



Governor Brad Little

Director Mathew Weaver

May 10, 2024

RE: Preliminary Order Requiring Controlling Works and Measuring Devices in Water District 65, Payette River and Tributaries

Dear Water User,

The Idaho Department of Water Resources (Department) has issued the enclosed Preliminary Order (order) requiring the installation of headgates, controlling works, and measuring devices on surface water diversions within Water District 65. **The owners of affected water rights must install the required devices on or before June 1, 2026.** Pages 4 and 5 of the order describe the specific requirements and exceptions.

The measurement requirements of the order do not apply to certain domestic and stockwater uses (see order item 3) and diversions for irrigation uses of five acres or less and non-irrigation uses with a total diversion rate of 0.24 cfs or less (see order item 4). Note: *A common or shared point of diversion serving multiple water rights must be measured if the sum of authorized irrigated acres exceeds five or the total diversion rate of non-irrigation use exceeds 0.24 cfs.*

Please reference the enclosed document “*Minimum Acceptable Standards for Open Channel and Closed Conduit Measuring Devices*” for information on types of measuring devices acceptable to the Department. This document and additional information related to water measurement are available on the Department’s website at www.idwr.idaho.gov/water-data/water-measurement/

If you have questions concerning this matter, please contact the Department’s Water Distribution Section at 208-287-4800 or Watermaster Neil Shippy at 208-642-4465.

Respectfully,

Rob Whitney
Manager, Water Distribution Section

Enclosures:

*Preliminary Order Requiring Controlling Works and Measuring Devices in Water District 65
Explanatory Information to Accompany a Preliminary Order
IDWR Minimum Acceptable Standards for Open Channel and Closed Conduit Measuring
Devices*

cc:

Nick Miller, IDWR Western Region Manager
Niel Shippy, Water District 65 Watermaster

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

IN THE MATTER OF REQUIRING)
CONTROLLING WORKS AND)
MEASURING DEVICES ON)
DIVERSIONS FROM THE PAYETTE)
RIVER AND TRIBUTARIES IN)
WATER DISTRICT 65)
_____)

PRELIMINARY ORDER

BACKGROUND

On July 7, 1989, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued an order creating Water District 65 (“WD65”), Payette River and tributaries, and a Declaration of Intent: (a) describing the initial steps to organize the water district and elect a watermaster, and (b) limiting the regulation of water delivery within WD65 to parts of the basin as deemed necessary. The order creating WD65 excluded seven pre-existing water districts (65A, 65B, 65C, 65D, 65K, 65L, 65M) within the Payette River basin.¹

On June 30, 1992, the Director issued an Amended Declaration of Intent expanding regulation and control of diversions by the WD65 watermaster to include the North and South Forks of the Payette River and the Deadwood River downstream from Cascade and Deadwood reservoirs to ensure proper delivery of natural flow and released stored water. The Amended Declaration of Intent stated that the watermaster should extend regulation to other portions of the Payette River and its tributaries (excluding the areas and streams within other existing water districts) when resources are available to the watermaster.² In 2023, the WD65 watermaster initiated steps to administer and account for water rights and diversions in other portions of the water district not previously administered.

The WD65 watermaster, under the supervision of the Director, distributes the natural flow of the Payette River and its tributaries, except for those streams administered by Water Districts 65A, 65B, 65C, 65D, 65K, 65L, and 65M. The watermaster also delivers stored water to downstream users via the North and South Forks and mainstem Payette River. Functioning headgates, controlling works, and measuring devices are essential for the watermaster to properly distribute natural flow water rights and stored water in WD65.

The WD65 watermaster relies on a computerized water rights accounting program to determine which water rights are in priority during the irrigation season. The water rights accounting program is a set of computational tools used to quantify natural flow available,

¹ *Order & Decl. of Intent, In the Matter of Creation of Water District No. 65, Payette River and Tributaries* (July 7, 1989).

² *Am. Decl. of Intent, In The Matter of Water District No. 65, Payette River and Tributaries* (June 30, 1992).

natural flow use, and storage use on a daily, after-the-fact basis. Water rights accounting computes available natural flow using streamflow, reservoir, and diversion measurements.

LEGAL PROVISIONS

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

42-701. INSTALLATION AND MAINTENANCE OF CONTROLLING WORKS AND MEASURING DEVICES BY WATER APPROPRIATORS – PROCEDURE UPON FAILURE TO INSTALL AND MAINTAIN – MEASURING AND REPORTING OF DIVERSIONS – PENALTY FOR FAILURE TO COMPLY – ENFORCEMENT PROCEDURE – REPORT FILING FEE.

(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.*

(2) *If an appropriator determines that installation and maintenance of a measuring device required by the director would be burdensome for his diversion, the appropriator may, upon approval of the director, execute an agreement with the director and submit to the director such information and technical data concerning the diversion and pumping facilities as the director determines necessary to establish the relationship of power usage to water withdrawal by any pump used to divert public water.*

(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, or has not executed an agreement in lieu of a measuring device as provided in subsection (2) of this section, 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.

