes here are the substantially same as those proposed by it in Rule 730 directly above. Consistent with the reasoning outlined in the Agency Response to Rule 730 above, Strawman 2.0 Rule 740 has been modified, or not.

## 72. Comment: Amend Rule 750:

### ~~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.~~

( )

**Agency Response:** The Agency declines to adopt Suez's proposed deletion here. Strawman 2.0 Rule 750 has been used for clarification in contested cases in the past and the Agency

recommends maintaining it.

73. Comment: Amend Rule 781:

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).

*Agency Response:* Suez's proposed addition of a rule specific to attorney fees is rejected. While the potential for attorney fees remains a potentiality in certain rare circumstances before the Agency, that outcome is sufficiently represented by the relevant statutes, e.g., I.C. § 12-117, which may change.

74. Comment: Amend Rule 790:

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 party is not entitled to judicial review of an agency action in district court until that person has exhausted all administrative remedies available with the agency, but~~ a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable in district court if review of the final agency action would not provide an adequate remedy. ( )

{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?}

*Agency Response:* The Agency declines to accept Suez's proposed changes. The IAPA controls the doctrine of exhaustion. Exhaustion of administrative remedies does not appear to the Agency to be discretionary. *See e.g.* I.C. § 67-5271.