

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

<b>IN THE MATTER OF APPLICATION FOR ) PERMIT NO. 65-23457 IN THE NAME OF ) GLENN FORD AND JOYCE FORD )</b>	<b>PRELIMINARY ORDER APPROVING APPLICATION</b>
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**PROCEDURAL HISTORY**

On June 16, 2011, Glenn Ford and Joyce Ford (“the Fords”) filed Application for Permit to Appropriate Water No. 65-23457 (“application”) with the Department of Water Resources (“IDWR” or “Department”). IDWR published notice of the application in the manner set forth in Idaho Code § 42-203A. Allen Ranch LLP (“Allen”) protested the application.

On July 17, 2012, IDWR conducted a hearing in Boise, Idaho, to take evidence in connection with the application.

At the hearing, the Fords represented themselves. Glenn Ford testified for the Fords. Attorney Bruce M. Smith represented Allen. Allen did not testify or call any witnesses.

Allen’s protest states that it is based on “inadequate supply and improper diversion structure.”

During the hearing, the hearing officer admitted the following exhibits:

- A Overview of the Ford property
- B Design details of the diversion and delivery system
- 1 Table of Rock Creek/Richard Creek water rights
- 3 *GPM/GPH Flow based on PVC pipe Size*

During the hearing, the hearing officer took notice of the following: the application file compiled by IDWR, water district records for district 65, water measurement and stream flow measurements from IDWR and other agencies, past IDWR holdings as they are relevant to the application, and well driller reports or logs.

Based on the administrative record, including the application file and evidence and testimony presented at the hearing, the Hearing Officer finds, concludes and orders the following:

**FINDINGS OF FACT**

1. On June 16, 2011, the Fords filed Application for Permit to Appropriate Water No. 65-23457 with IDWR. The application does not propose a new use of water; it was filed to bring a pre-existing water use into compliance with Idaho water law. The application seeks authorization for the diversion of 0.04 cfs from a stream in the NE¼SW¼, Section 3,

Township 13 North, Range 3 East, B.M., for use in an artificial waterfall. The place of use described in the application is also in the NE¼SW¼, Section 3, Township 13 North, Range 3 East, B.M.

2. The source stream is not named by the United States Geological Survey. Locally, the source stream is known as Rock Creek or as Richards Creek. Water rights from this source that are not the subject of this hearing state the source is an “unnamed stream” or “Rock Creek”. The Department recently completed an administrative process for two other rights from this source. During that process, the Department determined the source should be called Rock Creek.
3. In the application, the applicants provided the following textual descriptions of their water use:

4” plastic pipe from culvert to top of waterfall, Pipe delivers water to waterfall where it falls into tank to another pipe, returning [sic] it to Rock Creek. No water is consumed [sic].

This request is for use of a small amount of water to be diverted from Rock Creek to a water feature on my property. The pipe will be inserted into a culvert approx 120’ above the water feature where it will travel in the pipe to the top of the water feature (waterfall). The water will then travel down the waterfall approx 15’ where it is collected in a 100 gallon plastic tank. An overflow pipe in the tank then returns the water back to Rock Creek. No water is used or consumed in this process. This waterfall is for esthetics [sic] only.

4. Mr. Ford designed and constructed the diversion system and the water feature as he described it in the application. Mr. Ford provided additional details in his testimony. In the culvert, Mr. Ford installed a “V” shaped piece of corrugated metal to funnel Rock Creek water into a 4-inch flexible PVC pipe. Approximately 120 feet of buried 4-inch PVC pipe carries water via gravity to the top of the 15-foot rock water feature. Buried beneath the waterfall is a 100-gallon tank that catches all of the water that flows over the waterfall and through a metal grate. To prevent water loss caused by splashing, Mr. Ford installed rubber matting around and beneath the rock waterfall and the buried tank to catch water and direct it into the tank. The buried tank is equipped with an overflow outlet that allows water to flow back to Rock Creek through a 3-inch PVC pipe.
5. Exhibit B shows that Mr. Ford proposes to modify the present diversion system by installing a “T”-shaped pipe fitting and a gate valve in the 4-inch PVC pipe about 100 feet from the point of diversion and before the water reaches the waterfall. The “T” pipe fitting and gate valve will allow Mr. Ford to control the flow and quantity of water to the waterfall and will return water in excess of 0.04 cfs to the stream before the water reaches the waterfall. The “T” fitting and a gate valve configuration can be installed inches from the point of diversion in the creek if required by IDWR.

