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DEPARTMENT OF WATER RESOURCES

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Attorney for Mayfield Townsite LLC and
Ark Properties, LLC

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

IN THE MATTER OF APPLICATION FOR)	
TRANSFER NO. 73811 (SHEKINAH)	OBJECTION AND MOTION TO
INDUSTRIES); APPLICATION FOR)	LIMIT TESTIMONY AND
TRANSFER NO 73834 (ORCHARD RANCH);)	OTHER EVIDENCE TO ONLY
APPLICATION FOR PERMIT NO 63-32499)	INFORMATION RELEVANT TO
(MAYFIELD TOWNSITE); APPLICATION)	WATER AVAILABILITY IN THE
FOR PERMIT NO 61-12095 (NEVID-)	STAFF DESIGNATED STUDY
CORDER); APPLICATION FOR PERMIT NO)	AREA
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))	
)	

COME NOW MAYFIELD TOWNSITE, LLC and ARK PROPERTIES LLC through their counsel of record, Bruce M. Smith, Moore Smith Buxton & Turcke, Chtd., and pursuant to IDWR Rule 260, move the Hearing Officer for an order limiting testimony and evidence at the hearing on this matter to information relevant to the water supply in the study area. The order should preclude testimony and evidence related to Snake River flows, the Swan Falls Agreement, issues related to trust water, and injury to water rights.

**OBJECTION AND MOTION TO LIMIT TESTIMONY AND OTHER EVIDENCE TO ONLY
INFORMATION RELEVANT TO WATER AVAILABILITY IN THE STAFF DESIGNATED STUDY
AREA - 1**

ARGUMENT

On April 11, 2013, Idaho Power Co. (IPCO) provided Mayfield/Ark with a Supplemental Exhibit List and a Witness List that deal with issues related to the Swan Falls Agreement, trust water, and flows in the Snake River. In its technical reports prepared by ERO Resources dated November 14, 2012 and January 31, 2013, IPCO generally refers to these same issues. Based on its witness list, IPCO has indicated it will call IDWR employees Shelley Keen and Liz Cresto to testify as to these matters. Evidence on issues related to the Swan Falls Agreement, flows in the Snake River, and trust water development is clearly beyond the scope of this hearing which is limited to the issue of water availability for certain applications for permits. Allowing such extraneous material and issues into this proceeding will harm the interests of Mayfield and Ark Properties.

From the very beginning of this consolidated hearing process, it has been made clear that the only issue for the consolidated hearing relates to the available water supply in the area encompassed by the pending applications. In his September 2, 2011, letter to the parties, IDWR spokesman Shelley Keen stated that the "IDWR intends to hold a single consolidated hearing to take evidence regarding the water supply available for the eight pending applications." The Draft Order for Consolidation dated November 23, 2011, indicated the purpose of the hearing 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 Draft Order requested that IDWR staff prepare a staff memorandum "regarding the sufficiency of water supply in the area

roughly bounded by the proposed points of diversion.” In response to the Draft Order IPCO requested the hearing also address IPCO’s interest in the “hydraulically connected reaches of the Snake River.” See IPCO letter dated December 8, 2011.

The January 24, 2012 Order Creating Consolidated Case and Consolidating Protested and Unprotested Applications indicated a sub-issue is whether surface water in the Snake River is also part of the water supply that should be considered. The Order concluded that “Identifying the boundaries of the area prior to the [staff] technical report 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 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 users...The other contested case issues will be addressed in individual contested case hearings set by the regional office following this [consolidated] hearing.” The Order specifically stated that the applications were consolidated for “the limited issue of the sufficiency of the ground water supply.”

The Hearing Officer’s order was adhered to by staff in preparing its May 31, 2012, staff memorandum (“Staff Memo”). The Staff Memo indicates that three items of information were requested: (1) a study boundary; (2) data and information within the boundary; and (3) the sufficiency of the water supply within the boundary for existing and new uses. In response to the first item of requested information, staff established a study boundary that only goes to the “rim of the Snake River Canyon”. Staff Memo at 3; See also Figure 2. The Staff Memo did not consider or address flows in the Snake River, trust water issues, or injury to IPCO or other water rights. As directed, the Staff Memo looked only at the limited issue of the available supply of

water for the consolidated applications. The staff-designated study area extended only to the rim of the Snake River canyon, not the river itself. Thus, the geographical study area as determined by staff clearly did not encompass the Snake River or flows in the Snake River. Equally as important, none of the pending applications which were consolidated for consideration of the sole issue of water availability has a point of diversion or place of use in the trust water area as defined by IDWR Rules. See IDAPA 37.03.08.030 and Appendix A.

If IPCO or other parties are allowed to present evidence related to the Swan Falls Agreement, Snake River flows, trust water issues, or evidence of injury it will only serve to extend the hearing resulting in increased costs for all the applicants, including Mayfield Townsite LLC and Ark Properties LLC. While the IDWR rules as to evidence are generally recognized as broad, the rules do not permit the introduction of evidence that is clearly not relevant. Further, due process requires that parties be given adequate notice of the issues in the hearing. Evidence as to the Swan Falls Agreement, trust water, and Snake River flows are not relevant to the explicit direction in the Order consolidating the applications for the limited purpose of examining water supply in the study area. In a similar vein, evidence as to injury to IPCO's water rights is not properly before the Hearing Officer, since IPCO has not protested either Application for Permit No. 63-32499 (Mayfield Townsite LLC) or 63-33344 (Mayfield Townsite/Ark Properties, LLC). Injury can be addressed in the subsequent proceedings as appropriate as indicated in the Order.

CONCLUSION

The Hearing Officer should grant this motion and direct IPCO and other parties to limit testimony and evidence to only that which is relevant to the issue of the water supply in the staff determined study area.¹

RESPECTFULLY SUBMITTED this 15th day of April, 2013.

MOORE SMITH BUXTON & TURCKE, CHTD.



Bruce M. Smith
Attorney for Mayfield Townsite LLC and
Ark Properties LLC

¹ Mayfield/Ark Properties acknowledge that IPCO does have interests that relate to Snake River flows and the Swan Falls Agreement. However, this hearing is not an appropriate forum to raise those interests.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of April, 2013, I caused to be served a true and correct copy of the foregoing **OBJECTION AND MOTION TO LIMIT TESTIMONY AND OTHER EVIDENCE TO ONLY INFORMATION RELEVANT TO WATER AVAILABILITY IN THE STAFF DESIGNATED STUDY AREA** addressed to the following:

Original to: (Via Facsimile)

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FACSIMILE COVER SHEET

DATE: April 15, 2013 RECIPIENT'S FAX: 287-6700

TO: IDWR CLIENT: 1606-00

RE: Consolidated Hearing for Water Right Applications Along I-84 Corridor between
Boise and Mountain Home

FROM: Bruce M. Smith/Kat

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