

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

IN THE MATTER OF THE PROPOSED) WATER MEASUREMENT DISTRICT) IN ADMINISTRATIVE BASIN 15 –) <u>MALAD VALLEY</u>)	PRELIMINARY ORDER CREATING WATER MEASUREMENT DISTRICT AND REQUIRING INSTALLATION OF MEASURING DEVICES
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FINDINGS OF FACT

1. On November 4, 2015, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued an *Order Designating Malad Valley Ground Water Management Area* (“Order”). The Malad Valley Ground Water Management Area (“MVGWMA”) includes “[a]ll of the Malad River drainage within the state of Idaho and all ground water underlying these drainages, including the drainages of all creeks and streams tributary to the Malad River.” *Order* at 3.

2. The Department assembled an advisory committee (“Committee”) comprised of ten water users from the MVGWMA to prepare a draft management plan for the management area. On November 3, 2017, the Director issued an *Order Approving Ground Water Management Plan* approving the *Final Malad Valley Ground Water Management Plan* (“Management Plan”)¹.

3. The Management Plan includes the following provisions:

The Committee recommends creating a water measurement district as described in Chapter 7, Title 42, Idaho Code The District should include water users who divert from any water source (surface water or ground water) within Malad Valley.

The Committee also recommends that all water users in the District be required to install IDWR approved measuring devices, except water users with small diversions (those uses with a total combined diversion rate less than or equal to 0.24 cfs or total combined irrigation less than or equal to 5 acres). IDWR should issue an order requiring installation of approved measuring devices and giving water users two years to install the devices.

Management Plan at 6.

4. On July 17, 2018, the Department issued notice of a public hearing regarding a proposed water measurement district in Malad Valley on August 9, 2018, in Malad City, Idaho. The Department mailed the notice to all owners of record for surface water and ground water rights within the Malad River drainage, designated by the Department as Administrative Basin 15, except

¹ The Management Plan is attached to the November 3, 2017 *Order Approving Ground Water Management Plan*.

for domestic and stockwater uses, as defined in Idaho Code §§ 42-111 and 42-1401(11) and instream stockwater uses, as defined in Idaho Code § 42-113.

5. Administrative Basin 15 is primarily located within Oneida County. The Department published notice of the August 9, 2018 public hearing on July 19 and 26, 2018, in the Idaho Enterprise (Oneida County).

6. Consistent with Idaho Code § 42-706, the Department conducted a public hearing on the proposed water measurement district on August 9, 2018, in Malad City. Members of the public in attendance asked questions and provided comments about the proposed changes.

7. Based on Department records, there are 217 surface water rights within Administrative Basin 15, excluding water rights for small domestic or stockwater use. Of these 217 water rights, 2 are permits, 33 are licenses, 81 are decreed rights based on old decrees and 101 are statutory claims filed pursuant to Idaho Code § 42-243.

8. Many of the decreed surface water rights in the basin are poorly defined. The old decrees for surface water sources in the basin did not define all of the elements on the water rights or did so in broad terms. It will take a significant amount of work by a district hydrographer to identify the proper points of diversion and places of use for the 81 decreed surface water rights.

9. The Department has never verified any of the elements listed on the 101 surface water statutory claims in the basin. It will take a significant amount of work by a district hydrographer to confirm the current ownership and water use under the 101 statutory claims.

10. Based on Department records, there are 285 ground water rights within Administrative Basin 15, excluding water rights for small domestic or stockwater use. Of these 285 water rights, 32 are permits, 209 are licenses and 44 are statutory claims filed pursuant to Idaho Code § 42-243. As part of the licensing process, the Department conducted field exams to verify the points of diversion and places of use for the licensed water rights.

11. The Department typically excludes the following types of water right diversions from district-wide water measurement orders:

- a. Diversions for domestic and stockwater uses as defined by Idaho Code §§ 42-111 and 42-1401A(11);
- b. Diversions irrigating less than or equal to five acres; and
- c. Diversions delivering water for any purpose other than irrigation that divert less than or equal to 0.24 cfs.

12. The Department typically excludes from water measurement orders any diversions irrigating five acres or less because their inclusion normally adds a large number of diversions to measure and results in additional workload and budget for water districts. Although the number of diversions irrigating five acres or less is typically significant, the total amount of water use is relatively small compared to the remaining water uses and water rights in a water district.

