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WATER RESOURCES
WESTERN REGION

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

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

**PACWEST'S ANSWER TO
APPLICANT'S OPPOSITION TO
PACIFIC WEST LAND, LLC'S
PETITION TO INTERVENE**

Pacific West Land LLC ("PacWest"), through counsel Jeffrey C. Fereday and Michael P. Lawrence of the firm Givens Pursley LLP, and pursuant to IDAPA 37.01.01.270.02 and .350 to .354, files this answer to applicant Mayfield Townsite, LLC's ("Mayfield") Opposition to Pacific West Land LLC's Petition to Intervene ("Opposition Motion").¹ The Hearing Officer should grant PacWest's Petition to Intervene because PacWest satisfies the Idaho Department of Water Resources' ("IDWR" or "Department") standards for intervention.

¹ Although not styled as such, Mayfield's Opposition Motion is a "motion" to which PacWest is entitled to file an "answer." IDAPA 37.01.01.354 allows a party to oppose a petition to intervene exclusively "by motion." PacWest is entitled to file an answer to Mayfield's Opposition Motion pursuant to IDAPA 37.01.01.270.02 ("Answers to motions may be filed by persons or parties who are the object of a motion or by parties opposing a motion within fourteen (14) days of the filing of the motion.").

ARGUMENT

1. PacWest has a direct and substantial interest.

As discussed in PacWest's Petition to Intervene, PacWest has a direct and substantial interest in Mayfield's Amended Application for Permit No. 63-32499 ("Application"). Specifically, Mayfield's proposed water use could affect the availability and future quality of the ground water supply necessary for PacWest's nearby 9,600-home planned community project or the ground water supply available to others whose use may affect PacWest's project. (See PacWest's Petition to Intervene at 3-4.) There is no question that Mayfield's proposed water use will directly affect the area's ground water supply. Additionally, there is no question that the status of the area's ground water supply directly affects PacWest's water right application and its proposed planned community project. PacWest has a substantial interest in ensuring that the area's ground water supply is not compromised so it can obtain its municipal water right and complete its project.

Mayfield's assertion that PacWest's interests are "junior" is irrelevant. (See Opposition Motion at 3.) Rule 353 does not require a potential intervenor to hold a senior water right. Indeed, there is no requirement in Idaho's statutes or IDWR's Rules that either a protestant or an intervenor hold any water right. The fact that PacWest filed its water right application (and will file its land use applications) after Mayfield does not make its interests in Mayfield's proposed water use any less direct and substantial. PacWest is keenly interested in protecting the water resource from adverse affects Mayfield's (or others') water use might cause.

PacWest's interest in the area's ground water is no less direct and substantial than Mayfield's. PacWest has filed an application for a future needs type municipal water right permit to supply a proposed planned community. This is all that Mayfield has done. Certainly

Mayfield would not contend that its interest in the ground water resource is not direct and substantial.

Similarly, it seems unlikely that Mayfield would consider its own interests theoretical or not substantial simply because it has not yet received land use approvals for its project. Nevertheless, this is exactly the charge Mayfield levies against PacWest.² PacWest is currently preparing its applications for land use entitlements from Ada County. To obtain these entitlements, PacWest will undoubtedly have to demonstrate the ability to provide an adequate water supply to its proposed planned community. Accordingly, PacWest's interest in protecting the water supply for its project is substantial.

2. PacWest does not seek to address PacWest's water use or application.

Mayfield incorrectly asserts that "PacWest's petition indicates that its participation will seek to have Mayfield, the Protestants, and IDWR consider asserted facts, interests, and circumstances regarding its junior application that may or may not come to fruition." (Opposition Motion at 4.) Nowhere in its Petition to Intervene does PacWest make such a suggestion. Rather, PacWest expressly states that it seeks only to address Mayfield's application in light of the criteria contained in Idaho Code Section 42-203A(5). (See PacWest's Petition to Intervene at 4-5.) PacWest recognizes that these are the issues that are appropriate for consideration in this contested case.

3. PacWest's intervention will not delay proceedings in this matter.

This matter is in its initial stages. Nothing has been scheduled—not discovery, pre-hearing conference, or hearing. Apparently, Mayfield has "commenced efforts to engage in

² It makes no difference that Mayfield's land use applications have been filed and deemed "initially complete." Anyone familiar with the land use approval process understands that the filing of an application does not guarantee that a project will come to fruition. This is particularly true for a project the size Mayfield proposes. Mayfield's own project clearly is no less theoretical than it alleges PacWest's to be.

discussions with the Protestants.” (Opposition Motion at 2.) It does not appear, however, that any resolution has been reached. PacWest is ready to participate in those same discussions. PacWest’s intervention clearly will not cause delays or upset any existing schedules.

