

ADMINISTRATOR'S MEMORANDUM
(Supersedes Illegal Diversion of Water No. 2)

To: Water Management Division Staff
Water Allocation Bureau
Water Compliance Bureau and Regional Offices

Illegal Diversion of Water No. 3

From: Mat Weaver, Deputy Director



Date: October 9, 2015

**RE: ENFORCEMENT POLICY AND PROCEDURES FOR USE, STORAGE, OR
DIVERSION OF WATER WITHOUT A VALID WATER RIGHT OR REQUIRED
AUTHORIZATION**

BACKGROUND

Purpose

This memorandum supersedes the Administrator's Memorandum "Illegal Diversion of Water No. 2" dated May 26, 1987. There have been significant changes to related laws and rules subsequent to the 1987 memo. A notable change was the inclusion of the standardized enforcement procedure required under Idaho Code § 42-1701B (1998).

This memorandum establishes the Idaho Department of Water Resources' ("Department") policy for investigation and enforcement associated with the use, storage, or diversion of water *absent* a valid water right or required authorization ("violations" or "unauthorized activities"). Administrative enforcement actions may be initiated for such unauthorized activities and for failure to comply with certain conditions of approval, administrative orders, and administrative rules.

This memorandum shall be used by Department staff that engage in regulatory and enforcement actions or related investigations when a violation is suspected, alleged, discovered, or confirmed. This memorandum describes necessary practices and procedures for conducting and documenting investigations associated with unauthorized activities under the Department's jurisdiction and the subsequent documentation and tracking of related regulatory efforts.

Nothing in this policy is intended to discourage Department staff from investigating a suspected violation either independently or in response to an outside complaint.

References

- Idaho Code §§ 42-311, 42-350, 42-351, 42-701, 42-1601 thru 42-1605, 42-1701(5), and 42-1701B
- Idaho Administrative Procedures Act ("IDAPA") - IDAPA 37.01.01 (Rules of Procedure), IDAPA 37.02.03 (Water Supply Bank Rules), IDAPA 37.03.08 (Water Appropriation Rules), and IDAPA 37.03.09 (Well Construction Rules)

Application

This memorandum shall be used by all Department staff conducting enforcement activities or investigations. Department enforcement actions and associated investigations must be consistent and compliant with the laws and regulations of the state governing the use, storage, and diversion of Idaho's public water to include:

- Use, storage, or diversion of water in excess of or without a valid water right;
- Use, storage, or diversion of water determined to be inconsistent (not in conformance) with a valid water right or any associated condition(s) of approval, including conditions of Water Supply Bank lease and rental agreements;
- Failure to properly control and to allow waste from a flowing artesian well;
- Failure to install or maintain approved measuring devices or controlling works as required by an administrative order or otherwise prescribed by law;
- Failure to measure and report water use when required by an administrative order; and/or
- Use, storage, or diversion of water contrary to applicable water law, administrative rules, conditions of approval, or administrative order(s).

Authority

Authority for the director or designated Department staff to investigate the unauthorized use of water and commence administrative enforcement actions is prescribed under Idaho Code §§ 42-351, 42-1605, 42-1701(5), and 42-1701B(1).

Under Idaho Code § 42-1701B, the Department (on behalf of the director) may commence administrative enforcement actions through a Notice of Violation ("NOV") and resolve such violations through a Consent Order and Agreement ("COA"). The COA will specify any civil penalty or other terms and conditions to which the parties have agreed. Additionally, the Department may initiate civil enforcement actions through the Attorney General or, in rare cases, file a criminal complaint.

DOCUMENTING COMPLAINTS

The Department receives numerous complaints each year alleging unauthorized activities or violations of Idaho water laws and rules. Many complaints originate as verbal reports from the public or public agencies. After receiving a verbal complaint, staff should request a written summary of the complaint including sufficient information to determine if an investigation should be initiated. The Department may provide a standardized complaint form to assist the public in providing all necessary information. Complaints should be entered and tracked in the Department's complaints and enforcement database ("enforcement database"). The enforcement database is a shared resource and should be used by all staff to archive a complaint, general information, and associated documents and/or evidence.

DOCUMENTING INVESTIGATIONS AND EVIDENCE

Documentation of an investigation and appurtenant evidence is necessary prior to initiating an enforcement action. The enforcement database provides a central location for documenting, tracking, and managing information and evidence associated with a complaint, investigation, or enforcement action. The database *should* be used to inventory and archive written complaints and *must* be used to inventory and archive confirmed violations that result in a subsequent enforcement action.

