

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.

After the October 25, 2011 meeting, the Director distributed a draft Order Creating Contested Case and Consolidating Protested and Unprotested Application (“draft order”). The draft order was distributed to the October 25, 2011 meeting participants with the following request:

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.

Meeting participants raised the following issues:

1. The proposed schedule does not provide enough time, and the proposed hearing date will likely conflict with the IWUA summer conference.
2. The geographic area under consideration is not sufficiently defined.
3. The staff memorandum should not be required.
4. The Shekinah Industries transfer should not be included in a consolidated proceeding.
5. When a point of diversion is transferred to a new location, is it appropriate to subordinate the transferred right to rights with points of diversion already established near the new location?
6. Parties and IDWR should have to disclose information at the same time, and then rebuttal reports or amended reports should be allowed.
7. How will consideration of the issues besides sufficiency of water supply proceed in each case?
8. What will be the consequences of withholding information?
9. The Findings of Fact are not sufficient to support the conclusion that the rights of the parties will not be prejudiced.

Most of the above issues are beyond the Director’s request for suggestions about scheduling. Nonetheless, the Director will attempt to address the concerns.

Issues 4 and 5 challenging the consolidation of a transfer application were addressed in the draft order and are readdressed in the final order.

Issue 8 questions what will be done if someone withholds information. The director has the authority to limit or prevent a party’s participation in the hearing should information be withheld.

Several parties expressed concern about the timetable for scheduling (Issue no. 1). Two of the meeting participants filed a request for a scheduling conference. Based on the broad

concern about the hearing schedule, the Director will calendar in this order a time and place to confer about scheduling the hearing and preparatory activities.

The boundaries of the area within which the sufficiency of water will be analyzed are currently undefined (Issue no. 2). At a minimum, the area should encompass the proposed points of diversion and places of use. One sub-issue is whether surface water in the Snake River is also part of the water supply that should be considered. Identifying the boundaries of the area prior to the technical reports being filed might conflict with some of the technical information. As a result, the area boundaries will be determined, as nearly as possible from the technical reports.

The worth of a staff memorandum has been questioned (Issue no. 3). If needed, the timing of its submittal has also been questioned (Issue no. 6). The Director has the discretion to request a staff memorandum in a contested case to assist him in gathering and evaluating information. IDAPA 37.01.01.602. In this case, the Director has determined the staff memorandum will assist the participants in preparing for presentation of evidence and the Director in understanding the evidence. The staff memorandum should suggest and justify a study boundary, present data and information within the boundary, and conclude, to the extent possible, the sufficiency of water supply within the suggested boundary for existing and new uses. The Director has also determined presubmittal of the staff memorandum will more efficiently promote and assist hearing preparation.

The other contested case issues will be addressed in individual contested case hearings set by the regional office following this hearing (Issue no. 7).

Findings of fact regarding prejudice have been included in the following order (Issue no. 9).

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. First, the Director finds that the issue of water availability presented in each of these applications is related. These applicants seek to appropriate new ground water rights or transfer ground water rights in the same general area, an area that is of concern to the Department because of falling ground water levels. Second, the Director finds that the rights of the parties will not be prejudiced by the consolidation. The reference to "rights of the parties" in this rule undoubtedly refers to the procedural due process rights of the parties because IDAPA 37.01.01.556 addresses the procedural step of consolidating of contested cases and because the substantive rights of the parties are what is to be determined in the consolidated case. Procedural due process requires that a party be provided with an opportunity to be heard at a meaningful time and in a meaningful manner. *Halvorson v. North Latah County Highway Dist.*, 151 Idaho 196, 254 P.3d 497, 505 (2011). The Director will ensure that this proceeding moves forward in a timely manner and operates in accordance with the Department's rules of procedure and the Idaho Administrative Procedure Act. As such, the rights of the parties will not be prejudiced.

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. A determination of water supply will certainly inform a decision on whether granting a point of diversion transfer of a senior priority water right into a limited water supply is in the local public interest, is consistent with the conservation of water resources in Idaho, or will 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	5.00
Nevid	61-12096	4/3/2007	Municipal & Fire Protection	20.48

Orchard Ranch	63-32703	6/21/2007	Irrigation (was municipal)	9.60
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	9.00

IT IS FURTHER ORDERED that ground water and surface water data will be posted on the Department's website at the following node:
http://www.idwr.idaho.gov/news/Issues/EADA_2012/Default.htm.

IT IS FURTHER ORDERED that the Director will conduct a scheduling conference on the following day and at the following time: Wednesday, February 15, 2012, beginning at 10:00 a.m., in IDWR's Conference Rooms C & D.

IT IS FURTHER ORDERED that a date for a hearing shall be determined at the scheduling conference along with a date the following interim steps and any other necessary preparatory activities:

- Submittal of a staff memorandum regarding the sufficiency of water supply.
- Commencement of discovery.
- Filing of technical reports.
- Disclosure of expert witnesses.
- Exchange of exhibit documents and a list of witnesses.
- Filing of dispositive motions.

DATED this 24th day of January, 2012.



 GARY SPACKMAN
 Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2012, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document Served: **Order Creating Contested Case and Consolidating Protested and Unprotested Applications**

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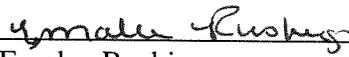
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