4. IDWR and Petitioners will not adequately represent PacWest’s interests.

With all due respect to the Department, there is no basis for Mayfield’s contention that IDWR will adequately represent PacWest’s interests. By this logic, no one would ever have grounds to protest a water right application because IDWR is “on the case.” Such a position would gut the protest provisions in Idaho Code Section 42-203A and IDWR’s Rules of Procedure and Water Appropriation Rules.

It is just as clear that Protestants also do not adequately represent PacWest’s interests. As stated in PacWest’s Petition to Intervene, the current Protestants’ interests seem to be limited to injury to their own water rights—protests that Mayfield could easily and inexpensively resolve by agreeing to compensate the Protestants for any injury caused to their wells. Such a resolution would not protect PacWest’s interests.

What is not clear is whether the existing Protestants have the technical knowledge necessary to adequately analyze the affects of Mayfield’s proposed water use or have experts to assist them in doing so. This would include expert knowledge in hydrogeology and planned community planning and development. PacWest, on the other hand, does have such experts.

Contrary to Mayfield’s assertions, PacWest is very interested in whether Mayfield’s proposed water use will cause injury to existing water rights. For example, if such injury consists of forcing unreasonable effort or expense to divert existing rights (IDAPA 37.03.08.045.01.a.ii) or if the water quality is rendered unusable (IDAPA 37.03.08.045.01.a.iii), such affects would harm PacWest as much as existing water rights.

Mayfield also is incorrect is assuming that PacWest will not challenge Mayfield's proposed water use on grounds that it is not in the public interest, that it is contrary to the conservation of water resources, or that the water supply is insufficient for Mayfield's proposed use. (Opposition Motion at 5-6.) The "devil is in the details" and Mayfield has provided few in its application. As PacWest pointed out in its Petition, whether the water supply is sufficient for Mayfield's proposed use is unknown because the size and geographic extent of the aquifer(s) in this area are unknown and Mayfield provides no information to further this understanding. PacWest further does not concede that Mayfield's proposed use is in the public interest or consistent with the conservation of water resources simply because it seeks to develop a planned community. Not all planned communities are created equal. How much water is proposed for common area irrigation, how the community will manage use of water for private landscape irrigation, and how the community will treat and reuse water are just a few of the factors that must be considered.

PacWest is in a better position than the existing Protestants to challenge Mayfield's good faith and financial resources because PacWest is a land developer and understands the financial resources required to complete a project like Mayfield's. The "financial information" included with Mayfield's application simply does not "demonstrate[] the existence of the financial resources required for development of Mayfield's Application." (Opposition Motion at 1.) Instead, it shows that an individual involved with Mayfield has developed projects of unknown size in the past. This does not satisfy the financial information requirements in IDAPA 37.03.08.040.05.f. Nor does it indicate the extent of the applicant's own investment. *Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 447 (1985) ("extent of applicant's own investment is a strong factor"). This information does not show that it is "reasonably probable" that Mayfield

has “sufficient financial resources.” IDAPA 37.03.08.045.01.d.i.³

PacWest also is concerned about Mayfield’s good faith in bringing its application. IDAPA 37.03.08.045.01.c. Mayfield’s financial document states that Mayfield’s seeks only to “bring entitlements to land,” not to develop the proposed project. PacWest is very concerned with any speculative water right application that might affect its ability to obtain its water right for its project.⁴

5. PacWest’s intervention should not be conditioned.

There is no justification for conditioning PacWest’s intervention as suggested by Mayfield. It would be a useless exercise to grant PacWest’s intervention but prohibit it from “raising an objection” to Mayfield’s application. (Opposition Motion at 6.) The Department’s rules for intervention do not prohibit intervenors from raising factual or legal issues beyond those raised by the Protestants. That said, PacWest is not interested in lengthening or complicating the proceedings beyond what is necessary. The conditions suggested by Mayfield are unnecessary and are not in the realm of “reasonable conditions.” IDAPA 37.01.01.353.

PacWest respectfully requests the Hearing Officer grant its Petition to Intervene without condition.

³ Contrast this with PacWest’s financial information in Exhibit 9 to Attachment A of PacWest’s Application for Permit No. 63-33036. The adequacy of PacWest’s application is, of course, not relevant to Mayfield’s application or PacWest’s Petition to Intervene. Nevertheless, we note that PacWest’s financial statement far surpasses Mayfield’s in terms of detail and also that Mayfield is incorrect in its statement that PacWest did not file a financial statement with its application. (Opposition Motion at 2.)

⁴ PacWest’s extensive hydrologic, engineering and land planning studies to support its request for a municipal water right (and for its planned community project in general) belie any suggestion that its own interests are speculative.

DATED this 6th day of November 2008.

Respectfully submitted,

GIVENS PURSLEY LLP

By

A handwritten signature in black ink, appearing to be "Jeffrey C. Fereday" and "Michael P. Lawrence", written over a horizontal line.

Jeffrey C. Fereday
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

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