

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE**

**STATE OF IDAHO**

**IN THE MATTER OF REQUIRING MEASURING  
DEVICES AND CONTROLLING WORKS ON RUSH  
CREEK, A TRIBUTARY TO THE WEISER RIVER,  
WATER DISTRICT 67.**

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**PRELIMINARY  
ORDER**

**FINDINGS OF FACT**

1. Diversions of water from Rush Creek and its tributaries are controlled and regulated by the watermaster of Water District no. 67, Weiser River.
2. The water rights authorizing diversion of water from Rush Creek were decreed in the case of Muir v. Allison, (7<sup>th</sup> Judicial Dist. 1921). The Muir decree required construction of measuring devices and controlling works by the appropriators.
3. On September 24, 1986, the Idaho Department of Water Resources (IDWR) issued an order requiring installation of headgates and controlling works for diversions of water from Rush Creek and its tributaries. A water right holder could seek an exemption upon a showing that the structures were either unfeasible or unnecessary.
4. Not all of the waterusers owning water rights authorizing the diversion of water from Rush Creek and its tributaries have installed, constructed, and maintained adequate measuring devices and controlling works for the administration by the watermaster and delivery of water to the waterusers.
5. The watermaster of Water District no. 67 has been required, in some cases, to determine water deliveries by estimating diversion rates based on imprecise methods of measurement or control.

**CONCLUSIONS OF LAW**

1. Idaho Code § 42-701 states, in part:
  - (1) The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted. Each device shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point. Each such appropriator shall construct and maintain, when required by the director of the department of

water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water. Plans for such headgates, rating flumes or other measuring devices shall be approved by the department of water resources.

(3) Any appropriator or user of the public waters of the state of Idaho that neglects or refuses to construct or maintain such headgates, controlling works, or measuring devices. . . , upon receiving ten (10) days' notice from the director of the department of water resources within which to begin and diligently pursue to completion the construction or installation of the required device or devices or to begin and diligently pursue to completion a remedy to such defects as exist in accordance with said notice, then the director of the department of water resources may order the duly qualified and acting watermaster of the water district to shut off and refuse to deliver at the point of diversion, the water owned by such appropriator or user until the user does construct and maintain such headgates, controlling works or measuring devices or remedy the defects which exist or the director may take action pursuant to section 42-1701B, Idaho Code, to enforce the requirement to construct, install or maintain such devices.

(4) The appropriators or users of the public waters of the state of Idaho shall be given a reasonable time within which to complete construction of such headgates, controlling works or measuring devices, depending upon the size and extent thereof, when due diligence has been used in the prosecution of such work.

2. An order should be issued again requiring the water users of Rush Creek and its tributaries to install, construct, and maintain adequate measuring devices and controlling works.

### ORDER

IT IS HEREBY ORDERED that on or before June 1, 2001, the water users diverting water from Rush Creek and its tributaries shall install, construct, and maintain measuring devices and lockable controlling works of a type acceptable to IDWR, unless expressly exempted by IDWR after a showing by a water right holder that the structures are unnecessary.

IT IS FURTHER ORDERED that, after June 1, 2001, the watermaster shall shut off and refuse to deliver water from Rush Creek and its tributaries to any water user authorized to divert water from Rush Creek and its tributaries who has not installed, constructed, and properly maintained adequate lockable controlling works and measuring devices.

Dated this 28<sup>th</sup> day of February, 2001.

  
GARY SPACKMAN  
Western Regional Manager

**CERTIFICATE OF MAILING**

I hereby certify that on the 28 day of February 2001, I mailed a true and correct copy, postage prepaid, of the Preliminary Order to those listed below:

  
\_\_\_\_\_  
Lisa Mattson  
Secretary

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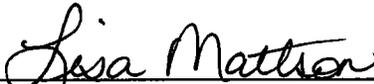
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**CERTIFICATE OF MAILING**

I hereby certify that on the 2 day of March 2001, I mailed a true and correct copy, postage prepaid, of the Preliminary Order to those listed below:

  
\_\_\_\_\_  
Lisa Mattson  
Secretary

BRUCE SMITH  
MOORE SMITH BUXTON &  
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MIDVALE ID 83645

**CERTIFICATE OF MAILING**

I hereby certify that on the 6 day of March 2001, I mailed a true and correct copy, postage prepaid, of the Preliminary Order to those listed below:

  
\_\_\_\_\_  
Lisa Mattson  
Secretary

BRETT NEWBOLD  
3488 WARD RD  
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**EXPLANATORY INFORMATION  
TO ACCOMPANY A  
PRELIMINARY ORDER**

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

**PETITION FOR RECONSIDERATION**

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

**EXCEPTIONS AND BRIEFS**

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

**REQUEST FOR HEARING**

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

**ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

**CERTIFICATE OF SERVICE**

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the

proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

### **FINAL ORDER**

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

### **APPEAL OF FINAL ORDER TO DISTRICT COURT**

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

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

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.