Note: Authority for the director and/or employees of the Department, including water district watermasters who are appointed by the director, to make “reasonable entry” upon lands for the purpose of making investigations and surveys related to water use, or for other purposes necessary to carry out the duties imposed by law, is authorized by Idaho Code § 42-1701(5).

Regulatory staff should exercise discretion under these authorities and whenever practical contact the land owner or an authorized representative of the land owner prior to entry upon private lands.

Regulatory staff should avoid threatening or confrontational situations and solicit assistance from local law enforcement when necessary.

Evidence Necessary to Substantiate an Unauthorized Use of Water

When investigating an alleged violation, the investigator must assemble evidence considering the possibility that the documented observations may be used to establish a case in court. The investigator must carefully collect, analyze, and document evidence to support a specific conclusion.

Evidence may include the following:

- The actual observation and documentation by Department staff or a Department-appointed watermaster of an offending diversion, storage facility, and/or application of water;
- Time stamped photographs and video with appropriate narration;
- Written statements from individuals who have observed the activity (written statements must include the name, address, and signature of the witness); and/or
- Aerial photos and/or maps depicting the extent of use.

Evidence other than actual observations of unauthorized activity should also be collected if it supports the theory that water was illegally used, stored, or diverted. This evidence may include ruts created by a pivot system tire tracks, wet soil, water marks, growing crops, and changes in electrical or flow meter reading(s).

Prior to initiating a formal enforcement action, the investigator must determine whether the evidence supports a conclusion that water is or has been used, stored, and/or diverted without the required authorization. In some cases, the investigator must observe the unauthorized activity (for example, when aerial imagery is not yet available).

The investigator must collect and record GPS information and/or legal description(s) (PLS information) for the place of use, storage reservoir, and/or point of diversion. The investigator should describe delivery system components and record pump and motor specifications, makes, models, and serial numbers. The crop type should also be noted along with the number of acres, if the violation is associated with irrigation. For non-irrigated unauthorized activity, the flow rate or storage volume must be determined. Flow rate or storage volume should ideally be measured. When measurement is not possible, a flow rate or volume may be estimated provided that the estimate is accompanied by sufficient supporting calculations and/or information.

Investigations (in the field or otherwise) should result in the completion of an investigation report that summarizes the findings and conclusions of the investigation and recommends a specific response. The Department may provide field investigation staff with a field report form including a “punch list” to

assist with collecting necessary information and evidence. Field notes should be dated, organized, and readable as the documents may be used as evidence in court.

ENFORCEMENT PROCEDURES

The Department's goal in water-use related regulatory or enforcement matters is to ensure compliance by users with all Idaho laws, orders, rules, and/or water right elements and approval conditions.

Administrative enforcement actions may be initiated for violations that are documented and confirmed by methodical investigation. Violation(s) of Idaho Code § 42-351 (use, storage, or diversion of water without a valid water right) is a primary focus. Uncontrolled, unauthorized, or unnecessary flow from an artesian well constitutes a violation of Idaho Code § 42-1602 and Idaho Code § 42-351.

Administrative enforcement actions may also be initiated for failure to comply with administrative orders requiring installation of measuring devices or controlling works and measurement and reporting of water use required under Idaho Code § 42-701. Such actions must be presented to the responsible party as a Department-issued NOV.

Education and Awareness

Department staff should encourage voluntary compliance through education of water users to avoid a violation or to correct an existing violation. Education may include providing information and instruction to a water user(s) who may not be aware of statutory requirements, associated rules, or specific conditions for use and diversion of water. Staff should provide clear direction or instructions (verbally and in writing) on how a violation can be avoided or corrected. Staff should direct users to the Department website and other available publications or resources.

Warning or Pending Notice of Violation

A documented warning, or Pending Notice of Violation ("PNOV"), will create a permanent record of the unauthorized activity in cases where a violation is corrected without issuing an NOV. Examples include:

- Verbal warning: The issuance of a verbal warning or instruction to cease and desist must be documented in writing for later reference. A descriptive memorandum or investigation report should be added to the enforcement database.
- Written warning or PNOV: Should include a "cease and desist" provision and should be added to the enforcement database.

