



WA
State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

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Interim Director

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DEPARTMENT OF
WATER RESOURCES

February 29, 2012

To whom this may concern:

It has come to our attention that there may have been an error in the process of sending out the Order Denying Petition to Postpone Hearings. Enclosed is a copy of two pages that may have not been included with that. Thank you, and sorry for any inconvenience.

Rachel Sommer
Administrative Assistant

purposes. The Department designated the application as Application No. 65-23457.

2. The stream source for Right Nos. 65-3111X, 65-3111A, and 65-13088, and for Application Nos. 65-23451 and 65-23457 is variously referred to as Rock Creek, Richard Creek, or unnamed stream.
3. In conformance with the requirements of Idaho Code §§ 42-203A(2) and 42-222(1), the Department caused notice of each of the four applications to be published.
4. The two Allen applications were each protested by more than ten individuals or organizations. Allen protested the West Mountain and Ford applications. Allen, West Mountain, Ford, and all the protestants from the Allen applications will collectively be called "the Parties" in the remainder of this order.
5. After consulting Allen's attorney, on January 18, 2012, the Department scheduled a hearing to consider Allen's two applications on May 8 and 9, 2012. The Department notified all the Parties of the hearing dates.
6. After consulting Allen's attorney, on January 18, 2012, the Department scheduled a hearing to consider West Mountain's application and Ford's application on July 17 and 18, 2012. The Department notified all the Parties of the hearing dates.
7. On January 20, 2012, Allen's attorney notified the Department that Allen would not be available for the May 8 and 9, 2012, hearing, and he requested that the hearing be rescheduled.
8. On February 8, 2012, in response to the Department's request for clarification of the rescheduling request, Allen's attorney notified the Department that Allen "will be out of town and out of the country from May through July." The response provided no further explanation.

CONCLUSIONS OF LAW

Governing Statutes and Rules

Idaho Code § 42-106 states, "As between appropriators, the first in time is first in right."

Idaho Code § 42-203A states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved

source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

Water Appropriation Rule 40.01.d (IDAPA 37.03.08.040.01.d) states:

An applicant may request in writing that commencement of processing of his or her application be delayed for a period not to exceed one (1) year or that processing be interrupted for a period not to exceed six (6) months. The Director at his discretion may approve the request unless he determines that others will be injured by the delay or that the applicant seeks the delay for the purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay. The Director may approve a request for delay for a shorter period of time or upon conditions, and may renew the approval upon written request.

Analysis

To meet the review requirements of Idaho Code §§ 42-203A and 42-222(1), particularly the sufficiency of water supply and injury review requirements, the Department must know and account for the quantity, timing, and location of each appropriation from the same water source. This is especially true on a small stream such as the one that is the source for the water rights and proposed water rights in the four applications. The hearing for Allen's applications was scheduled before the West Mountain and Ford applications because the Allen applications were filed first. If the Allen applications are not considered before the West Mountain and Ford applications, then a complete understanding of the prior appropriations from the source stream will not be available when the West Mountain and Ford applications are reviewed, and the Department would risk making an incorrect determination of the water supply and the potential for injury in the West Mountain and Ford cases. One option would be for the Department to delay both hearings until after July so the Allen applications can still be addressed first. However, delaying the hearing for the West Mountain and Ford applications would injure West Mountain and Ford by further delaying their opportunity to have their applications considered by the Department. Water Appropriation Rule 40.01.d provides for a delay in processing an application only if "others will not be injured by the delay."

In addition to the harm that could be done to West Mountain and Ford by delaying the hearings, the hearing officer must also consider the number of Parties involved. With so