

ORIGINAL

RECEIVED

OCT 23 2008

DEPARTMENT OF
WATER RESOURCES

Robert A. Maynard, Bar No. 5537
RMaynard@perkinscoie.com
Erika E. Malmen, Bar No. 6185
EMalmen@perkinscoie.com
PERKINS COIE LLP
251 East Front Street, Suite 400
P.O. Box 737
Boise, ID 83701-0737
Telephone: 208.343.3434
Facsimile: 208.343.3232

RECEIVED

OCT 27 2008

WATER RESOURCES
WESTERN REGION

Attorneys for Mayfield Townsite, LLC

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

Applicant Mayfield Townsite, LLC ("Mayfield") by and through its counsel of record Perkins Coie LLP, hereby responds in opposition to Pacific West Land, LLC's ("PacWest") Petition to Intervene pursuant to IDAPA 37.01.01 Sections 353 and 354.

I. BACKGROUND

On September 28, 2007, Mayfield filed an Amended Application for Permit No. 63-32499 ("Mayfield's Application") with the Idaho Department of Water Resources ("IDWR") requesting appropriation of 10 cfs for municipal use water to serve a planned development consisting of up to 8,000 homes. Mayfield's Application states that the municipal water will be regulated as a public water supply by the Idaho Department of Environmental Quality.

Attachment B to Mayfield's Application is a financial statement from RBC Builder Finance that demonstrates the existence of the financial resources required for development of Mayfield's Application.

Mayfield's Application is for current beneficial needs. Mayfield anticipates that the municipal system capacity and mainline system will be completed during the application development period. Mayfield's Application also included information provided pursuant to Idaho Code § 42-203A(5)(a-e).

After receipt and acceptance of Mayfield's Application, IDWR published notice and two parties, Daniel S. Van Grouw and G3, LLC ("Protestants") timely filed protests. Mayfield has commenced efforts to engage in discussions with the Protestants in a good faith effort to resolve Protestants' concerns and to otherwise successfully complete its application proceeding.

On April 11, 2008, PacWest filed Application for Permit No. 63-33036 ("PacWest's Application") requesting appropriation of 18.2 cfs for municipal use water to serve a planned development consisting of up to 9,600 homes, apparently located approximately four (4) miles from Mayfield's planned community. PacWest's Application at section seven (7) indicates that PacWest seeks a municipal water right for both present and future needs, with a planning horizon of 25 years. It does not appear that PacWest filed a financial statement with its Application, and it does not appear that PacWest has sought approval from local land use authorities required to develop its property.

On August 11, 2008, the Elmore County Growth and Development Department confirmed that the application for Mayfield Townsite Planned Community has been deemed initially complete. *See* "Exhibit A" attached hereto. Water right permit 63-12447 is currently being developed by Mayfield to provide irrigation for 200 acres within the boundaries of the planned community.

II. APPLICABLE LAW

IDAPA 37.01.01 Sections 350 through 354 govern intervention in contested cases. Section 353 states that "[i]f a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding."

Thus, a petitioner/intervenor has the burden to demonstrate (1) a direct and substantial interest; (2) that intervention will not unduly broaden the issues; and (3) that petitioner's interests are not adequately represented by existing parties.

III. ARGUMENT

A. **PacWest Does Not Have a Direct and Substantial Interest in Mayfield's Application.**

PacWest has not shown an existing direct and substantial interest in this matter, as required for intervention pursuant to Section 353. Dictionary definitions cited by PacWest indicate that a direct interest is "[l]acking [in] compromising or mitigating elements; absolute." *See Petition to Intervene of Pacific West Land, LLC* ("Petition to Intervene") at 3. PacWest's asserted interests are indeed comprised of compromising and mitigating elements. The fact that PacWest has just recently filed their junior Application, and the apparent lack of required local regulatory approvals are clearly compromising and mitigating elements of their asserted interests. PacWest may well not develop at all, let alone anytime soon, which renders their interests in this matter far from absolute. It is unjustifiably burdensome on the parties to allow PacWest to intervene on the basis of junior and theoretical interests.

