

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

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 35-14402 IN THE NAME OF
KARL T. COOK OR JEFFREY M. COOK

ORDER DISMISSING EXCEPTIONS

This matter is before the Director of the Department of Water Resources (“Director”) on exceptions filed by the Surface Water Coalition¹ to the *Preliminary Order Issuing Permit* (“Preliminary Order”) issued and served on May 15, 2015. The Surface Water Coalition asks the Director to reverse the Preliminary Order and deny the application. Applicants Karl T. Cook and Jeffrey M. Cook (collectively referred to as the “Cooks”) argue the exceptions filed by the Surface Water Coalition are not timely.

FINDINGS OF FACT

1. On August 29, 2014, the Cooks filed Application for Permit No. 35-14402 (“Permit No. 35-14402”) with the Idaho Department of Water Resources (“Department”).
2. Beginning on October 1, 2014, the Department advertised the permit.
3. On October 20, 2014, the Surface Water Coalition filed a joint protest.
4. On December 3, 2014, the Department held a pre-hearing conference. The parties were unable to resolve the issues of protest. The parties requested a hearing to decide the contested case.
5. On April 24, 2015, the Department held the hearing at the Department’s Eastern Regional Office located in Idaho Falls, Idaho.
6. On May 15, 2015, the Department issued the Preliminary Order, approving Permit No. 35-14402. The Department served the Preliminary Order on the parties that same day as indicated by the Certificate of Service attached thereto.

¹ The Surface Water Coalition is comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company.

7. The Department included an *Explanatory Information to Accompany a Preliminary Order* sheet (“Explanatory Information Sheet”) with the Preliminary Order. The Explanatory Information Sheet provides the parties with the time limits to file petitions for reconsideration and/or exceptions to the Preliminary Order.

8. On June 1, 2015, the Surface Water Coalition filed with the Department *Exceptions Brief of the Surface Water Coalition* (“Exceptions”).

9. On June 15, 2015, Cooks filed *Applicant’s Response to Exceptions Brief* (“Response”) arguing that “[b]ecause the [Surface Water Coalitions’] *Exceptions Brief* was submitted in [sic] June 1, 2015, **17 days** after the service, it is not timely.” *Response* at 2 (emphasis in original).

ISSUE

Were the exceptions filed by the Surface Water Coalition timely pursuant to the Idaho Administrative Procedure Act and Department’s Rules of Procedure?

PRINCIPLES OF LAW

Idaho Code § 67-5248 states in pertinent part:

67-5248. CONTENTS OF ORDERS. (1) An order must be in writing and shall include: (a) A reasoned statement in support of the decision. Findings of facts, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.

(b) A statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief.

...

(3) All parties to the contested case shall be served with a copy of the order. The order shall be accompanied by proof of service stating the service date, each party who was served and the method(s) of service.

(Emphasis added.)

Rule 730 of the Department’s Rules of Procedure establishes the deadline for filing exceptions with the Director. IDAPA 37.01.01.730. The rule provides in relevant part:

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,
- any party may in writing appeal or take exceptions 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). Otherwise, this preliminary order will become a final order of the agency.

ANALYSIS

The Cooks argue the Exceptions are not timely. *Response* at 2. The Director agrees. Orders issued by the Department must include a statement of administrative remedies and applicable time limits for seeking reconsideration or other administrative relief. Idaho Code § 67-5248. In this case, the Department included an Explanatory Information Sheet with the Preliminary Order explaining the time limits for seeking reconsideration or other administrative relief. The Explanatory Information Sheet provides, in relevant part:

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, the preliminary order will become a final order of the agency.

This language is consistent from Rule 730 of the Department's Rules of Procedure.

The Department issued the Preliminary Order approving Permit No. 35-14402 on May 15, 2015. The Department served the Preliminary Order on the parties that same day as indicated by the Certificate of Service. *Certificate of Service of the Preliminary Order* at 11. No parties filed petitions for reconsideration so the deadline to file exceptions was fourteen days after service of the Preliminary Order. IDAPA 37.01.01.730. Fourteen days after May 15, 2015, is May 29, 2015. The SWC filed its Exceptions on June 1, 2015. Thus, the SWC filed the Exceptions three days past the deadline.

CONCLUSIONS OF LAW

1. The Exceptions filed by the Surface Water Coalition are untimely and the Preliminary Order has become a final order of the agency by operation of law. IDAPA 37.01.01.730; Idaho Code § 67-5246(3).

2. The Director lacks jurisdiction to consider the Exceptions. *See City of Eagle v. Idaho Dep't of Water Res.*, 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011). Accordingly, the Exceptions should be dismissed.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that SWC's *Exceptions* are DISMISSED.

Dated this 1st day of July 2015.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July 2015, a true and correct copy of the foregoing document was served by U.S. mail, postage pre-paid and property addressed to the following:

Documents Sent: Order Dismissing Exceptions and Explanatory Information to Accompany a Final Order.

Robert L. Harris
Holden Kidwell Hahn & Crapo
P.O. Box 50130
Idaho Falls, Idaho 83405-0130

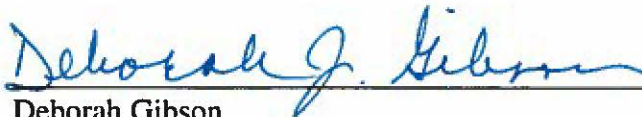
Paul Arrington
Barker Rosholt & Simpson
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3027

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, Idaho 83318-0248

Courtesy Copies provided to:

Karl T. Cook or Jeffrey M. Cook
702 West 7th South
Rexburg, Idaho 83440

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


Deborah Gibson
Administrative Assistant to the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date 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. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.