When a violation is evident and an NOV is issued, all related information or documentation *must* be included in the Department's enforcement database.

Administrative Enforcement Action (NOV) and Other Enforcement Options

Determining an Enforcement Response or Action

Department responses to confirmed violations must be consistent with applicable laws, rules, and this policy. Responses should be representative of the severity or scope of the unauthorized activity or violation.

Assessment of the severity or scope of a violation should be based on actual facts obtained through the investigation with consideration for the following:

- The size (acres, diversion rate, or storage volume) and public perception of the violation (extent or number of complaints from the public or other users);
- The potential extent of injury to the public resource or individual water right holders resulting from the violation;
- The extent of the alleged violator's previous knowledge or understanding that the unauthorized use was not in compliance with applicable law or rules;
- An alleged violator's lack of response to a previous warning or PNOV;
- The willingness and cooperation of the alleged violator to correct the identified unauthorized activity; and/or
- An alleged violator's history of previous violations.

Issuing an NOV

An NOV may follow a written PNOV, warning letter, or a previous NOV, upon confirmation of a violation. An NOV may be issued even though a warning or PNOV has not been previously sent. Enforcement actions should be timely, well documented, and diligently pursued until the violation is corrected and resolved. All NOVs must be included in the Department's enforcement database along with supporting documentation and evidence.

Typically, an NOV is issued in letter form and is addressed to the individual(s) or entity determined to be responsible for the violation. When an NOV is issued for a violation(s) of Idaho Code § 42-351 and/or § 42-1601 thru 42-1603, the NOV must be consistent with Idaho Code § 42-1701B(2).

The NOV should contain the following elements:

- Enforcement case number from the enforcement database;
- A cease and desist provision;
- Specific location information where the alleged violation occurred (generally PLS info, county, and address when available);
- Citation of specific rules and/or laws (statutes) violated and brief description of each;
- Any redress and civil penalties the Department seeks pursuant to the NOV; and
- Notification to the recipient that they are entitled to a compliance conference upon request (within 14 days of receipt).

Regional office enforcement staff may coordinate administrative enforcement actions with state office Compliance Bureau staff. In some cases, regional office staff and/or program managers may prefer that an NOV is issued by Compliance Bureau staff. This approach may allow regional staff to maintain an optimal relationship with local area water users and should be considered upon request of Regional Managers and Program Managers. Department-designated legal staff from the Attorney General's Office is also available to advise or assist staff with administrative or non-administrative enforcement actions.

The following are examples of non-administrative enforcement actions authorized by law:

- Civil enforcement actions
- Court injunctions or orders

- Misdemeanor citation or criminal complaint – reference Idaho Code §§ 18-4301 thru 18-4310 and 42-1605(2)

Examples of NOVs can be found in the enforcement database and letter templates can be obtained through the Water Compliance Bureau.

Violations on Privately Owned Land

Idaho Code § 42-351 states the person or entity engaged in and/or in direct control of an unauthorized activity may be issued an NOV. To the extent practical, Department staff engaged in the initial investigation should make a reasonable effort to determine and document the party responsible for the violation. In some cases the person(s) or entity may also be the owner of the property. It is not unreasonable to issue an NOV jointly to the operator and the property owner. Irrigators, operators, or a lessee should not be viewed as unaccountable simply because they do not own the property. The land owner of record should be copied on any NOV that is issued directly to a party or entity (such as a lessee) other than the owner. A PNOV directed to the property owner may be a practical way of determining and documenting the person(s) or entity responsible for a violation.

Violations on Land Managed by a Local, State, or Federal Agency (Public Land)

A thorough investigation is appropriate to determine the party responsible for or directly engaged in any unauthorized use, storage, or diversion of water occurring on lands managed by a local, state, or federal agency. In some cases, the agency who owns the land may not be aware that an unauthorized activity has occurred or may not have direct control over a violation (such as a trespass issue). It is advisable to first contact the public agency that manages the land to discuss the violation and solicit the land manager's cooperation in determining the responsible party. If it is determined that the agency who manages the land is responsible for a violation, a formal enforcement action may be initiated and directed to the agency. Otherwise, it may be appropriate for Department staff to work jointly with the agency to identify the responsible party. The land manager or owner of record should be copied on any NOV that is issued directly to a party or entity other than the manager or owner.

