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DEPARTMENT OF  
WATER RESOURCES

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*Attorneys for Karl T. Cook and Jeffrey M.  
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**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

**APPLICANT'S RESPONSE TO  
EXCEPTIONS BRIEF**

Karl T. Cook or Jeffrey M. Cook, (hereinafter collectively the "Applicant"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits this *Applicant's Response to Exceptions Brief* (this "Response"). This *Response* addresses arguments made in the *Exceptions Brief* submitted by the Surface Water Coalition ("SWC"), the protestants to the above-referenced permit application, on June 1, 2015. The Applicant has fourteen (14) days from the service date of an exceptions brief to respond to any party's appeal. *Explanatory Information To Accompany A Preliminary Order* at 1. This *Response* has been served on June 12, 2015, and is therefore timely submitted.

I. **ARGUMENT.**

- A. **The *Exceptions Brief* was not timely submitted, and therefore, the *Preliminary Order* has become a final order of IDWR. As a result, the *Exceptions Brief* filed by the SWC should not be considered.**

The *Preliminary Order Issuing Permit* (“*Preliminary Order*”) has a service date of May 15, 2015.<sup>1</sup> The *Explanatory Information To Accompany A Preliminary Order* contained within the *Preliminary Order* issued on May 15<sup>th</sup> clearly states:

**EXCEPTIONS AND BRIEFS**

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

The above information is a summary of the law contained at IDAPA 37.01.01.730.02.c. Based on this rule, the SWC’s *Exceptions Brief* was due 14 days after May 15, 2015, meaning it was due on May 29, 2015. Because the SWC’s *Exceptions Brief* was submitted in June 1, 2015, **17 days** after the service date, it is not timely. Because it is not timely, the *Preliminary Order* “**will** become final without further action of the agency . . .” IDAPA 37.01.01.730.02.a (emphasis added). Other than a petition for reconsideration, which the SWC did not file, there are no other administrative remedies available to the SWC or avenues to extend the deadline for submitting their *Exceptions Brief*. By operation of law, the *Preliminary Order* has become a final order of the agency and can no longer be challenged by the SWC before IDWR.

Furthermore, as a final order of the agency, the SWC cannot now appeal the decision to the district court because it now lacks subject matter jurisdiction:

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<sup>1</sup> The service date is contained on pages 10 and 11 of the *Preliminary Order*.

“Absent a statutory exemption, the exhaustion of an administrative remedy is a prerequisite for resort to the courts.” *Dept. of Agric. v. Curry Bean Co.*, 139 Idaho 789, 792, 86 P.3d 503, 506 (2004). “This Court has held that generally the exhaustion doctrine implicates subject matter jurisdiction because a ‘district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted.’ ” *Owsley*, 141 Idaho at 135, 106 P.3d at 461 (quoting *Fairway Dev. v. Bannock Cnty.*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990)).

Fuchs v. State, Dep't of Idaho State Police, Bureau of Alcohol Beverage Control, 152 Idaho 626, 629, 272 P.3d 1257, 1260 (2012). This is because of the policy considerations underlying administrative appeals:

The Idaho Administrative Procedure Act (IDAPA) provides that “[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.” I.C. § 67–5271.

...

“Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.” *White v. Bannock County Comm'rs*, 139 Idaho 396, 401–02, 80 P.3d 332, 337–38 (2003).

Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 870, 872, 154 P.3d 433, 441, 443 (2007).

Because no timely exceptions brief or petition for reconsideration was filed, the *Preliminary Order* has become a final order of IDWR. As a final order of the agency, the Applicant now possesses a permit to develop 35-14402 which cannot be challenged by the SWC.

**B. In the alternative, the *Preliminary Order* should be upheld.**

Even with the requirement to limit 35-14402 and the Applicant's other water rights to the diversion of 1,221 acre-feet of water—down from 2,187 acre-feet decreed to all of Applicant's water rights (approximately ½ of the decreed volume)—the SWC has taken exception to the *Preliminary Order*. The Applicant is not necessarily thrilled with the 1,221 acre-foot volumetric

limitation because there was evidence presented demonstrating that as much as 1,522 acre-feet was actually diverted—admittedly at a higher rate—which was the very purpose for Applicant’s filing of 35-14402. Nevertheless, given the deference that should be afforded the hearing officer’s fact finding, the Applicant has not challenged this limitation and will strictly comply with it.

The SWC argues that the ability to file a water right permit to allow for additional rate was addressed in a prior matter involving the City of Shelley, *Id.* at 4-6, and since the City of Shelley was not issued a permit on this basis, the Applicant is now entitled to divert more than was “reasonably expected” under its water rights in violation of the City of Shelley decision. *Id.* at 7.

However, as discussed by the hearing officer in the *Preliminary Order*, the City of Shelley matter was different because the City did not propose to limit its water rights to the volume it historically diverted. Rather, the City proposed to limit its volume to the decreed volume of its water rights. The Applicant’s proposal limits its diversion volume to what was actually diverted, or at least what was reasonably expected because of the 8.2 cfs diversion rate the Applicant utilized. *Preliminary Order* at 4 (“ . . . the Department must determine the volume of water the Cooks would have diverted if they had operated within the limits of their existing water rights.”) (underlining in original). Even the SWC’s expert witness testified that the impacts to the SWC’s rights depend on total volume diverted, not the rate at which it is diverted. Testimony of Greg Sullivan.

Finally, the SWC argues that this will set a “dangerous precedent” for users on the Snake Plain and throughout Idaho if the *Preliminary Order* is upheld. *Exceptions Brief* at 2. We think this “floodgates” argument is an overstatement of the *Preliminary Order*’s precedent, primarily

because this statement ignores the 44% reduction of decreed volume of the Applicant's water rights. This is significant and real mitigation, and it appears to the Applicant that this is not dangerous precedent, but will be helpful in reducing diversions from the ESPA because the water right holder will be giving away any ability to "grow" further into his water right's decreed volume. He will forever be limited to what he decided to sacrifice in terms of volume in order to gain the benefit of an increased diversion rate.

Because the *Preliminary Order* is soundly reasoned, it should be upheld in the unlikely event that the SWC avoids the consequences of its untimely filing of its *Exceptions Brief*.

Dated this 12<sup>th</sup> day of June, 2015.

  
For Robert L. Harris, Esq.  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 12<sup>th</sup> day of June, 2015.

**DOCUMENT SERVED: APPLICANT'S RESPONSE TO EXCEPTIONS BRIEF**

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