13. According to Department records, there are 25 ground water rights within Administrative Basin 15 authorizing less than five acres of irrigation and not combined with other irrigation water rights. These 25 water rights authorize a combined diversion rate of 1.90 cfs. All of the ground water rights in Administrative Basin 15 which include irrigation as a beneficial use authorize a total diversion of approximately 365 cfs. Therefore, the water rights authorizing less than five acres of irrigation constitute less than one percent of the total authorized ground water diversion rate for irrigation in the basin.

14. The Department also typically excludes from water measurement orders any non-irrigation ground water diversions of 0.24 cfs or less because, while the number of diversions for such rights can be significant, the total water use is small.

15. The Department's *Minimum Acceptable Standards and Requirements for Open Channel and Closed Conduit Measuring Devices* ("Minimum Measurement Standards")² requires installation of a certified flow meter on closed conduit or pipeline diversions. *Minimum Measurement Standards* at 2. Many ground water delivery systems pressurize closed conduits to convey and apply the water. The Minimum Measurement Standards allows alternative meters or methods if such meters or methods "will produce similarly accurate results." *Id.*

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-701(1) states, in pertinent part:

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 such appropriator shall construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device . . . 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.

Idaho Code § 42-705 states, in pertinent part:

The director of the department of water resources is authorized to create water measurement districts to carry out the water measuring requirements of this chapter and shall have direction and control of the measurement of water existing therein or diverted from all public water sources, including ground water sources, within a water measurement district.

² Available at <https://idwr.idaho.gov/water-data/water-measurement/>.

Idaho Code § 42-706(1) states, in pertinent part:

The director of the department of water resources is authorized to divide the state into water measurement districts in such manner that each public water source or sources or part thereof shall constitute a water measurement district; provided, that any appropriation or use included in a water district created pursuant to chapter 6, title 42, Idaho Code, shall not be included in a water measurement district.

Idaho Code § 42-706(2) states, in pertinent part:

Before entering an order creating, modifying, or abolishing a district, the director shall, by regular mail, send notice of the proposed action to each appropriator and water user in the district or proposed district. The notice shall describe the proposed action to be taken, the reasons therefor, the time and place of a hearing to be held concerning the proposed action, and provide a time period within which written comment on the action will be accepted. The hearing shall not be held sooner than ten (10) days after the mailing of the notice, and the written comment period shall not close sooner than ten (10) days after the hearing. Instead of mailing notice, the director may publish notice describing the proposed action, the time and place for the hearing, and the deadline for receiving written comment. The notice shall be published once a week for two (2) weeks in a newspaper or newspapers having general circulation within the district or proposed district, with the second publication appearing at least ten (10) days before the date set for the hearing. The hearing shall be held within the district or proposed district, or at some nearby location convenient to the affected appropriators or water users.

ANALYSIS

The Management Plan suggests including surface water rights in the proposed water measurement district in Malad Valley. There are a number of compelling reasons to exclude surface water diversions from the proposed water measurement district. Many of the decreed and statutory claim surface water rights within Administrative Basin 15 are still in the name of the original decreed owner or claimant and have never been updated. The surface water statutory claims have never been investigated or verified. Also, many of the old decrees do not define points of diversion and only define the places of use for water rights using broad legal descriptions. It will be very challenging to discern current ownership and water use under these water rights. Further, the MVGWMA was created because of concerns with aquifer levels in Administrative Basin 15 rather than concerns about surface water use or supplies. The MVGWMA only governs ground water rights and ground water uses within Administrative Basin 15. Therefore, surface water rights will not be included in the water measurement district.

During the public hearing, water users raised concerns with the proposed water measurement district. In addition to comments at the hearing, the Department received eighteen written comments, all from water users who purported to own shares in surface water irrigation companies. Sixteen of these comments were identical. The comments, verbal and written, raised the following objections or concerns. Each will be discussed in greater detail below:

1. The irrigation companies in the valley already monitor their water use so surface water rights should not be included in a water measurement district.
2. The Department should conduct additional public meetings before creating a water measurement district.
3. The Department should bear the cost of operating the water measurement district.
4. The proposed water measurement district should be created by the vote of the citizens of Oneida County.
5. Creating a water measurement district and requiring installation of measuring devices creates more government regulation and undue financial hardship on a struggling community.