PacWest does not seek to represent any public interest and is in no position to do so. PacWest does not assert that Mayfield's proposed beneficial use of water to develop a planned community is not in the community's best interest. In fact, PacWest proposes to develop a planned community that consumes more water per household than that of Mayfield. PacWest's motives for seeking intervention are wholly self-interested and based upon a very recent junior application for a future water right that does not yet, and may not ever, exist.

B. Since PacWest Does Not Have a Direct and Substantial Interest in These Proceedings, PacWest's Presence and Assertions of Uncertain Potential Future Interests Will Hinder Progress and Unduly Broaden the Issues.

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. Having to account for such uncertainties and virtual unknowns in these proceedings will undoubtedly broaden the issues for consideration and may result in ultimately unnecessary, unwarranted conditions or restraints on Mayfield's use of water, and wasted time, energy, and resources which impose an undue burden on IDWR, Mayfield, and Protestants. PacWest's intervention may stymie progress with the Protestants and result in a lengthy and cumbersome administrative process that would not occur if PacWest were not allowed to intervene.

C. The Issues Raised In PacWest's Petition Are Adequately Represented By Protestors, IDWR is Statutorily Obligated to Consider the Issues Asserted by PacWest, and PacWest's Junior Contingent Interests Are Properly Protected Through Their Own Application Process.

The issues raised in PacWest's Petition to Intervene parrot statutory criteria that are adequately represented by the Protestants and must be addressed by IDWR in evaluating Mayfield's Application regardless of whether PacWest is a party to the proceeding. PacWest

concedes this point in their Petition to Intervene at 5 where PacWest states that "issues raised by the Protestants are contained within these statutory criteria, as are the issues PacWest seeks to address."

Idaho Code § 42-203A(5) provides that when the Director of IDWR is evaluating an application, the Director must determine (1) whether the water use proposed in the application will reduce the quantity of water under existing water rights; (2) whether the water supply itself is insufficient for the purpose for which it is sought to be appropriated; (3) whether the application is made in good faith or whether it is made for delay or speculative purposes; (4) the sufficiency of financial resources to complete the work involved; (5) local public interest; and (6) whether the use is contrary to conservation.

PacWest does not have an existing water right, and therefore does not have an interest in the first criteria. As to the second criteria, PacWest is not likely to assert that water supply is insufficient and even if they did, the Protestants have raised this issue and will adequately represent this interest. As to the third criteria, PacWest again is in no better position than Protestants to challenge Mayfield's good faith; Mayfield is currently developing an approved permit for irrigation, and its Planned Community application has been deemed complete by Elmore County. *See* "Exhibit A" attached hereto.

Mayfield has submitted financial information to IDWR and PacWest does not have any unique ability to contest it, so there is no justification for intervention under the fourth criteria. In upholding the Director's standard of "reasonably probable" in the context of the financial resources requirement, the Idaho Supreme Court noted that "[a]ny concern which may exist about tying up the water to the prejudice of a potential junior applicant is adequately satisfied by other statutory provisions requiring timely commencement, progress

and completion of works." Shokal v. Dunn, 109 Idaho 330, 336, 707 P.2d 441, 447 (1985). Finally, as to the fifth and sixth criteria, PacWest did not and for obvious reasons will not assert that a planned community is not in the public interest or is contrary to conservation.

In short, PacWest does not have any absolute, direct, or substantial interests or unique perspective to justify intervention. Issues such as aquifer water quantity and quality are appropriately represented by the Protestants and will be addressed by IDWR in this case. Asking IDWR to consider effects on presently theoretical, contingent future water rights is outside the scope of IDWR's statutory mandate. In other words, the interests asserted by PacWest, to the extent they are proper, are adequately represented by the Protestants and IDWR. To the extent PacWest's interests are uncertain and encompass compromising and mitigating elements, they are outside the scope of, and therefore improper for, consideration in this proceeding. PacWest will have an entirely adequate forum for presenting its legitimate interests in its own junior application proceeding.