6. There was sufficient water in Rock Creek to operate the Fords' water feature from early spring to mid-autumn in 2010. Rock Creek has not been dewatered by the Fords' use of water for the waterfall.
7. To operate the water feature described in the application, water need not be delivered under pressure to the place of use. Due to the slope of the Fords' property, water can flow to the top of the water feature, cascade over the waterfall, and flow back to the source stream without being pressurized. Therefore, while the 4-inch pipeline employed by the Fords is capable of conveying more than the 0.04 cfs of water specified in the application, it can be utilized to convey only the requested 0.04 cfs of water.
8. The diversion from Rock Creek was not authorized when the waterfall was constructed by the Fords. On September 10, 2010, IDWR sent a Cease and Desist notice to the Fords. The notice stated that the Fords must stop diverting Rock Creek water by October 15, 2010. By the time the Fords received the notice, the diversion from Rock Creek had already been removed. Since then, the Fords have not diverted water for their waterfall.
9. The Fords' diversion of water occurs within Water District 65. The watermaster of Water District 65 regulates the diversion and use of surface water within Water District 65.
10. The Idaho Department of Fish and Game does not consider Rock Creek to be a fishery.
11. Allen owns Water Right 65-3111X, which has a June 1, 1984, priority date. Right 65-3111X authorizes the irrigation of 83 acres of land with 2.7 cfs of water diverted from Rock Creek. Allen's authorized point of diversion for Right 65-3111X is located within the NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>, Section 3, Township 13 North, Range 3 East, B.M. The Allen diversion from Rock Creek is approximately 0.24 miles downstream of the Fords' proposed diversion.
12. In addition to the Allen right, there are six other water rights with points of diversion from Rock Creek downstream of the Fords' proposed diversion. Information about the six rights is provided in the table below.

Right No	Priority Date	Diversion Rate (cfs)	Point of Diversion (all in Township 13 North, Range 3 East, B.M.)	Purpose	Owner
65-1880	8/15/1968	0.01	NWSE	DOMESTIC	CARMONA, CINDI BETHEL
65-3111F	6/1/1894	0.40	NWSE	IRRIGATION	UNITED STATES DEPT OF RECLAMATION
65-7272	4/13/1972	0.02	NWSE	DOMESTIC	HINES, ERNESTINE M; HINES, GUS
65-8012	4/1/1960	0.02	SWNE	DOMESTIC	DORMAN, DARRELL H
65-8808	5/1/1966	0.04	NWSE	DOMESTIC	MC CLINTICK, CRIS A; MC CLINTICK, RANDY; MC CLINTICK, TERRY
65-10439	6/1/1967	0.04	NWNE	DOMESTIC	FORREY, BRETT; FORREY, RAY

13. Rock Creek flows onto the Fords' property from the southwest via a culvert beneath a private road. Both the point of diversion and the point of the return of water to Rock Creek are on the Fords' property. There are no points of diversion appurtenant to other water rights between the point of diversion and the point of return flow proposed in the Fords' application.
14. IDWR personnel measured the flow in Rock Creek on November 18, 2011, and on December 21, 2011, and the creek flows were 0.90 cfs and 1.0 cfs, respectively. Both measurements were taken approximately 0.10 mile downstream from the Fords' proposed point of diversion on Rock Creek, adjacent to West Mountain Road.
15. The Fords' are retired and have a source of income. The waterfall and, for the most part, the diversion and delivery system, have already been financed and constructed.
16. The application proposes a non-consumptive use of water from Rock Creek. The Fords' system is designed to capture the water used in the waterfall and return it back to the creek. Some insignificant quantity of water may be lost to evaporation from the waterfall, but it is not likely to be much different from the amount of water lost to evaporation if the water were left in the stream and exposed to the air. Insignificant loss occurs in nearly every water use administered by IDWR as non-consumptive. Water uses are considered non-consumptive when it is extremely impractical, if not impossible, and unnecessary to quantify this insignificant loss.
17. The applicants contacted Nick Miller of IDWR for guidance as to the type of measuring devices required by IDWR. Mr. Miller directed the applicants to Department guidelines for diversion structures and measuring devices. The references did not exactly fit the waterfall and conveyance system proposed by the Fords. Nevertheless, it is possible to acquire or construct a measuring device, such as a small Parshall flume or V-notch weir, and controlling works sufficient to quantify and regulate the flow of water in the system proposed by the Fords.

