

## ADMINISTRATOR'S MEMORANDUM

MISCELLANEOUS NO. 12

**TO: Employees, Contractors and Other Representatives of the Idaho Department of Water Resources**

**FROM: *MS* L. Glen Saxton, Administrator, Water Management Division**

**RE: ENTRY UPON PRIVATE PROPERTY FOR ROUTINE (NON-ENFORCEMENT) INVESTIGATIONS AND DATA COLLECTION**

**DATE: September 16, 2003**

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The Idaho Department of Water Resources ("IDWR") has responsibility for various programs that require entering private property to make investigations and collect data. This memorandum provides guidance on exercising the authority provided by state law for representatives of IDWR to enter private property for purposes of data collection and other non-enforcement related investigations.

Several statutes provide authority for the Director and employees of IDWR to enter upon private land to perform IDWR's statutory duties:

1. Idaho Code § 42-1701(5) authorizes the director and/or employees of the department of water resources to "make reasonable entry upon any lands in the state for the purpose of making investigations and surveys, or for other purposes necessary to carry out the duties imposed by law." (emphasis added).
2. Idaho Code § 42-709(3) authorizes the district hydrographer and assistants to "make reasonable entry upon any lands in the state for the purpose of making water measurements or in direct support of making water measurements." (emphasis added).
3. Idaho Code § 42-237a(d) authorizes the director in administering and enforcing the provisions of the Ground Water Act to "go upon all lands, both

public and private, for the purpose of inspecting wells, pumps, casings, pipes, and fittings, including wells used or claimed to be used for domestic purposes.”

A deputy attorney general previously described the authority of the Director and IDWR employees to enter private land as follows:

I would conclude that generally the agents of the director may freely enter the property of others in the pursuit of their duty for the department. However, please note that the legislature has said that the director must make “reasonable entry” in the pursuit of his duty. I interpret this to mean that when possible the agents of the department should make contact with the land owner and inform him of the intent and request permission to enter upon his property to perform their duties.

Informal guidance letter by Robert M. MacConnell, Deputy Attorney General, September 22, 1976.

#### **GUIDANCE TO EMPLOYEES AND OTHER REPRESENTATIVES OF IDWR**

The common sense guidance in Mr. MacConnell's letter is still appropriate. Accordingly, employees of IDWR, water districts, measurement districts, and those persons performing work under contract with IDWR (herein collectively called “IDWR representatives”) are to comply with the following guidance:

1. Reasonable efforts should be made to obtain the permission of the owner, operator or other representative of the person controlling the property (herein called the “owner”). When asking the owner for permission, IDWR representatives should not aggressively assert that they have legal authority to enter without the owner's permission. If permission is refused, the determination that it is necessary and appropriate to assert the Director's statutory authority and the appropriate process to gain entry will be deferred to IDWR administration (see Paragraph 7).
2. When acting for IDWR, only enter private lands when necessary to carry out the departmental duties for which you have responsibility. If you do not know whether a parcel of land is privately owned, assume that it is until information is available to show it is publicly owned.
3. Whenever practical, make an appointment by either writing or telephoning the owner in advance of traveling to the site. If consultation with the owner is not needed during the field inspection, permission may be obtained to make the inspection without the owner in

attendance. If the project involves visiting a number of sites in an area, a press release should be made in addition to making appointments with the owners.

4. If you did not make an appointment, locate the owner or the person in charge to explain the purpose of your visit. Request permission to access the property to perform the investigation or other activity. In locating the owner or person in charge, it is reasonable to use roads, walkways, or other facilities that would normally be used by visitors to the property.

5. Do not enter any residence or other closed-in building without the permission of the owner. If you have reason to believe that the owner is in a building but you are not able to get his/her attention, wait outside, try to locate other representatives of the owner, or call on the telephone.

6. If a reasonable effort has been made to contact the owner, but he/she cannot be located, enter private property to make an inspection or other activity only if:

a. You have arranged in advance with the owner to do so without the owner being present; or

b. You are merely collecting information about parameters such as point of diversion, place of use, or meter readings and do not need to enter a building or other area for which the owner has an expectation of privacy (such as the area near a residence, areas near to animals that may be disturbed or fields or other areas clearly marked as closed to entry); and

c. The property is not marked with signs forbidding entry or you have not otherwise been told not to enter the property. Idaho Code § 18-7008 provides that fence posts painted orange (red seems also to be used in some areas) is a recognized way of posting property against trespass.

7. If entry to the property is denied, request permission to come back at a more convenient time. If the owner still refuses, thank him/her for the time spent with you and leave promptly on as good of terms as possible. Make a note of the time, date and reason given for denial, and report the information to your supervisor or the regional manager. The division administrator, and the department's deputy attorney general, then must be consulted in order to determine whether IDWR should exercise its statutory authority to access the property.

8. Miscellaneous:

a. This memorandum does not apply to investigations for the purpose of verifying that a violation of the law has occurred or to investigations related to enforcement of ongoing violations.

b. The guidance above does not apply to entry of property on Indian reservations. Contact IDWR's deputy attorney general for specific guidance when entry is needed on reservation lands.

c. The guidance above can be altered for routine visits to a site (such as measuring or monitoring of water diversions or water levels in a district or observation well network) by making advance arrangements with the owner for the use of appropriate ingress/egress routes, the obtaining of necessary keys, etc. The guidance is not intended to require additional contact with the owner before continuing existing routine monitoring programs.

d. As part of each visit during which the owner is not present, the IDWR representative should leave a dated business card at the site to confirm for the owner that entry was made as prearranged. Often the owner will appreciate a note conveying the results of the measurement or other activity.

e. Contact should be made with the appropriate officials responsible for managing state or federal lands and facilities prior to entering for investigation purposes.

f. IDWR representatives should carry and display to the owner a photo ID card issued by IDWR and should leave a business card with the owner. The representative should be prepared to put the owner in contact with his/her supervisor or other IDWR official that can confirm the validity of the request to enter the property.

g. If brought to the attention of IDWR representatives, IDWR representatives should be cognizant of concerns relative to spreading animal disease (such as hoof and mouth disease) and plant diseases (such as late blight). Equipment, boots, and clothing may need to be sanitized appropriately. If an outbreak is known to be occurring, specific guidance should be sought from IDWR management prior to commencing field work in the area. Do not enter feedlots, milking barns, or row crop fields without specific permission from the owner. Stay on clearly traveled roads and paths unless otherwise directed by the owner.

h. IDWR representatives should not cause damage to property or inconvenience the owner. When reading meters or making other inspections, IDWR representatives should not turn on or off, adjust or modify any pumping or other equipment. Close all gates that you have opened, pump house doors or covers, and return any meter/pipe insulation to the position found to minimize effects of freezing in the winter or other adverse weather conditions.