

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 65-23493 AND
APPLICATION FOR TRANSFER NO.
78252 IN THE NAME OF ALLEN RANCH
LLLP

**AMENDED INTERLOCUTORY
ORDER AUTHORIZING
CERTAIN TERMS AND
CONDITIONS**

FACTUAL AND PROCEDURAL HISTORY

On Tuesday, December 10, 2013, and Wednesday, December 11, 2013, the Department's Hearing Officer conducted a hearing in connection with the protests filed against application for permit no. 65-23493 and application for transfer no. 78252. The applicant, Allen Ranch LLLP, and the following protestants participated in the hearing:

- Sandra Chess
- Jim Bunce
- Cris McClintick
- Randy McClintick

Protestants West Mountain Properties LLC and West Mountain Water Association Inc. did not appear at the hearing. On December 23, 2013, the hearing officer issued default orders dismissing West Mountain Properties LLC and West Mountain Water Association Inc. from further participation in this matter.

Application for transfer no. 78252 seeks to add points of diversion to the irrigation use authorized by water right no. 65-3111X, but it does not seek to extend the authorized irrigation season.

Application for permit no. 65-23493 seeks, among other things, authorization for an extended irrigation season for the same irrigation use authorized by water right no. 65-3111X.

During the hearing the participating parties agreed to pursue settlement negotiations. The hearing officer adjourned the hearing for two hours to allow the negotiations to proceed. At the end of the adjournment, the participating protestants each informed the hearing officer on the record that they would withdraw their protests if the Department includes the following conditions on any approvals issued in this matter:

Between 4/15 and 10/15, when the water right holder is diverting into Little Rock Creek from Rock Creek from the upper point of diversion located in the NW¼SW¼, Section 3, Township 13 North, Range 3 East, B.M., the watermaster shall ensure between 0.40 cfs and 0.54 cfs is left in Rock Creek to supply downstream water users in Rock Creek.

For the extended irrigation season, the water right holder agrees there will be no use of temporary diversion works at the upper point of diversion, located in the NW¼SW¼, Section 3, Township 13 North, Range 3 East, B.M., after December 1.

Allen Ranch LLLP agreed on the record to accept the proposed conditions if the protests are withdrawn.

Pursuant to Rule 612 of the Department's Rules of Procedure (IDAPA 37.01.01.612), the Department has reviewed the conditions proposed by the parties.

On December 24, 2013, the Department issued an *Interlocutory Order Authorizing Certain Terms and Conditions* to implement the settlement agreement proposed by the participating parties.

On January 2, 2014, the Department received a *Petition for Clarification of Interlocutory Order Dated December 24, 2013* ("Petition") from Allen Ranch LLLP.¹ In its Petition, Allen Ranch LLLP asks the Hearing Officer to clarify two items. The first item is that the flow of water from Rock Creek into Little Rock Creek from December 1 to March 14 each year would not be blocked. Allen Ranch LLLP asserts that allowing flow from Rock Creek into Little Rock Creek from December 1 to March 14 would help to avoid the risk of flooding and resource damage at the confluence of the two streams and at downstream properties. The second item is that the bypass flow described in one of the proposed approval conditions is intended for the benefit of "those downstream water rights identified at the hearing, not new applications."

DISCUSSION

There was testimony at the hearing that during high flow conditions the majority of the flow of water moving down Rock Creek flows rather naturally into Little Rock Creek by inertia. However, the question before the Department is whether the water right applications should be approved as proposed, not whether it is appropriate for water in excess of existing water rights to flow from Rock Creek into Little Rock Creek to prevent flood damage. In the Conclusions of Law of the original interlocutory order, the Hearing Officer included the following statement:

This proposed condition restates the legal fact that the right holder is not authorized to divert the flow of Rock Creek or impede its flow outside the periods of use stated on the right holder's water right(s).

The Hearing Officer acknowledges that this statement could be interpreted to indicate that the flow of water from Rock Creek into Little Rock Creek to prevent flood damage is not authorized. The Hearing Officer does not intend to address the flood damage question. To preserve the question of flood damage prevention for another forum, the Hearing Officer will change this statement as follows:

¹ The Petition came from Allen Ranch LLP. In the record the applicant appears variously as Allen Ranch LLLP and Allen Ranch LLP. At the hearing, the attorney for Allen Ranch clarified that it is actually Allen Ranch LLLP, which is consistent with the publicly available records of the Idaho Secretary of State.