Current Measurement Activities by Irrigation Companies

As discussed above, surface water rights will be excluded from the water measurement district. Excluding surface water rights moots the irrigation companies' argument that surface water rights should not be included in the proposed water measurement district. However, the Department may still request measurement records from the irrigation companies as part of its hydrologic data collection efforts.

Additional Public Meetings

Samaria Water & Irrigation Company ("SWIC"), a surface water delivery company, asked the Department to conduct additional public meetings before forming a water measurement district. As discussed above, all surface water rights will be excluded from the proposed district, including the water rights held by SWIC. Therefore, additional public meetings regarding a proposed water measurement district would not benefit SWIC. In addition, the Department provided proper notice of the August 9, 2018 public hearing. By mailing direct notice to owners of record and publishing notice in the local newspaper, the Department provided more public notice than Idaho Code § 42-706(2) requires. There are no persuasive reasons to grant SWIC's request to conduct additional public meetings.

Proposed District Funded by Department

Idaho laws are clear that water measurement districts are funded by water users within the districts. See Chapter 7, Title 42, Idaho Code. The Department is not authorized to spend its budget financing water measurement districts within the state. A shift in funding water

measurement districts from water users to the State requires a legislative change and is beyond the scope of this order. This objection seeks a remedy that is not currently available under Idaho law.

Water Measurement District by Popular Vote

Idaho Code § 42-706 describes the process for creating a water measurement district. The Director has exclusive authority to create such districts, after conducting a public hearing. Idaho law does not currently include a mechanism to create or abolish water measurement districts through a general election ballot item. Once a district is created, water users within the district may vote on various items related to the district, such as election of the hydrographer, adoption of an annual budget, and appointing an advisory committee. This objection seeks a remedy that is not currently available under Idaho law.

Measuring Devices and Financial Hardship

Idaho Code § 42-701 requires water users to install measuring devices at their own expense at the points of diversion authorized by their water rights, when notified by the Department. In order to collect accurate data to understand the amount of ground water use in the area that is necessary for future management of the resource, and in order for the proposed water measurement district to function properly, water users within the district must install measuring devices at their authorized points of diversion. Measuring devices will allow the district hydrographer to easily monitor the volume of water pumped from each well and will reduce the annual expenses of the water measurement district. Requiring the installation of measuring devices for ground water diversions is consistent with other ground water management areas in the state. Since 2016, the Department has issued measurement orders for ground water diversions in the Eastern Snake Plain Aquifer, Raft River and Mountain Home Ground Water Management Areas. In some of these areas, local water users or ground water districts have secured government cost-share grants to reduce flow meter installation costs.

CONCLUSIONS OF LAW

The Director has statutory authority to require installation of measuring devices and create a water measurement district. Idaho Code §§ 42-701 and 42-706. The Management Plan approved by the Director recommends the creation of a water measurement district that includes water users who divert from any water source (surface water or ground water) within Malad Valley. *Management Plan at 6*. Surface water rights will not be included in the proposed measurement district given that:

1. Much of the available surface water in the proposed measurement district is used and measured by irrigation companies who can report water use data directly to the Department;
2. A large number of surface water rights account for a relatively small amount of water use compared to the irrigation companies;
3. Ownership records for most surface water rights is outdated;

4. Many surface water rights lack adequate point of diversion and water use descriptions; and
5. The level of time and expense spent to contact current owners, locate points of diversions, and measure and report water use for a large number of surface water rights is not commensurate with the relatively small amount of water diverted under those rights.

Therefore, the water measurement district should be composed of all ground water rights within Administrative Basin 15, except for domestic and stockwater uses, as defined in Idaho Code §§ 42-111 and 42-1401(11).

Consistent with the Management Plan, the Department should require ground water users within the district to install measuring devices within two years, or by 2021. A measurement district is not necessary for the next year, 2019, if measuring devices are not required for two years. During 2019, the Department will inventory ground water wells subject to this order to get an accurate count of wells subject to measurement and reporting. The Department's inventory will assist the measurement district with budget planning for 2020 and 2021. The measurement district's responsibility in 2020 will be limited to checking flow meter installations and assisting ground water users with measuring device compliance. In 2021 and thereafter, the measurement district will read and record flow meters, report the water use to the Department, and facilitate local compliance with the Department's measurement standards.