CONCLUSIONS OF LAW

1. The Director is authorized by Idaho Code § 42-701(1) to require the water users or appropriators of any public waters of the state to install and maintain lockable headgates, controlling works, and measuring devices at the point where the water is diverted.
2. The Director has a “‘clear legal duty’ to distribute water” according to the partial decrees issued by the Snake River Basin Adjudication (“SRBA”) District Court. *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017). The SRBA District Court issued the *Final Unified Decree* on August 26, 2014. *Final Unified Decree, In re SRBA*, Case No. 39576 (5th Jud. Dist. Ct. Aug. 26, 2014).
3. Adequate control and measurement of diversions from streams with commingled natural flow and storage water are necessary for the Director to comply with his clear legal duty to distribute water according to decreed, licensed, and permitted water rights.
4. Distribution of water within water districts shall be accomplished by watermasters appointed and supervised by the Director. Proper control and measurement of diversions will ensure:
 - a. The watermaster can distribute water consistent with the prior appropriation doctrine and protect senior priority water rights during times of water scarcity;
 - b. Diversions of water do not exceed the legal limits of the associated water rights; and
 - c. The watermaster can quantify the total amount of water delivered within the water district and the amount of water delivered to the individual water users each year, as required by law.
5. It is necessary for the Director to require the installation of headgates, controlling works, and measuring devices within WD65.

ORDER

IT IS HEREBY ORDERED that the appropriators or users of the public waters in WD65 shall install headgates, controlling works, and measuring devices in accordance with the following provisions:

1. The owners of surface water rights and diversions shall install and maintain lockable headgates and controlling works consistent with Idaho Code § 42-701(1), at each point where water is diverted.
2. Except as noted in numbers 3 and 4 below, the owners of surface water rights in WD65 shall install and maintain measuring devices of a type acceptable to the Department at such point as is most practical below where water is diverted.
3. The requirement to install measuring devices does not apply to domestic and stockwater rights or uses as defined by Idaho Code §§ 42-111 and 42-1401A(11), and in-stream watering of livestock as defined by Idaho Code § 42-113.
4. The requirement to install measuring devices does not apply:
 - a. If the sum of the authorized irrigated acres under the water rights sharing the same diversion is less than or equal to five acres; or
 - b. If the sum of the authorized diversion rates under the water rights sharing the same diversion for any purpose other than irrigation is less than or equal to 0.24 cfs.
5. The deadline to install the required headgates, controlling works, and measuring devices is June 1, 2026.
6. If a dispute or priority delivery call occurs prior to June 1, 2026, the Department or the watermaster may require installation sooner than June 1, 2026.
7. This order shall become effective immediately for any new diversion(s) authorized after the date of this order except those exempted in numbers 3 and 4 above. The water user shall be allowed a reasonable amount of time to install required headgates, controlling works, or measuring devices.
8. Measuring devices acceptable to the Department are identified in the Department's *Minimum Acceptable Standards and Requirements for Open Channel and Closed Conduit Measuring Devices* ("Minimum Acceptable Standards"), attached herein.
9. The Department may consider a variance from the requirement to install measuring devices shown in the Department's Minimum Acceptable Standards. Variance requests must be received by the Department no later than March 1, 2026, and may include the following methods or devices:

- a. Properly functioning closed conduit flow meters installed prior to the date of this order;
 - b. Non-standard devices in open channels or rated sections with approved measurement plans satisfying the requirements of the Minimum Acceptable Standards; or
 - c. Development of a Power Consumption Coefficient (PCC), or use of an hour meter for qualifying diversions and under limited circumstances.
10. Flow meters installed prior to the date of this order that do not meet the established standard for accuracy ($\pm 5\%$) or do not meet the manufacturer installation requirements must be replaced with a meter shown in the Department's *List of Approved Closed Conduit Flow Meters* available at <https://idwr.idaho.gov/files/water-measurement/approved-flow-meter-list.pdf>.
11. If a water user cannot meet the installation deadline, the Department may grant an extension of time. An extension request for each diversion must be submitted to the Department no later than March 1, 2026. Extension requests will be considered on a case-by-case basis. Conditions that may qualify for an extension of time include, but are not limited to, the following:
 - a. Site specific condition(s) that prevent accurate water measurement;
 - b. Delays caused by the requirements of other government entities; or
 - c. The diversion is unused.
12. If a water user fails to comply with the requirements of this order, the Director may instruct the WD65 watermaster to shut off and refuse delivery of water at any non-compliant diversion.

Dated this 10th day of May 2024.



Rob Whitney
Manager, Water Distribution Section

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

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. **Note: the petition must be received by the department within this fourteen (14) day period.** 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 Water Resource 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 service date 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.