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

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 63-32499 IN THE
NAME OF MAYFIELD TOWNSITE,
LLC.

**APPLICANT'S PETITION FOR
RECONSIDERATION OF PRELIMINARY
ORDER GRANTING PETITIONS TO
INTERVENE AS TO PACIFIC WEST
LAND LLC**

Applicant Mayfield Townsite, LLC ("Mayfield") by and through its counsel of record Perkins Coie LLP, hereby petitions for reconsideration of the November 20, 2008 Preliminary Order Granting Petitions to Intervene ("Preliminary Order") pursuant to Idaho Code § 67-5243 and IDAPA 37.01.01 Sections 350-354. Mayfield does not oppose McCallum/Ark Properties LLC ("McCallum") Petition to Intervene or the provisions in the Preliminary Order related to McCallum. Mayfield does oppose Pacific West Land LLC's ("PacWest") Petition to Intervene and respectfully petitions the Idaho Department of Water Resources ("IDWR") to reconsider provisions in the Preliminary Order relating to PacWest intervention.

I. ARGUMENT

The only interests PacWest appears to have in Mayfield's senior water rights application proceeding, beyond interests already adequately protected by the Protestants, is

having Mayfield's Application delayed, complicated, made prohibitively expensive¹ or simply denied by IDWR. Such interests are not a valid basis to intervene in Mayfield's administrative water rights proceeding. Although the Preliminary Order states that PacWest is an "area land owner," Mayfield is unaware of any evidence submitted to IDWR in this application proceeding that supports such an assertion.

Even assuming that PacWest is an area land owner, it is important to note that the standard for intervention in this proceeding is not the same as for the SRBA, which essentially allows for an automatic right of intervention based on the presumption of a shared water source. The relevant legal standard here is the showing of a "direct and substantial interest" that *also* does not "unduly broaden the issues." IDAPA 37.01.01.353. According to Section 353, intervention is subject to reasonable conditions and a timely petition to intervene may be denied altogether if (1) PacWest's interest is adequately represented by existing parties or (2) PacWest's participation will unduly broaden the issues. Although the Preliminary Order states that "several of the petition[ers] concerns are not represented by the protestants," the Preliminary Order does not specifically identify what those concerns are. A review of the criteria for approval of water right applications found at Idaho Code § 42-203A(5) indicates that any *valid* concerns of PacWest are in fact adequately represented by existing Protestants.

PacWest concedes that it is unknown whether a shared water source or hydraulic connection exists between PacWest's and Mayfield's proposed ground water wells² and a

¹ PacWest's argument that Mayfield's potential ability to resolve issues with the Protestor's "inexpensively" is a valid basis for intervention is unsettling and perhaps indicative of PacWest's motives. See *Petition to Intervene of Pacific West Land LLC* at 5; *PacWest's Answer to Applicant's Opposition to Pacific West Land, LLC's Petition to Intervene* at 4.

² "Whether a hydraulic connection will exist between PacWest's and Mayfield's proposed wells is unknown at this time...Mayfield's Application does not state whether the aquifer

shared source is not a presumption under the intervention criteria. Although PacWest is correct that a senior water right is not a hard and fast requirement for intervention, PacWest's limited status as an unpublished *junior* water right *applicant* justifies increased scrutiny of PacWest's legitimate interests and motivation for intervention.

Mayfield's administrative senior water rights application proceeding is simply not the proper forum to make connectivity or other such determinations regarding PacWest's junior water rights application. Such determinations are appropriately made during *PacWest's* application proceeding as they will add undue cost, broadening of issues, and delay to Mayfield's proceeding. PacWest is well behind Mayfield in the administrative process and Mayfield should not be required to wait for PacWest to catch up-only to then be bombarded and further delayed by broadened issues.

Further, as a matter of policy, PacWest should not be allowed to intervene under the circumstances presented here because PacWest did not file a protest during the protest period and there is no apparent justification for PacWest's failure to do so. Allowing PacWest to intervene after the protest period with the *same rights as Protestants* practically negates the purpose for having a defined protest period in the first instance. A defined protest period provides for a needed degree of certainty and allows for early and efficient identification of potential issues. The free and unconditional granting of intervention to parties with no existing water right and no apparent excuse for failure to timely file a protest sets unwanted precedent and effectively serves as a disincentive to comply with IDWR regulations.

In the event that any final order allows for PacWest intervention, Mayfield respectfully asks that reasonable conditions be placed on PacWest intervention pursuant to

from which Mayfield proposes to divert extends to the area of the PacWest Project." *Petition to Intervene of Pacific West Land LLC* at 2.

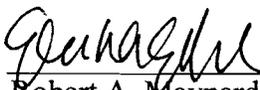
IDAPA 37.01.01.353. PacWest intervention should be conditioned as follows: (1) PacWest intervention and participation shall not be a basis for any delay or extension of time in the proceeding; (2) PacWest shall not broaden the issues to be heard at hearing. More particularly (a) PacWest shall not initiate or supplement any discovery requests; (b) PacWest shall not present factual witnesses; (c) PacWest shall not present any expert witnesses unless such witnesses are approved by IDWR prior to any hearing in the proceeding, as well as remaining subject to objections by any other party to the proceeding; and finally (d) PacWest shall be automatically dismissed from the proceeding in the event that Mayfield and Protestants reach settlement.

II. CONCLUSION

Mayfield's position is that PacWest's junior, contingent and generic interests are not direct and significant and do not outweigh the potential for harm resulting from undue delay, increased expense, complication, and broadening of the issues that the PacWest intervention would involve. Even if PacWest had a direct and substantial interest, intervention should be denied on the basis of unduly broadening the issues and on the basis that any legitimate PacWest interests are adequately represented by the existing Protestants. If PacWest is allowed to intervene, its participation should be limited by the reasonable conditions proposed above.

DATED: December 3, 2008

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on December 3, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

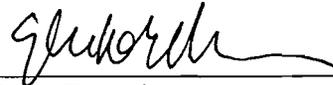
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