

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

**IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 65-23451 IN THE NAME OF)
ALLEN RANCH LLP, APPLICATION FOR)
PERMIT NO. 65-23457 IN THE NAME OF)
GLENN FORD AND JOYCE FORD,)
APPLICATION FOR TRANSFER NO.)
77121 IN THE NAME OF ALLEN)
RANCH LLP, AND APPLICATION FOR)
TRANSFER NO. 77209 IN THE NAME OF)
WEST MOUNTAIN WATER)
ASSOCIATION, INC.)
_____)**

**ORDER DENYING PETITION
TO POSTPONE HEARINGS**

FINDINGS OF FACT

1. This order addresses contested cases for the following four applications (“four applications”):
 - a. On March 16, 2011, Allen Ranch, LLP, (“Allen”) applied to the Department of Water Resources (“Department”) to transfer the point of diversion of Water Right No. 65-3111X. The source of water for Right No. 65-3111X is an unnamed tributary of the North Fork of the Payette River. The Department designated the transfer application as Application No. 77121 (“Allen transfer”).
 - b. On April 18, 2011, Allen applied to the Department to appropriate 2.70 cfs of water from the same unnamed tributary of the North Fork of the Payette River that is the source of water for Right No. 65-3111X. Allen proposes to use water for irrigation and stockwater purposes. The Department designated the application as Application No. 65-23451.
 - c. On April 27, 2011, West Mountain Water Association, Inc., (“West Mountain”) applied to the Department of Water Resources (“Department”) to transfer the point of diversion and place of use for Water Right Nos. 65-3111A and 65-13088. The source of water for Right Nos. 65-3111A and 65-13088 is the same stream source for Right No. 65-3111X and Application No. 65-23451. The Department designated the transfer application as Application No. 77209 (“West Mountain transfer”).
 - d. On June 16, 2011, Glenn Ford and Joyce Ford (“Fords”) applied to the Department to appropriate 0.04 cfs of water from the same stream that is the source of water for Right Nos. 65-3111X, 65-3111A, and 65-13088, and for Application No. 65-23451. Fords propose to use water for aesthetic

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

therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the 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; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Idaho Code § 42-222(1) states, in pertinent part:

Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon

. . . .

* * *

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the

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."

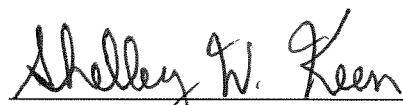
In addition to the harm that could be done to West Mountain and Ford by delaying the hearings, the hearing officer must also consider the number of Parties involved. With so

many Parties involved in the Allen applications, it is extremely difficult to find hearing dates that are convenient for everyone. Further delay is not in the public interest.

ORDER

Allen's petition to delay the hearings for the four applications is **DENIED**.

Dated this 24th day of February, 2012.



Shelley W. Keen
Hearing Officer