



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

November 23, 2011

Re: Draft Order for Consolidation of Contested Cases – Boise to Mountain Home Corridor

Dear Participant:

Enclosed is a draft order for consolidation of contested water right applications in the Boise to Mountain Home Corridor. Please review. At the earlier meeting conducted on October 20, 2011, the parties had an opportunity to present arguments about their respective view on issues related to consolidation. After some additional review of the law, rules, and practical considerations, the draft order contains my reasoning for creating a contested case and consolidating all the applications together regarding the issue of sufficiency of the water supply.

Please review the schedule for a hearing date and the other deadlines for preparatory activities. On or before December 9, 2011, please submit to me suggestions for compression or extension of the time periods. I will issue the order shortly thereafter.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink that reads "Gary Spackman". The signature is fluid and cursive, with a long, sweeping underline.

Gary Spackman
Interim Director

Enclosure

SHEKINAH INDUSTRIES, INC
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CITY OF MOUNTAIN HOME
ATTN: WAYNE SHEPHERD
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MOUNTAIN HOME, ID 83647

G 3 LLC
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ATTN: NORMAN M SEMANKO
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DRAFT

BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 73811 (SHEKINAH)
INDUSTRIES); APPLICATION FOR)
TRANSFER NO. 73834 (ORCHARD)
RANCH); APPLICATION FOR PERMIT)
NO. 63-32499 (MAYFIELD TOWNSITE);)
APPLICATION FOR PERMIT NO.)
61-12095 (NEVID-CORDER);)
APPLICATION FOR PERMIT NO.)
61-12096 (NEVID); APPLICATION FOR)
PERMIT NO. 63-32703 (ORCHARD)
RANCH); APPLICATION FOR PERMIT)
NO. 61-12256 (INTERMOUNTAIN)
SEWER AND WATER); APPLICATION)
FOR PERMIT NO. 63-33344 (ARK)
PROPERTIES-MAYFIELD TOWNSITE).)
_____)

ORDER CREATING CONTESTED CASE AND CONSOLIDATING PROTESTED AND UNPROTESTED APPLICATIONS

On October 25, 2011, the Director conducted a meeting with representatives of applicants seeking to appropriate new ground water rights or transfer ground water rights in the general area on both sides of Interstate Highway I-84 between Mountain Home and Boise. Protestants to several of the applications also attended the meeting.

The purpose of the meeting was to discuss the sufficiency of the water supply for the pending applications and the possibility of consolidating all of the applications together and holding an administrative hearing to address the sufficiency of the water supply for the entire geographical area bounding the points of diversion proposed by the pending applications.

The parties raised several objections to the proposal:

1. The Director does not have the authority to create a contested case and conduct a hearing for an application to appropriate water for which all protests have been resolved.
2. Even if there is a question of sufficiency of water supply, the Director should process an unprotested application to appropriate water out of chronological order of receipt of the application.

3. Sufficiency of water supply is not a statutory criterion for considering an application for transfer, and an application for transfer should not be included in a consolidated hearing with applications to appropriate water to determine whether the water supply is sufficient to allow additional diversions of ground water.

ANALYSIS

Authority to Create a Contested Case and Consolidate it with Other Contested Cases

Idaho Code § 42-203A(4) provides that “in the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter,” The use of the discretionary term “may” establishes that the issuance is not automatic. Idaho Code § 42-203A(5) provides the criteria the director must evaluate to approve an application. These criteria are to be considered by the director “[i]n all applications whether protested or not protested... .”

The Department’s Water Appropriation Rules address whether a hearing can be conducted for an unprotested application. Rule 40 of the Water Appropriation Rules (IDAPA 37.03.08.40) states:

040. PROCESSING APPLICATIONS FOR PERMIT AND REPROCESSING PERMITS (Rule 40).

01. General

a. Unprotested applications, whether for unappropriated water or trust water, will be processed using the following general steps:

i. Advertisement and protest period;

ii. Department review of applications and additional information, including department field review if determined to be necessary by the director;

iii. Fact finding hearing if determined to be necessary by the director;

It is within the Director’s authority to initiate a hearing so that the Director can gather sufficient information to issue the statutorily mandated decision.

The Director may consolidate two or more proceedings for hearing upon finding that they present issues that are related and that the rights of the parties will not be prejudiced. IDAPA 37.01.01.556. The Director finds that the issue of water availability presented in each of these applications is related and finds that the rights of the parties will not be prejudiced by the consolidated proceeding.