ORDER

IT IS HEREBY ORDERED that:

1. The Malad Valley Water Measurement District ("MVWMD") is created, effective **November 4, 2019**. The MVWMD shall include all ground water rights within Administrative Basin 15, as depicted in the attached map, labeled as Attachment A, except the following:
 - a. Domestic and stockwater uses as defined by Idaho Code §§ 42-111 and 42-1401(11).
 - b. Irrigation uses of five acres or less³; and
 - c. Non-irrigation uses where the total authorized water right rate of diversion is equal to or less than 0.24 cfs (approximately 108 gallons per minute).⁴

³ A common point of diversion used for multiple irrigation rights where each individual right is five acres or less must be measured if the sum of the irrigated acres pursuant to the authorized rights exceeds five acres.

⁴ A common point of diversion serving multiple non-irrigation uses must be measured if the total diversion rate pursuant to the authorized right(s) is greater than 0.24 cfs.

2. The annual meeting of the MVWMD shall be conducted **November 4, 2019**, in accordance with Idaho Code § 42-707 at a time and place to be specified in a notice that the Department will mail to each right holder within the MVWMD.

3. A budget for the MVWMD must be developed for consideration at the annual meeting scheduled for November 4, 2019, and the water users must elect a district hydrographer. In preparation for the annual meeting scheduled for November 4, 2019, the Department will assist the water users with the formation of an organizational steering committee and conduct one or more meetings with the committee.

4. The holders of ground water rights in the MVWMD, except those ground water rights, uses and diversions identified in item 1.a. through 1.c above, shall install and maintain on each point of diversion or well, a measuring device of a type acceptable to the Department. **Owners of irrigation diversions that are required to be measured shall install acceptable measuring devices by the start of the 2021 irrigation season. Owners of non-irrigation diversions that are required to be measured shall install acceptable measuring devices by January 1, 2021.**

5. Measuring devices acceptable to the Department for wells required to be measured shall be flow meters identified in the Department's *List of Approved Closed Conduit Flow Meters* (copy attached).⁵ These specifications apply to wells used for both irrigation and non-irrigation water uses.

6. The Department will consider a request for variance of the Department approved flow meter requirement upon submittal of a written request to the Department. Acceptable variances may include the following methods or devices:

- a. Use of an hour meter (time clock) for open discharge wells with electric pumps that operate at a constant rate of flow; or
- b. Use of an acceptable closed conduit flow meter installed prior to the date of this order; or
- c. Use of power consumption coefficient for irrigation wells with a single operating condition, and an electric pump connected to a dedicated demand meter.

7. All requests for variance must be received by the Department by **July 1, 2020**. The Department will consider requests on a case-by-case basis. Variance requests proposing use of an existing flow meter will be denied unless the existing meter is tested and satisfies the Department's established standards for accuracy and the manufacturer installation specifications. Existing meters that do not satisfy the established standard for accuracy and the manufacturer specifications must be replaced with a meter from the Department's *List of Approved Closed Conduit Flow Meters*. Requests for variance must be submitted using the Department's form "*Request for Variance of IDWR Approved Flow Meter Requirement*" available on the Department's website or upon request.

⁵ Also available at available at <https://idwr.idaho.gov/files/water-measurement/approved-flow-meter-list.pdf>.

8. If a user cannot comply with the deadlines in item 4 of this order, the Department may grant an extension. An extension request for each diversion must be submitted to the Department by **July 1, 2020**. Extension requests will be considered on a case-by-case basis. Conditions that may result in the Department granting an extension include, but are not limited to the following:

- a. The diversion is unused; or
- b. Unique site specific condition(s) prevent accurate water measurement; or
- c. Delays caused by requirements of other government entities.

9. This order shall become effective immediately for any new diversion(s) authorized after the date of this order, except water right diversions described in items 1.a. through 1.c.

