



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

July 2, 2013

RE: Preliminary Order Appointing Lateral Manager for the Ellis Subdivision Lateral

Dear Water User:

Enclosed please find a copy of the Preliminary Order regarding the above referenced matter. This order appoints Dave McFarland of Carmen, Idaho as lateral manager for the Ellis Subdivision Lateral Ditch. Mr. McFarland will be contacting each of the users on the lateral ditch to discuss each user's irrigation system and water rights. The Idaho Department of Water Resources (IDWR or Department) asks that you fully cooperate with the lateral manager as he attempts to understand your systems and properly deliver each user's water rights.

Also enclosed is an informational sheet that explains options for responding to preliminary orders. Please note that any party subject to the order may file a petition for reconsideration within fourteen (14) days of the service date of the order, which is the date of this letter. The Department will act upon petitions within twenty-one (21) days of their receipt.

Please contact me directly at 208-287-4959 if you have any questions concerning the attached order.

Sincerely,

Tim Luke
Chief, Water Compliance Bureau

Encl: *Preliminary Order*
Responding to Preliminary Orders issued by IDWR

cc: Dave McFarland, Lateral Manager
Brian Keller, Water District 75D Watermaster
IDWR Eastern Region
Rob Harris, Attorney
Dan Steenson, Attorney

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF THE)
APPOINTMENT OF A LATERAL)
MANAGER FOR THE ELLIS)
SUBDIVISION LATERAL)
_____)

PRELIMINARY ORDER

This matter having come before the Department of Water Resources (“IDWR” or “Department”) as a result of the filing of a petition to appoint a lateral manager, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On June 10, 2013, the Department received a petition (“petition”) from Rob Harris, attorney representing Jack and Diane Ellis, and Lee and Ann Lieberman (“petitioners”), water right holders for water delivered through the Ellis Subdivision Lateral Ditch (“Ellis Lateral”), requesting appointment of a lateral manager for the ditch.
2. The water users on the Ellis Lateral, diverting from Smout Creek, tributary to Freeman Creek, located within Water District 75D, Carmen Creek and tributaries, near Carmen in Lemhi County, have been unable to select a lateral manager as provided by law.
3. The petitioners own water right nos. 75-14352, 75-14356 and 75-14768 (Ellis), and 75-14353 and 75-14357 (Lieberman) for irrigation use on their respective properties. Water is delivered through the Ellis Lateral to their respective properties.
4. The petitioners allege that disputes have arisen among lateral users concerning proper distribution of water from the lateral, and the rights of the petitioners have been and are being injured.
5. The petitioners requested that the Department appoint a lateral manager for the entire Ellis Lateral.
6. On June 13, 2013, the Department provided written notice of the petition to water users

- from the Ellis Lateral and to the watermaster of Water District 75D and provided 14 days for written response to the petition.
7. On June 19, 2013, the Department received a letter from Lucy Littlejohn, a user and right holder on the Ellis Lateral. Ms. Littlejohn requested an exemption from sharing in the cost of a lateral manager in 2013, because the appointment is being made too late in the season and she does not anticipate using water this year.
 8. The Department received no other comments or responses to its June 13th notice. Department staff did receive a phone call from the Water District 75D watermaster prior to the Department receiving the June 10th written petition requesting appointment of a lateral manager. The watermaster provided some description of the lateral ditch system
 9. The Department has reviewed the petition, responses and other available information.
 10. The Ellis Lateral diverts water from Smout Creek at two diversions located in Township 21N, Range 23E, Section 31, NENE. The two ditches are known as the Upper and Lower Ditches. At times of low flow water is typically diverted to the Upper Ditch only. The Upper Ditch has a measuring device which was described as adequate by the Water District 75D watermaster. Department records list eleven separate water rights and six different property owners receiving water through the Ellis Lateral for irrigation purposes. All of the users in the Ellis Lateral can receive delivery of their water through the Upper Ditch.

ANALYSIS

Current problems on the Ellis Lateral appear to be concerns about the distribution of water from the Upper Ditch during low flow conditions when only the senior priority rights on the lateral can be delivered. There are six water rights and five separate right holders that share a common senior priority date of May 1, 1915. The users may need to initiate a rotation schedule in order to more efficiently irrigate their respective properties during low flow periods when only all or a portion of the May 1, 1915 priority rights can be delivered. Information made available to the Department as a result of the petition indicates that two separate rotation schedules were discussed among the lateral users but the users may not have been in complete agreement concerning implementation of the schedules. It is not clear to the Department that users are

closer to accepting any rotation schedule since the petition was submitted to the Department on June 10, 2013. Other information made available to the Department indicates that there are a number of measuring devices and head gates throughout the Ellis Lateral system. It is not clear if all of the measuring devices and head gates are adequate or need maintenance. Present and past problems with distribution of water on the lateral ditch may be caused by lack of measurement and control of water, ditch maintenance, and misunderstandings of appropriate allocation of water and who is authorized to allocate and control the distribution of water. Ideally, to reduce disputes over distribution of water, every diversion from the Ellis Lateral to each individual user should have a controllable head gate and measuring device and someone responsible for proper distribution of water to all users. The Department recognizes the financial burden that this may impose on water users. However, some level of measurement and control is necessary and should be a goal for all water users in the coming years to avoid future disputes up and down the ditch.

