

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); 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)) _____)	ORDER GRANTING IN PART AND DENYING IN PART MAYFIELD AND ARK OBJECTION AND MOTION TO LIMIT TESTIMONY AND OTHER EVIDENCE
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PROCEDURAL HISTORY

On April 15, 2013, Mayfield Townsite, LLC (“Mayfield”) and Ark Properties, LLC (“Ark”) filed an *Objection and Motion to Limit Testimony and Other Evidence to Only Information Relevant to Water Availability in the Staff Designated Study Area* (“motion”). Oral argument on the motion was presented at the start of the consolidated hearing in this matter on April 17, 2013. The motion asks the Director (“Director”) of the Idaho Department of Water Resources (“Department”) to preclude testimony and evidence by Idaho Power Company (“Idaho Power”) related to Snake River flows, the Swan Falls Agreement, and issues related to trust water. *Motion* at 2. Mayfield and Ark argue that these issues fall outside the scope of the hearing and that the Director should limit consideration to only issues related to the sufficiency of supply. *Id.* Mayfield and Ark also argue they were not given sufficient notice that these issues would be included in this proceeding. *Id.* at 4. At oral argument on the motion, Mayfield and Ark also argued that the water sought to be appropriated by Mayfield, Ark and the other applicants is outside the trust water area boundary shown in Appendix A to the Department’s Water Appropriation Rules and that Idaho Power is in fact trying to modify the trust water area boundary without appropriate notice and opportunity for public comment as required by IDAPA 37.03.08.030.01.b.

Nevid, LLC (“Nevid”), Orchard Ranch, LLC (“Orchard Ranch”) and Shekinah Industries, Inc (“Shekinah”) spoke in support of the motion at oral argument. Idaho Power opposed the motion, arguing the Director cannot determine whether there is sufficient water available for the consolidated applications without understanding who is already in line for the existing water supplies. Idaho Power argued the Director must consider Idaho Power’s hydropower water rights and the State of Idaho’s minimum stream flows when assessing the sufficiency of supply. At oral argument, Idaho Power acknowledged that the points of diversion for the consolidated applications are outside the trust water area boundary and that Idaho Power “is not here today to look to move the trust water line. That is not the intent.” *Audio Recording of Hearing, Day 1, Part 1* (April 17, 2013) at 38.06 minutes. The Director did not rule on the motion at the start of the hearing, instead deciding to take the motion under consideration.

Trust Water

The term “trust water” refers to water made available for future development as a result of the 1984 Swan Falls Agreement between the State of Idaho and Idaho Power. *State Water Plan* (2012) at 48.¹ The legislation ratifying the Swan Falls Agreement placed in trust “a portion of Idaho Power’s water rights” for its hydroelectric facilities located in the Snake River Basin between Swan Falls Dam and Milner Dam. Memorandum Decision and Order on Cross-Motions for Summary Judgment, consolidated subcase 00-92023, at 31 (April 18, 2008).² The trust water can be appropriated by third parties following the Department’s consideration of certain criteria. Idaho Code § 42-203C; IDAPA 37.03.08.45. The trust water area boundary is the geographical area that encompasses the water made available by the Swan Falls Agreement. *State Water Plan* at 49; IDAPA 37.03.08.30.

The water sought for appropriation by these consolidated applications is outside the trust water boundary. Idaho Power has not sought to modify the trust water area boundary as required by IDAPA 37.03.08.030.01.b. At oral argument, Idaho Power expressly stated that it is not seeking to change the trust water area boundary in this proceeding. To allow Idaho Power to claim injury to its water rights would in effect allow Idaho Power to modify the trust water area boundary without following the procedure set forth in IDAPA 37.03.08.30.01.b. The regulatory procedure is intended to ensure that the public has an opportunity to comment on a proposed change of the rule.

Because water being sought for appropriation in this proceeding is outside the trust water boundary, it cannot be considered trust water. Because the water cannot be considered trust water, Idaho Power is foreclosed from claiming injury to its water rights in this proceeding. The Director grants Mayfield and Ark’s motion as it applies to issues related to injury of Idaho Power’s water rights. Issues of injury to Idaho Power’s water rights are excluded from consideration in this proceeding.