IV. CONCLUSION

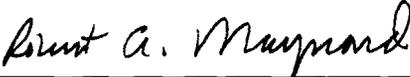
Because PacWest does not have a direct and substantial interest in this case, will unduly broaden the scope of the issues, and for all the other reasons stated above, PacWest's Petition to Intervene should be denied.

If PacWest is permitted to intervene, Mayfield respectfully requests that reasonable conditions be placed on the issues allowed to be raised by PacWest, pursuant to the authority found at IDAPA 37.01.01 Section 353. These conditions should include, at the least: 1) prohibiting PacWest from raising an objection to Mayfield's Application or IDWR issuing a permit based thereon, since PacWest did not timely file a protest and since its Application is junior; 2) prohibiting PacWest from raising factual or legal issues beyond those raised by the

Protestants in their participation; and 3) prohibiting PacWest from otherwise lengthening or complicating these proceedings.

DATED: October 23, 2008

PERKINS COIE LLP

By: 

Robert A. Maynard, ISB No. 5537
RMaynard@perkinscoie.com
Erika E. Malmen, ISB No. 6185
EMalmen@perkinscoie.com

Attorneys for Mayfield Townsite, LLC

CERTIFICATE OF SERVICE

I, the undersigned, certify that on October 23, 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):

John Westra Western Regional Office Idaho Department of Water Resources 2735 Airport Way Boise, Idaho 83705-5082	Hand Delivery U.S. Mail Facsimile Overnight Mail	_____ _____ <input checked="" type="checkbox"/> _____ _____
Brian F. McColl WILSON McCOLL 420 West Washington PO Box 1544 Boise, Idaho 83701-1544	Hand Delivery U.S. Mail Facsimile Overnight Mail	_____ _____ _____ <input checked="" type="checkbox"/> _____
Daniel S. Van Grouw Dana L. Hofstetter HOFSTETTER LAW OFFICE, LLC 608 W. Franklin St. Boise, ID 83702	Hand Delivery U.S. Mail Facsimile Overnight Mail	_____ _____ _____ <input checked="" type="checkbox"/> _____
G3, LLC Todd Haynes 310 S. Garden St. Boise, ID 83705	Hand Delivery U.S. Mail Facsimile Overnight Mail	_____ _____ <input checked="" type="checkbox"/> _____ _____
Director of IDWR PO Box 83720 Boise, Idaho 83720-0098	Hand Delivery U.S. Mail Facsimile Overnight Mail	_____ <input checked="" type="checkbox"/> _____ _____ _____
Scott N. King SPF Water Engineering, LLC 300 East Mallard Drive, Suite 350 Boise, Idaho 83706	Hand Delivery U.S. Mail Facsimile Overnight Mail	_____ _____ <input checked="" type="checkbox"/> _____ _____

Jeffrey C. Fereday
Michael P. Lawrence
GIVENS PURSLEY LLP
601 West Bannock Street
PO Box 2720
Boise, Idaho 83701-2720

Hand Delivery
U.S. Mail
Facsimile
Overnight Mail

Bruce M. Smith
MOORE SMITH BUXTON & TURCKE,
CHARTERED
950 West Bannock Street, Suite 520
Boise, Idaho 83702

Hand Delivery
U.S. Mail
Facsimile
Overnight Mail



Erika E. Malmen

Exhibit A



Elmore County Growth and Development Department

520 East 2nd South Street
Mountain Home, ID 83647
(208) 587-2142 ext.254
Fax (208) 587-2120

Bonnie Sharp
Director

Myron Adamson
Building Official

Noe Garza
*Code Enforcement
Officer*

Bob Knight
Planner

Beth Westerwelle
Planner

Kacey Hultenius
*Administrative
Assistant*

August 11, 2008

Mark Pecchenino
Pecchenino & Associates, Inc.
2173 N. Ten Mile Road
Kuna, ID 83634

Dear Mr. Pecchenino:

After reviewing your application for Mayfield Townsite Planned Community, it has been deemed to be initially complete. We acknowledge receipt of your check for \$63,693.95 and the five additional printed copies.

The legal descriptions included in the application and Mr. Monteith's metes and bounds file are deemed sufficient to establish the legal boundary and closure.

Thank you for your time and effort.

Bonnie Sharp