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DEPARTMENT OF
WATER RESOURCES

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Attorneys for D. Michael Preston and Shekinah Industries, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 78356 (SHEKINAH INDUSTRIES); APPLICATION FOR TRANSFER NO. 78355 (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); APPLICATIONFOR 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)	**PETITION FOR CLARIFICATION, OR IN THE ALTERNATIVE, PETITION FOR RECONSIDERATION**

Shekinah Industries, Inc. and D. Michael Preston (together "Shekinah"), through their attorneys Givens Pursley LLP and pursuant to IDAPA 04.11.01.770, hereby petition for clarification, or in the alternative, for reconsideration, of the Director's November 4, 2013 Final Order Regarding Water Sufficiency ("Sufficiency Order") in the above-captioned matters. Shekinah requests clarification that Findings of Fact Nos. 15 and 16, and Conclusion of Law 12

of the Sufficiency Order should not be read to find or conclude that the volume of water that Shekinah would be authorized to divert under its water rights at the proposed new points of diversion under Transfer No. 78356 is limited to 1,107 acre-feet per year (i.e., less than the currently decreed 4 AFA per acre).[1] To the extent Findings of Fact Nos. 15 and 16 and Conclusion of Law 12 *are* intended by the Director to limit the volume of water Shekinah would be authorized to divert under its water rights at the proposed new point of diversion under Transfer No. 78356, they are improper and the Director must reconsider and revise the Sufficiency Order because they are outside the scope of limited issue before the Department under this consolidated proceeding, they are not supported by substantial evidence and they exceed the Director's authority under Idaho Code §§ 42-220 and 42-1420.

Background

Shekinah objected to the Director's proposal to consolidate its transfer application, which involves existing water rights, in a proceeding with applications for new appropriations. Nevertheless, the Director ordered consolidation "for the purpose of conducting a hearing regarding the limited issue of the sufficiency of the ground water supply . . . ." January 24, 2012 Order Creating Contested Case and Consolidating Protested and Unprotested Applications ("Consolidation Order") at 5. Responding to Shekinah's objection the Director held that "[w]hen an application for transfer proposes moving a 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 [i.e., statutory issues to be determined in review of a transfer

[1] Shekinah's Application for Transfer 78356 proposes transferring 5.56 cfs and 1,476 acre-feet per annum of six ground water rights decreed in the SRBA to irrigation of 369 acres: 61-7119, 61-7396, 61-2154, 61-10378, 61-7005 and 61-2155. As decreed, these water rights are authorized for diversion of 4 acre-feet per annum per each irrigated acre.

application] requires a water availability analysis. A determination of water supply will certainly inform a decision [on injury, local public interest and conservation of water resources]." *Id.*

The consolidated case proceeded with the Department staff and the parties' experts presenting their opinions regarding the factors affecting a determination of water supply. This involved defining the relevant study area boundary, and estimating base ground water levels and the net recharge rate for the study area. The May 31, 2012 Staff Memo ("Staff Memo") ordered by the Director proposed a study area boundary and attempted to "quantify the maximum amount of water that is available for appropriation in the study area." Staff Memo at 19. The Staff Memo estimated the net recharge rate for the study area to be 7,100 AFA. *Id.* The parties' submitted expert reports responding to the Staff Memo.

In short, the Consolidation Order and the proceeding as it went forward were intended to estimate whether unappropriated water is available for beneficial use within the area encompassing the proposed points of diversion, and if so, how much. Neither the Consolidation Order nor the evidence given at the hearing purported to determine the volume of water that Shekinah should be authorized to divert if Transfer 78356 is approved.

Nevertheless, the Sufficiency Order suggests that the water rights Shekinah proposes to transfer might be limited to a diversion volume of no more than 1,107 AF (3 AFA per acre) instead of the 1,476 AFA (4 AFA per acre) authorized by the SRBA decrees. Finding of Fact 15 states in part:

> Dr. Petrich estimated the annual volume for each transfer and new application . . . No objections to the volumes calculated by Dr. Petrich were raised at the hearing. The Director adopts these volume estimates for consideration of the amount of water needed for each application, recognizing that the volumes may need to be adjusted during further processing of the applications.