CIVIL PENALTIES AND REDRESS

Proposed and Agreed Civil Penalties

NOVs must identify any civil penalty the Department is seeking in response to a violation. The penalties proposed should be consistent with Idaho Code § 42-1701B (6) (a) i or ii. Penalties should be calculated and proposed at the maximum level prescribed by statute and are based on acreage, rate of diversion (cfs), or storage volume (acre feet). Partial acreages are assessed penalties as if a full acre was irrigated. Penalties for unauthorized irrigation should not be calculated based on a volume that was presumed to have been used.

Under Idaho Code § 42-1701B (6) (b), penalties shall not be assessed for a violation that has occurred more than twelve (12) months prior to issuance of the NOV. However, for irrigation or storage uses, an NOV may seek penalties for two (2) successive years or seasons if issued within twelve (12) months of the last use in the previous year.

Penalties are intended to discourage future unauthorized use. Generally, an agreed-to penalty *should not* be less than two times (2X) the amount it would have cost the operator to rent water from the

Water Supply Bank (“WSB”) for the specific use. Before negotiating a reduced penalty, enforcement staff should ask WSB staff to estimate or calculate how much a rental would have cost the operator to cover the unauthorized use.

Penalties proposed in an NOV may be reduced or negotiated, and agreed to by the Department and the NOV recipient (“agreed penalties”) at or following a compliance conference. The Department may reduce the civil penalty proposed by an NOV or may suspend a portion of the proposed penalty for a specified period, contingent upon a required level of performance or other desired outcome (e.g. abandonment of a well or removal of a diversion structure). In contemplating a reduced or suspended penalty, staff should consider the NOV recipients past history of compliance. Repeat violators should not be extended as much latitude as first time violators. Staff should also consider the Department’s time and expense resulting from an enforcement action when negotiating a reduced or suspended penalty.

Additional Redress Associated with an NOV

The Department may seek redress or specified action of the NOV recipient in addition to monetary penalties. The following are some examples:

- Installation of Department-approved measuring devices and/or control devices;
- Demand to decommission a well or remove an unauthorized point of diversion;
- Curtailment of use by a water district watermaster; and
- Restitution for the unauthorized use.

Use of the WSB for Existing Violations

When a cease and desist order is served upon a water user by the Department, the user must cease diversion of water until a valid water right is obtained or other authorization, such as a WSB rental, has been secured. The Idaho Water Resource Board has adopted policies precluding rental of water from the WSB for past use. A person or entity notified of an unauthorized use may submit an application to rent water from the WSB to authorize use. In these instances Department regulatory staff *should not* request that WSB staff give preference to rental applications intended to legitimize an existing unauthorized use.

COMPLIANCE CONFERENCE

Upon request, an NOV recipient shall be entitled to a compliance conference with the Department. A compliance conference is a meeting between the Department and the NOV recipient to discuss the facts of the matter at hand and ideally reach an agreement to correct a violation and resolve the NOV. Each case may present a unique set of facts that should be considered when evaluating the severity of the violation. Department staff should use the compliance conference to develop or identify specific terms and conditions to resolve the violation that will be included in a COA. The terms of the COA must address any requirements for redress and civil penalties presented in the NOV and/or other terms and conditions agreed between the Department and the NOV recipient. A draft COA may be presented to the NOV recipient for review and signature after a verbal agreement is reached at the compliance conference. Preliminary meetings that are a part of the initial investigation and occur prior to an NOV are not a compliance conference and should not be referenced as such, but they should be documented and added to the enforcement database.

CONSENT ORDER AND AGREEMENT

An NOV must be resolved through a COA. Terms included in a COA generally result from a compliance conference and/or documented correspondence between the Department and the NOV recipient preceding the compliance conference.

The required COA must specify the terms and conditions agreed to by the Department and the NOV recipient that will resolve the administrative enforcement action (NOV). A COA must characterize the complete agreement between the Department and the NOV recipient. A COA must contain the following elements:

- “Findings of Fact” or “Background” information qualifying the violation;
- “Conclusions of Law” or “Applicable Law” providing the legal basis for the action; and
- “Order” or “Terms of Agreement and Order” containing the terms and/or redress required and deadlines for compliance with the terms.

The COA must be prepared for signature by the Department and consent of the respondent or recipient of the NOV.

Examples of COAs can be found in the enforcement database and templates are available through the Water Compliance Bureau.