## ANALYSIS

Mr. Ford designed and installed the waterfall and conveyance system described in the application and operated it for at least five months in 2010. He implemented conservation measures, such as the rubber matting, closed piping, and the buried holding tank, so that the water diverted from the creek is returned to the creek. Mr. Ford provided credible testimony that his use of Rock Creek water is non-consumptive. In addition, Mr. Ford provided credible testimony that his diversion of water has not and would not dewater the creek as it flows across his property.

Allen's protest states that he thinks the water supply is inadequate and the diversion system improper. Mr. Allen did not testify or call witnesses to testify on his behalf and it was not clear from the hearing whether Mr. Allen meant that he did not think the water supply was adequate for the proposed use or if the Rock Creek water supply was inadequate to satisfy this proposed use as well as the senior rights on the Creek. No testimony was offered alleging injury to Rock Creek water users.

Regardless of what Allen's protest meant regarding the adequacy of the water supply, the Fords demonstrated that there was water present in Rock Creek to operate the waterfall from spring to autumn. Additionally, IDWR staff verified Rock Creek flows of approximately 1.0 cfs, far more than the diversion rate proposed in the application, in November and December of 2011. Fords also showed that their water use would not injure other water users when their system is maintained and operated properly. Because Fords' water use is non-consumptive, and because Fords return the water diverted from Rock Creek back to the creek without bypassing any diversion points for any other water rights, Fords' water use does not reduce the quantity of water available for other diversions from Rock Creek.

The second prong of the Allen protest is that the diversion system is improper. During the hearing, Mr. Allen's attorney elaborated that he meant the diversion system developed and operated by the Fords is not consistent with the application. Specifically, he alleged that the Fords will be diverting approximately 240 gpm (0.54 cfs) through the 4-inch pipe and not the roughly 18 gpm that equates to 0.04 cfs. Mr. Allen's attorney alleged that a system properly designed to only divert 0.04 cfs would have to be restricted to a 0.29-inch diameter pipe. To support this contention, Allen offered Exhibit 3, *GPM/GPH Flow based on PVC pipe Size*, available at the [www.flexpvc.com](http://www.flexpvc.com) internet website.

Exhibit 3 provides a table that indicates a range of flows for various pipe specifications and system pressures. In the column for low pressure or gravity systems designed at a velocity of 6 f/s, the flow indicated for a 4-inch diameter pipe is 240 gpm. The exhibit appears to be a technical sales tool and includes many caveats regarding the general nature of the information provided, that other factors influence flow, and that the information is not a substitute for engineering.

Flow through a pipe is influenced by many things, such as pipe diameter and type, water turbulence and velocity at the source, friction loss, pressure, and system design (number of bends, fittings, slope, number and type of pumps). The key factor for the Fords is that the water flowing to their water feature need not be delivered under pressure. Therefore, the pipeline does not need to flow full. A 4-inch pipe may carry 240 gallons per minute, but it could also be used to convey any lesser amount if the water need not be under pressure at the point of usage. Mr. Ford testified that using a 0.29-inch pipe would be impractical and that it would easily clog. The Hearing Officer agrees that restricting the pipe diameter to 0.29 inches is not reasonable. The amount of water flowing in the 4-inch pipeline can be controlled by using a measuring device and gate valve or other controlling works.