¹ A more detailed explanation of trust water can be found in the 2012 State Water Plan and at: http://www.idwr.idaho.gov/WaterManagement/WaterDistricts/PDF/Snake_M-SF/PDF/Overview_of_Swan_Falls_Settlement_02-28-12_Final.pdf

² While IDAPA 37.03.08.030. refers to placing flows in trust, the SRBA District Court expressly held that it is water rights not water that forms the res of the trust.

Sufficiency of Supply

While the Director has excluded testimony and evidence related to injury to Idaho Power's water rights, the Director must consider other water rights when considering water sufficiency. The Director cannot ignore the hydraulic connection between the ground water to be diverted under the consolidated applications and the Snake River, nor can the Director ignore the impacts those diversions have on other non-Idaho Power water rights. Stated another way, the Director cannot determine whether there is sufficient water available for the consolidated applications without understanding the impact of the applications on existing water rights. When evaluating water sufficiency below Milner Dam³, the Director must consider all water rights. The Director denies Mayfield and Ark's motion to strike testimony and evidence related to impacts of the proposed diversions on the Snake River because the Director has an obligation to consider the impact of the applications on all existing water rights below Milner Dam.

Notice

Mayfield and Ark argue they were not given sufficient notice that issues related to the Snake River and impacts on the State of Idaho's minimum stream flows would be included in this proceeding. *Motion* at 4. Mayfield and Ark argue the Snake River is outside the study area boundary developed by the Department in its staff memo titled *Sufficiency of Water Supply for Water Right Applications and Transfers* ("IDWR memo"). *Id.*

The Director agrees that the Snake River is outside of the study area boundary developed in the IDWR memo. However, that is not the issue here. The issue is whether there was sufficient notice to Mayfield and Ark that issues of the Snake River flows and the impact of pumping by the consolidated applicants on the Snake River would be an issue in this proceeding. A review of the expert reports submitted in this proceeding shows that the parties were on notice that questions of the consolidated applications' impacts on the Snake River would be an issue in this proceeding. The reports prepared by the technical experts involved in this matter, including Mayfield and Ark's expert, recognize that the Snake River minimum flows play a part in the consideration of the sufficiency of water supply. For example, the IDWR memo discusses the impact of pumping by the applications on the Snake River. *IDWR memo* at 16-17, 20. This memo was prepared nearly a year prior to the hearing in this matter. Mayfield and Ark's own expert report, titled *Response to IDWR Staff Memo Regarding the Sufficiency of Water Supply for Water Right Applications and Transfers Along the I-84 Corridor* ("SPF report"), considers impact of pumping on the Snake River and the Snake River minimum stream flows at Murphy Gage. *SPF report* at 3,12. This report is dated November 15, 2012, five months prior to hearing. The rebuttal report prepared by Mayfield and Ark's experts titled *Rebuttal Report of Christian R. Petrich* ("SPF rebuttal report") specifically addresses the concerns related to the impact of pumping on the Snake River and the State of Idaho's minimum flows. *SPF rebuttal report* at ii, 20-25. Mayfield and Ark cannot reasonably suggest that they did not have adequate notice that

³ Idaho Code § 42-203B provides that administration of the rights to the use of the waters of the Snake river or its tributaries downstream from Milner Dam shall not consider any portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner Dam. Consideration of the impacts of the applications is limited to waters downstream from Milner Dam.

issues of the hydraulic connection between ground water and the Snake River and the impact of pumping on the State of Idaho's minimum stream flows would be an issue in this proceeding.

ORDER

Based on the forgoing, IT IS HEREBY ORDERED that Mayfield and Ark's *Objection and Motion to Limit Testimony and Other Evidence* is PARTIALLY GRANTED and PARTIALLY DENIED. The Director GRANTS Mayfield and Ark's request to exclude issues of trust water and injury to Idaho Power's water rights from consideration in this proceeding. However, the Director DENIES Mayfield and Arks' request to exclude issues related to the Snake River flows and impacts on the State of Idaho's minimum flows.

DATED this 4th day of November, 2013.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2/21 day of November, 2013, a true and correct copy of the document described below was served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: ORDER GRANTING IN PART AND DENYING IN PART MAYFIELD AND ARK OBJECTION AND MOTION TO LIMIT TESTIMONY AND OTHER EVIDENCE.

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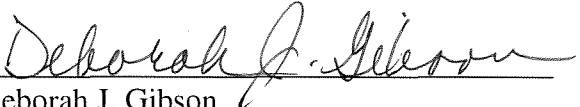
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