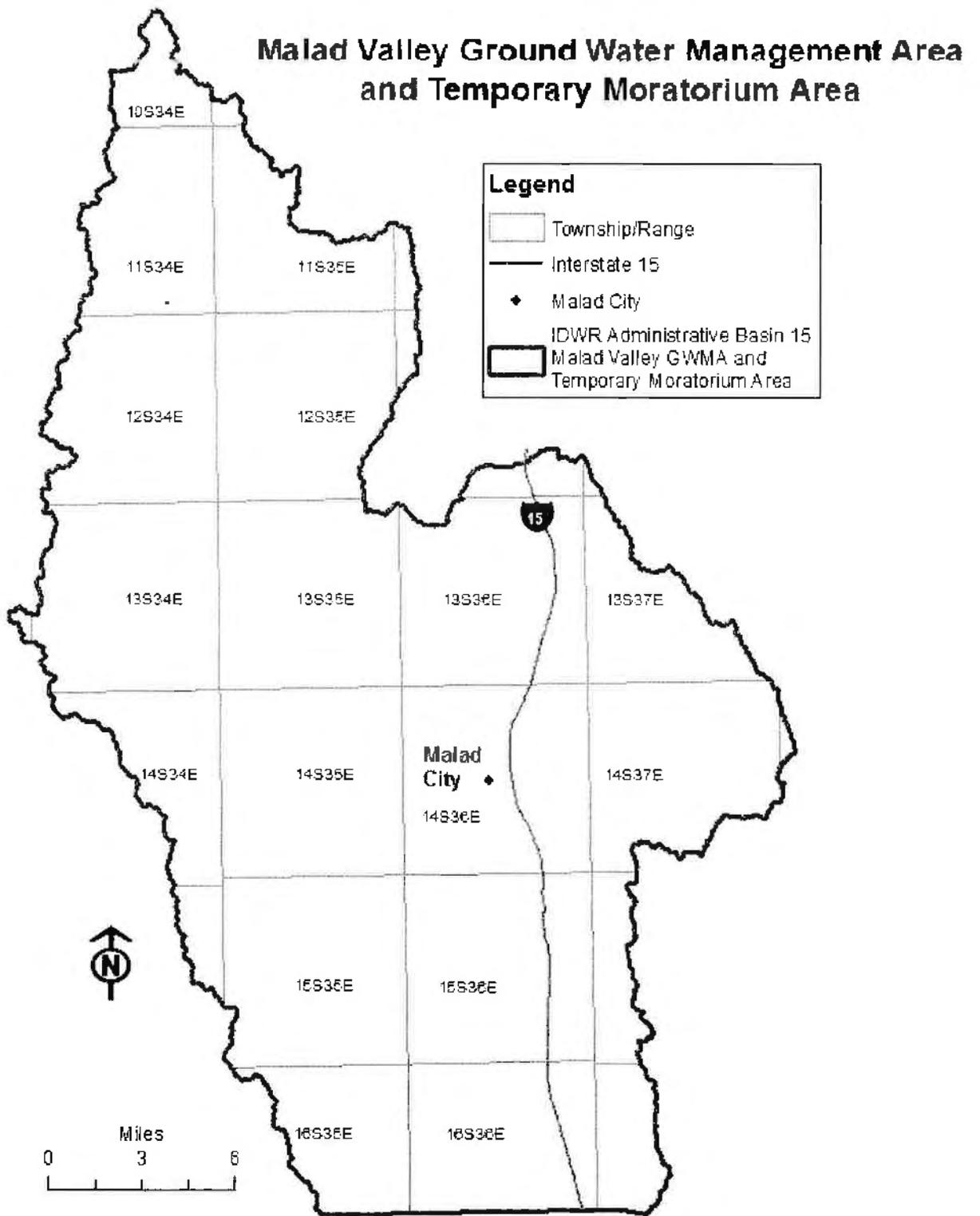
10. Pursuant to Idaho Code § 42-1701A(3), any person aggrieved by this order may, within fifteen days after receipt of written notice of the order or receipt of actual notice, file with the Director a written petition stating the grounds for contesting the order and requesting a hearing.

Dated this 9th day of November 2018.



James Cefalo
Hearing Officer

Attachment A



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November, 2018, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho, and posted on the Department's website: www.idwr.idaho.gov. Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.



Sharla Cox
Administrative Assistant
Idaho Department of Water Resources