The director is authorized to commence a contested case by notifying the applicants of the initiation of the contested case. The director is authorized to conduct a fact finding hearing and consolidate several contested cases for the hearing. This is true even if an application is no longer protested.

Processing Unprotested Applications Ahead of Protested Applications

As discussed above, the third sentence of Idaho Code § 42-203(5) lists the criteria for evaluating the application and requires that the Director consider the criteria even if the application is not protested. Because the Director has the statutory obligation to consider all the listed criteria even when there is no protest, the suggestion that the Director must automatically approve an unprotested permit is contrary to the plain language of the statute. Even if there is no protest, the Director must still review and evaluate the application to ensure it meets the statutory criteria. If the application does not satisfy the criteria, the application must be denied. The Director is not required to process the unprotested applications ahead of the protested applications.

Furthermore, if there is a question about a limited water supply, it would be imprudent to approve an appropriation of ground water when earlier in time filings, if approved, could deplete the supply to the extent that there would not be sufficient water for the junior priority water right.

Consolidation of an Application for Transfer in the Contested Case and Hearing

Shekinah Industries argues that its application should not be consolidated in a hearing with applications for appropriation of new water rights. IDWR evaluates applications for transfer under Idaho Code § 42-222 instead of Idaho Code § 42-203A. Water sufficiency is not one of the criteria of Idaho Code § 42-222. While Shekinah Industries is correct that the two statutes contain different criteria, some of the criteria of Idaho Code § 42-222 are applicable to the issues to be addressed in the hearing. Idaho Code § 42-222 requires that the transfer cannot injure other water rights, the transfer must be in the local public interest, and the transfer must be consistent with the conservation of water resources within Idaho. If there are water availability problems, all three of these criteria are at issue. When an application for transfer proposes moving the point of diversion a significant distance to a location with a possible separate ground water supply, the assessment of injury, local public interest, and conservation of water requires a water availability analysis. Granting a point of diversion transfer of a senior priority water right into a limited water supply may not be in the local public interest, may not be consistent with the conservation of water resources in Idaho, and may cause injury to other water rights.

ORDER

IT IS HEREBY ORDERED that a contested case is created for application to appropriate water number 63-32703 (Orchard Ranch). This order constitutes the notice of the proceeding as required by IDWR's Rules of Procedure. The Director of IDWR will conduct the hearing.

IT IS FURTHER ORDERED that the following applications for transfer/new water rights are consolidated for the purpose of conducting a hearing regarding the limited issue of the sufficiency of the ground water supply:

NAME	NUMBER	PRIORITY	WATER USE	CFS
Shekinah Industries (was Kohtz) Received 12/4/2006	73811 Reinstated 6/2011	1963 +	Irrigation	5.56
Orchard Ranch Received 6/21/2007	73834	1976	Irrigation (was municipal)	11.36
Mayfield Townsite	63-32499	7/28/2006	Municipal	10.00
Nevid	61-12095	4/3/2007	Municipal	05.00
Nevid	61-12096	4/3/2007	Municipal & Fire Protection	20.48
Orchard Ranch	63-32703	6/21/2007	Irrigation (was municipal)	09.60
Intmntn. Sewer & Water	61-12256 *	1/17/2008	Municipal	13.76
Ark Properties/Mayfield Townsite	63-33344	3/1/2010	Irrigation in planned community 63-32499	09.00

IT IS FURTHER ORDERED that the parties to the above matter place all available ground water and surface water data and current information to the Idaho Department of Water Resources on or before January 20, 2012. Upon submittal of the information, the Department will place the information on its website at the following node: _____

IT IS FURTHER REQUESTED AND ORDERED that the Director requests that Department staff prepare a staff memorandum regarding the sufficiency of water supply in the area roughly bounded by the proposed points of diversion. The staff memorandum should be submitted to the director and posted on the node on or before February 24, 2012.

IT IS FURTHER ORDERED that discovery is authorized to commence immediately.

IT IS FURTHER ORDERED that shall disclose their expert witnesses on or before January 20, 2012.

IT IS FURTHER ORDERED that the parties shall exchange of exhibit documents and a list of witnesses on or before May 25, 2012.

IT IS FURTHER ORDERED that all dispositive motions shall be filed on or before June 4, 2012.

IT IS FURTHER ORDERED that the hearing shall be conducted on June 26-28, 2012 in the offices of the Idaho Department of Water Resources, 322 E Front Street, Boise Idaho.

DATED this _____ day of November, 2011.

GARY SPACKMAN
Interim Director