This proposed condition restates the legal fact that Allen Ranch LLLP's water rights do not authorize the installation of physical works that would cause water to flow from Rock Creek into Little Rock Creek outside the periods of use stated on the right holder's water right(s).

As for the proposed agreement that Allen Ranch LLLP will leave 0.40 cfs to 0.54 cfs in Rock Creek to supply downstream water users, the record does not indicate that the proposed condition was considered relative to new downstream appropriations. Nevertheless, the Hearing Officer agrees that this is an important question that appears to have been overlooked during the negotiations among the parties. This order shall be amended to clarify this point.

AMENDED CONCLUSIONS OF LAW

The first proposed condition requires that 0.40 cfs to 0.54 cfs must be passing Allen Ranch LLLP's upper diversion point in order for Allen Ranch LLLP to divert water from Rock Creek pursuant to its water right(s). The Department accepts the proposed condition as requested by the parties, but with the addition of the word "existing" to clarify that Allen Ranch LLLP's agreement to the condition is not intended for the benefit of downstream water uses established in the future.

The second proposed condition, which prohibits the use of temporary diversion works at the upper point of diversion, would prevent the right holder from impeding the flow of Rock Creek down its natural course from December 1 of each year until the authorized irrigation season commences the next year. This proposed condition restates the legal fact that Allen Ranch LLLP's water rights do not authorize the installation of physical works that would cause water to flow from Rock Creek into Little Rock Creek outside the periods of use stated on the right holder's water right(s). Because only application for permit no. 65-23493 proposes the extended irrigation season ending on November 30, and the transfer does not propose such an extended season for water right no. 65-3111X, this proposed condition is applicable only to the application for permit and not to the application for transfer. The Department should include the proposed condition on any approval issued in connection with the application for permit, but it is not necessary for any approval issued in connection with the application for transfer.

AMENDED ORDER

IT IS HEREBY ORDERED that any permit or water right license issued in connection with application for permit no. 65-23493 and any approval issued in connection with application for transfer no. 78252 shall include the following condition:

Between 4/15 and 10/15, when the water right holder is diverting into Little Rock Creek from Rock Creek from the upper point of diversion located in the NW¹/₄SW¹/₄, Section 3, Township 13 North, Range 3 East, B.M., the watermaster shall ensure between 0.40 cfs and 0.54 cfs is left in Rock Creek to supply *existing* downstream water users in Rock Creek.

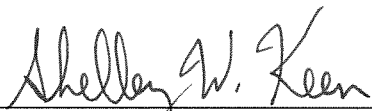
IT IS FURTHER HEREBY ORDERED that any permit or water right license issued in connection with application for permit no. 65-23493 shall include the following condition:

For the extended irrigation season, the water right holder agrees there will be no use of temporary diversion works at the upper point of diversion, located in the NW¼SW¼, Section 3, Township 13 North, Range 3 East, B.M., after December 1.

IT IS FURTHER HEREBY ORDERED that because the Department and Allen Ranch LLLP have agreed to the terms of settlement, the protests by Sandra Chess, Jim Bunce, Cris McClintick, and Randy McClintick are deemed **WITHDRAWN**.

IT IS FURTHER HEREBY ORDERED that this order is an interlocutory order issued pursuant to Rule 710 of the Department's Rules of Procedure (IDAPA 37.01.01.710). Any party aggrieved by this order may petition the hearing officer to review the order pursuant to Rule 711 of the Department's Rules of Procedure (IDAPA 37.01.01.711). Any such petition shall be submitted to the hearing officer by January 29, 2014.

Dated this 15th day of January, 2014.



SHELLEY W. KEEN
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2014, I mailed a true and correct copy, postage prepaid, of the foregoing AMENDED INTERLOCUTORY ORDER AUTHORIZING CERTAIN TERMS AND CONDITIONS to the person(s) listed below:

RE: Transfer No. 78252 65-3111X
Application for Permit 65-23493

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A handwritten signature in cursive script, reading "Jean Hersley", is written over a horizontal line.

Jean Hersley
Technical Records Specialist II