Appointment of a lateral manager for the Ellis Lateral is necessary to assist water users with their current problems and who can assist water users in developing a plan for future measurement, control and management as needed.

Installation of additional measurement and control devices during the current irrigation season may not be necessary at this time because it is not yet clear where additional measuring devices are the most critical and because it may interrupt irrigation at a time when water needs are greatest. However, an appointed lateral manager should have the discretion and ability to require installation or maintenance of measuring devices and controlling works this year if it is necessary to properly deliver water and resolve disputes on the ditch.

CONCLUSIONS OF LAW

1. Idaho Code § 42-1301 provides in pertinent part:

Where three (3) or more parties take water from the same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or distributing ditch or laterals or distributing ditches such parties shall constitute a water users' association known as "Water Users Association of Lateral or Laterals."

2. Idaho Code § 42-1308(1) provides in pertinent part:

- (1) In the event that the water users or the board of directors of any lateral or ditch association do not meet and elect a lateral manager as provided for in this chapter or a lateral manager is not selected as otherwise provided by law, then, the director of the department of water resources may appoint and fix the compensation of a lateral manager, upon the written petition of a water user alleging that water is not being apportioned and distributed properly among the users from the ditch or lateral and that the rights of the water user are being injured thereby.
- (2) If the water users also have failed to elect association officers, the lateral manager appointed by the director may exercise the duties of the association officers, including the making and collection of assessments, but not the borrowing of money, as is necessary to achieve the proper allocation and distribution of water from the ditch or lateral and without regard to the statutory dates of the performance of these duties.
- (3) The lateral manger appointed by the director shall hold office only for the period of time fixed by the order of appointment and in no event beyond the remainder of the year in which appointed.

* * *

- (6) Based upon a review of the petition, the responses thereto, the recommendations of the watermaster, if any, and any investigation by the department of water resources, the director shall issue an order with findings either appointing a lateral manager or declining to appoint a lateral manager. Any person aggrieved by the order of the director shall be entitled to request a hearing before the director pursuant to section 42-1701A, Idaho Code.

3. The Department should appoint a lateral manager for water right holders on the Ellis Lateral. The water right holders served by the lateral manager will constitute a water users association that will be referred to as the Ellis Subdivision Lateral Water Users Association.

ORDER

NOW THEREFORE, pursuant to Idaho Code § 42-1308, the Department does HEREBY ORDER and APPOINT Dave McFarland, to serve as lateral manager of the Ellis Subdivision Lateral Water Users Association until October 31, 2013.

The lateral manager shall have the authority to act as established under Title 42, Section 13, Idaho Code to provide for the proper distribution of valid water rights for each party within the Ellis Subdivision Lateral Water Users Association.

IT IS FURTHER ORDERED that the lateral manager be compensated for services as follows: An amount of \$25.00 per hour plus mileage at 55 cents per mile. Compensation to the lateral manager shall be divided evenly among all of the users on the lateral and payable on a monthly basis as determined by the lateral manager.

IT IS FURTHER ORDERED that the lateral manager shall deliver water rights from the lateral in accordance with each user's authorized water right rate(s) of diversion and priority date(s). The lateral manager may implement a rotation schedule only upon the unanimous consent of the lateral water users.

IT IS FURTHER ORDERED that a user may be exempt from assessments by the lateral manager provided that the user notifies the lateral manager on or before July 16, 2013 that he or she will not use water for the remainder of the year and upon verification by the lateral manager that the user has not diverted water from the lateral.

IT IS FURTHER ORDERED that the lateral manager may require installation of measuring devices and controlling works if necessary to properly distribute water to lateral users.

Dated this 2ND day of July, 2013.



Tim Luke, Chief
Water Compliance Bureau

CERTIFICATE OF SERVICE

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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, request 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 Rules of Procedure 302 and 303.

FINAL ORDER

The Department 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:

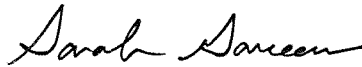
- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July 2013, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho. Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.

Documents served: **Preliminary Order Appointing Lateral Manager for the Ellis Subdivision Lateral**

A handwritten signature in cursive script, reading "Sarah Garceau", written in black ink.

Sarah Garceau
Technical Records Specialist
Idaho Department of Water Resources

BETH ANNE O CONNOR WALLACE
11920 NARCISSUS RD
JACKSON CA 95642

BESSIE Y HALVERSON
25 W 300 N
RUPERT ID 83350

KEVIN A AND ANDREA C AVERY
51 HWY 28
SALMON ID 83467

JEROLD W WALLACE
PO BOX 126
CARMEN ID 83642

LEE AND ANN LIEBERMAN
PO BOX 180
CORA WY 82925

LUCY HINCKLEY LITTLEJOHN
PO BOX 193
CARMEN ID 83462-0193

JACK F AND DIANE M ELLIS
PO BOX 301
SALMON ID 83467

KEVIN J AND MARY J KELLER
PO BOX 36
CARMEN ID 83462