

MEMORANDUM

TO: Files

FROM: Steve Lester 

DATE: April 28, 2011

RE: Complaint – J. R. Allen 65-3111X and West Mountain Water Association
65-3111A, 65-13088

James and Isabel Bunce visited the office yesterday to file a transfer application for West Mountain Water Association, Inc. They are officers/directors of the association. The visit was part of an ongoing process for multiple owners and several rights from the same stream. This has included Bunce calls to the governor's office and Bunce calls/visits with the director, allocation bureau chief and other staff. Based on that history, this memo is a reasonable substitute for a written complaint generally required before the department responds.

They discussed the authorized POD for Allen right 65-3111X. They stated the following concerns:

- Allen abandoned use of this POD.
- Allen has not "closed" the diversion.
- The ditch still diverts water from the creek, at least sometimes.
- The diversion of water causes flood damage, at least to Bunce property.

They showed me various photographs of the alleged damages. The photos are part of a notebook Bunce keeps for association records.

Bunce asked if Allen is allowed to keep this "abandoned POD" open and if the department will force Allen to "close the diversion" to prevent property damages.

Bunce also said Allen sometimes diverts the entire creek at the "Upper Allen" POD located less than ¼ mile upstream from the association's licensed POD. They wondered if he could keep diverting any water from that point without water right approval.

65-3111X Decreed POD

Angie Grimm and I visited the site last November. I reviewed Angie's 11/23/2010 memo summarizing that visit and also discussed this with her today. The POD did not appear to have been used for quite a while (about 6 years according to Allen). The diversion seemed to be abandoned and in a state of disrepair (remnants of old tarp etc.). We could not recall if the decreed POD was capable of inadvertently diverting water. Photos in the memo do not clearly answer the question. It is possible the diversion is not adequately sealed to prevent diversion under certain conditions.

Although it appears only Allen has used this diversion in somewhat recent times, it is the decreed POD for 3 splits of the original right: 65-3111A for association, 65-3111F for BOR, 65-3111X for Allen. This implies a shared responsibility to prevent unintentional diversion at this point.

If Allen is intentionally diverting from this point (unlikely), subsequent damages to property are civil problems. Otherwise, the situation is grayer. Who has legal responsibility to prevent unintended diversion at this point? Can the department require 1 of 3 right holders sharing the same authorized POD to bear full responsibility for the diversion?

Here is a suggested response to this complaint: letter to all 3 parties stating water cannot be diverted from this decreed POD unless beneficial use under the water right(s) will occur. The right holders should be notified of their shared responsibility to prevent unintentional diversion of water. Finally, damages from intentional or unintentional diversion of water are civil matters between parties.

Curtailment of "Upper Allen" POD

This diversion, along with the "Lower Allen" POD downstream from the decreed POD and from the subdivision, is not authorized at this time. Allen filed a transfer application to change the decreed POD to the Upper and Lower Allen diversions observed in the November visit.¹ There are conflicting stories regarding how long the upper diversion has been in place and in use – "forever" (Allen)² or about 2 years (Bunce). Observation of the upper diversion and various points along that ditch during the November visit confirmed the ditch has been in place for many years. Allen said the upper ditch has been used since his grandfather homesteaded the place. We cannot independently confirm how long it has been actively used.

Curtailment of at least the Upper Allen POD presents problems. The association is in the same situation: diverting 65-3111A from an unauthorized POD. That decreed right covers about half of the subdivision homes. The other homes are covered by 65-13088, diverted from the licensed POD. Both association rights have always been diverted from the same point according to Bunce. If that is true, subdivision right 65-3111A has been incorrectly decreed twice. The association POD issue will be resolved if its transfer is approved.

Curtailing one owner without curtailing the other is not justified.

Ordering the stream to be regulated by the Payette Watermaster is possible, although that will not provide timely relief. This will also require all the other rights from this source to be regulated. There are currently 9 rights (8 owners) confirmed from this stream. Most of the diversions are uncontrolled plastic pipes without measuring devices. It is unlikely that any of the users have paid water district assessments. The watermaster may lack enough help to regulate the stream this year.

Ordering Allen to install proper diversion works and a measuring device for the upper diversion is possible, although that will not provide timely relief (high flows etc.). An order along those lines probably should include the Lower Allen diversion since use from both cannot exceed 2.70 cfs. Of course, mandating this for only one diverter is hard to justify. Assuming Allen did install adequate controls, direct department regulation of the diversion(s) instead of watermaster regulation does not seem appropriate.

¹ Allen also filed application 65-23451 for these diversions: expand irrigation season plus year around stock water.

² This implies the Upper Allen diversion and the decreed POD ("abandoned 6 years ago") have been used together sometimes.

Installing proper controls for at least the upper diversion during this irrigation season could result in significant impacts to Allen's irrigation. In previous conversations, he said he lost about \$10,000 due to problems last year (alleged tampering with his upper diversion etc.).

I recommend the following solution while the applications are pending:

- Allen can use his upper diversion if enough water remains in the creek to satisfy the subdivision diversion and all other downstream diversions on this creek. He can use his lower diversion if water is available at that point (no other POD's below that point). Total use from his upper and/or lower diversion is limited to 2.70 cfs while his transfer application is pending.
- Association can continue diverting both its rights from the single POD while its transfer application is pending. Diverting 65-3111A from this point cannot deprive junior rights of water while the transfer is pending. Association use is limited to 0.05 cfs.
- Failure to comply with these requirements will result in curtailment of an otherwise unauthorized diversion.

Water shortages do not appear to be the problem. The recommended solution could provide Allen and the subdivision with adequate water while the applications are being resolved. There are obvious problems with this approach, but it might work for this year, providing time for a better solution.

Possible water right approvals should include rigorously enforced conditions for diversion works and measuring devices where needed. Processing the applications in May-June will determine if protests are filed. This will help determine the next steps for this conflict.