Because Fords' pipeline could potentially convey more water than proposed in the application, the Fords' system should be fitted with a measuring device adequate to enable the Fords and the watermaster of Water District 65 to regulate the diversion.

## CONCLUSIONS OF LAW

### Governing Statutes

1. Idaho Code § 42-203A(5) 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.

2. Idaho Code § 42-202B (3) defines local public interest as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.”

### **Burden of Proof**

3. IDWR Water Appropriation Rule 40.04 (IDAPA 37.03.08.040.04) states in pertinent part:

- a. Burden of proof is divided into two (2) parts; first, the burden of coming forward with evidence to present a prima facie case, and second, the ultimate burden of persuasion.
- b. The burden of coming forward with evidence is divided between the applicant and the protestant as follows:
  - i. The applicant shall bear the initial burden of proof of coming forward with evidence for the evaluation of criteria (a) through (d) of § 42-203A(5), Idaho Code;
  - ii. The applicant shall bear the initial burden of proof of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant than the applicant.

#### **Satisfaction of Idaho Code § 42-203A criteria**

4. No injury to senior water rights will occur from the Fords' proposed non-consumptive use, so long as their conveyance system and water feature are maintained and operated so that the water diverted is returned to Rock Creek.
5. The Fords established the water use proposed in the application and operated the waterfall for several months in 2010. This and the Rock Creek measurements taken by IDWR staff in late 2011 demonstrate that the water supply is sufficient for the proposed use.
6. The waterfall is present and the major components of the conveyance system are installed, which is sufficient proof that the application has been made in good faith and is not speculative.
7. The major components of the project's conveyance system are in place. Any modifications to the system will be minor compared to the cost already invested by the Fords. The Fords have proven they have sufficient financial resources to complete the project and finance any modifications required by the IDWR.
8. The source stream is not a fishery, and no other local public interest issues are discussed in the record. The proposed use does not conflict with the local public interest.
9. The Fords do not consume any water by operating the water feature. They have incorporated conservation measures in the system to ensure that all water is returned to the source stream. The diversion and use of water as described in the application is consistent with principles of conservation of the waters of the State of Idaho.
10. The Fords' place of use is not outside the watershed or local area where the water is proposed to be diverted. Therefore, the criteria described in Idaho Code § 42-203A(5)(g) does not apply to this application.

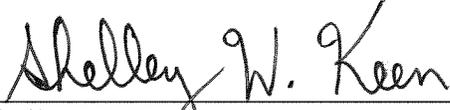
#### **ORDER**

Application for Permit No. 65-23457 is hereby **APPROVED** subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before September 1, 2013.
2. Use of this right shall be non-consumptive. The water diverted from Rock Creek shall be returned to Rock Creek.
3. The source is also known locally as Richards Creek.
4. Diversion and use of water under this right is authorized only in connection with a dwelling. The right holder shall not operate the water feature when the dwelling is not occupied for any extended period.

5. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 65, Payette River.
6. Prior to diversion of water under this right, the right holder shall install and maintain a gate valve or other suitable controlling device to control the flow of water as close to the point of diversion as is reasonably possible to ensure the diversion rate authorized under this right is not exceeded. The controlling device shall be lockable.
7. Prior to diversion of water under this right, the right holder shall install a measuring device of a type acceptable to the Department at the point of diversion.

Dated this 23<sup>rd</sup> day of August, 2012.

  
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Shelley W. Keen  
Hearing Officer

**CERTIFICATE OF SERVICE**

I hereby certify that on August 24, 2012, I mailed a certified true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER** to the person (s) listed below:

**RE: PRELIMINARY ORDER APPROVING APPLICATION 65-23457**

**GLENN FORD  
569 BRENDA LN  
CASCADE ID 83611**

**JOYCE FORD  
569 BRENDA LN  
CASCADE ID 83611**

**ALLEN RANCH LLLP  
C/O BRUCE SMITH  
MOORE SMITH BUXTON & TURCKE CHTD  
950 W BANNOCK ST STE 520  
BOISE ID 83702**

  
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**Jean Hersley  
Technical Records Specialist I**

## **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.