Finding of Fact 16 states that "At a maximum, there is a sufficient supply of water to satisfy only two applications and part of a third: 63-32499 (Mayfield), 73811 (Shekinah), and part of 61-12096 (Nevid)." This finding includes a table indicating an estimated annual volume for the Shekinah Transfer 73811 of 1,107 AFA. Further, Conclusion of Law No. 12 while noting that the Director is still required to consider other elements under Idaho Code, goes on to say only that [e]ach of the three application should be evaluated with a local public interest review of the limited ground water supply and the demand for the use of water for municipal and domestic uses." Sufficiency Order at 14.

Argument

The Sufficiency Order should be revised to clarify and confirm that Shekinah's water rights have not been determined by the Director to be reduced from 1,476 AFA to 1,107 AFA in this proceeding. If the language in Findings of Fact Nos. 15 and 16 and Conclusion of Law No. 12 is intended by the Director to have that effect, they must be revised. Findings purporting to limit the amount of water Shekinah may divert if its transfer application is approved to a per-acre annual volume less than was decreed in the SRBA are beyond the scope of the limited issue to be determined in these consolidated cases and exceed the Department's authority.

It was patently not apparent under the Consolidation Order or based on assumptions used by Dr. Petrich that any findings or conclusions could be made in the consolidated proceeding concerning the amount of water Shekinah would be authorized to divert under the water rights proposed for transfer. Such a determination under Idaho law is to be determined based upon the

water rights themselves (decree or license),[2] and affirmative evidence of actual historical diversions, beneficial use and consumptive use as applied to criteria such as injury, enlargement, local public interest and conservation of water resources[3]—none of which, other than the elements of the decreed rights themselves, came up in the hearing. It would be improper on the basis of a diversion volume assumption offered by Dr. Petrich for the limited purpose of estimating how many applications might be able to move forward with processing for the Department to find that Shekinah's water rights are now limited to the assumed amount.[4] This is particularly true where Dr. Petrich's assumption is inconsistent with legal findings and conclusions of the SRBA court concerning the water rights, which are binding on the Department, and where no evidence was introduced in the consolidated case challenging the validity of the decrees or the water rights' beneficial use. Shekinah's non-objection to Dr. Petrich using the assumption to opine that there is sufficient water in the study area to support all of two applications (including Shekinah's) and part of a third cannot be deemed an implied or express waiver or consent to the Director limiting Shekinah's diversion volume to less than the decreed 4 acre-feet per annum in this proceeding.[5]

For the foregoing reasons, the Director should revise the Sufficiency Order to confirm by clarification or on reconsideration that: 1) Shekinah has not waived its right to seek to transfer

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[2] A water right license or decree is binding on the state as to the right of the water right holder to use the amount of water mentioned therein. *See* Idaho Code §§ 42-220 (license) and 42-1420 (the decree shall be conclusive as to the nature and extent of all water rights in the adjudicated water system).

[3] Idaho Code § 42-222; IDWR Transfer Memo No. 24, December 21, 2009 §§ 5b, 5c, 5d, 5f.

[4] It is significant that Dr. Petrich assumed a total per acre diversion volume for irrigation for Transfer 78356 water rights and not a consumptive use volume, which is the relevant volume to consider in estimating or allocating the total available water supply. *See e.g.,* Staff Memo at 20 "The net recharge rate (7,100 AFA) is an estimate of the maximum additional consumptive use that could normally be authorized within the study area."

[5] That is not to say that Shekinah's water rights might not be conditioned or limited as part of the remaining transfer processing to the extent evidence is presented indicating that it would be necessary to satisfy the statutory

the full 1,476 AFA authorized by decrees of the SRBA Court: 2) the Shekinah water rights are not determined by the Sufficiency Order to be limited to a combined diversion volume of 1,107 or to any other amount less than the 1,476 AFA authorized by the SRBA decrees; 3) Dr. Petrich's assumptions concerning estimated diversion volumes as used in his testimony, in his expert report and in supporting exhibits are relevant solely in determining how many of the pending applications may continue to be processed now, and not for determining the volume of water that can be authorized for diversion if the applications are approved; and 4) any determination of the amount of water that Shekinah may be authorized to divert under Transfer 78356 remains to be determined in the remaining contested case.

RESPECTFULLY SUBMITTED THIS 18TH DAY OF NOVEMBER, 2013.

GIVENS PURSLEY LLP

By _____
Michael C. Creamer
Attorneys for D. Michael Preston and Shekinah Industries, Inc.

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criteria for approving a transfer contained in I.C. § 42-222. No such evidence has been presented by any party at present.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of November, 2013, a true and correct copy of the foregoing was filed, served by United States mail, postage prepaid and properly addressed to the following:

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