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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 63-34769 IN THE NAME OF
KNIFE RIVER CORPORATION

**SUEZ'S STATEMENT OF NON-
OPPOSITION TO SETTLEMENT AND
PERMIT**

SUEZ Water Idaho Inc. ("SUEZ"), by and through its counsel of record, hereby submits this statement of non-opposition to the January 8, 2020 *Water Right Application for Permit Protest Settlement Agreement* ("Settlement") entered into between the applicant Knife River Corporation ("Knife River") and the protestant Pioneer Irrigation District ("Pioneer") in the matter of application for permit no. 63-34769 (the "*Application*"), and the permit issued yesterday by the Idaho Department of Water Resources ("IDWR" or "Department") in the same matter.¹

¹ SUEZ is filing this statement after the Department issued the *Permit* because the Department did not give SUEZ an opportunity to provide its input prior to *Permit* issuance.

BACKGROUND

The *Application* requests a ground water permit in Canyon County, Idaho, for 1.00 cfs of commercial use and 0.12 cfs of irrigation. Pioneer timely filed its *Notice of Protest* (“*Protest*”) on September 23, 2019. On December 12, 2019, SUEZ filed *SUEZ’s Petition to Intervene* (“*Petition*”) for purposes of addressing Pioneer’s contention that the Knife River’s proposed groundwater diversions “may injure neighboring unlined Pioneer surface water facilities” *Protest* at 1.² The Cities of Boise, Caldwell, and Meridian (collectively, the “Cities”) also filed petitions to intervene to address this issue. As described in SUEZ’s petition to intervene, SUEZ and the Cities (along with the Cities of Eagle, Nampa, and Kuna) attempted to address the same issue in their 2017 efforts to intervene in *In the Matter of Applications for Permit Nos. 63-34079 and 63-34080 in the Name of Chris Emmert*, but they were denied intervention in that matter.

On December 17, 2019, the Department held a pre-hearing conference which was attended by representatives of Knife River, Pioneer, SUEZ, and the Cities. At the pre-hearing conference, Knife River and Pioneer explained that they were attempting to reach a settlement that would resolve Pioneer’s protest in a manner that avoids the need to resolve the issue of concern to SUEZ and the Cities (mitigation obligations to owners of unlined surface water facilities) . SUEZ and the Cities responded that they would likely not oppose such a settlement if it in fact avoided that issue, but reserving their options until actually seeing the settlement. With this understanding, Knife River and Pioneer stated they would not oppose SUEZ’s and the

² The grounds for protest stated in Pioneer’s *Protest* in full reads: “Applicant seeks to appropriate groundwater which may injure neighboring unlined Pioneer surface water facilities and Pioneer’s nearby Peterson Well in derogation of I.C. § 42-403A(5) [sic]. Also, Applicant receives irrigation water from Pioneer, consequently, any irrigation water sought should be conditioned to shoulder season use only. Pioneer reserves the right to raise additional issues under I.C. § 42-203A(5) as/if necessary upon discovery.” *Protest* at 1. SUEZ is concerned only with the issue described in the main Pioneer’s contention that Knife River’s proposed groundwater diversions “may injure neighboring unlined Pioneer surface water facilities”

Cities' intervention, and the Department's Western Regional Manager indicated that intervention would therefore be granted.

On January 15, 2020, the Department's Western Regional Manager sent a letter to the parties in the above-captioned matter that described, among other things: (a) a settlement agreement reached between the applicant Knife River and Pioneer; (b) conditions of approval that were agreed to by Knife River and Pioneer in the *Settlement*; and (c) the Department's intended process to complete its review of the *Application*, including its determination that the settlement of Pioneer's protest resolves the contested case and therefore the Department "will not respond to the petitions to intervene" filed by SUEZ and the Cities of Boise, Caldwell, and Meridian.³

The next day, the Western Regional Manager sent a letter to Knife River and Pioneer enclosing a draft permit ("*Draft Permit*") to be issued under the *Application*. As described in the letter, the Department "included standard conditions [in the *Draft Permit*] in place of the stipulated conditions [in the *Settlement*]" because "the conditions of approval agreed to by the parties are similar in language and intent to standard Department conditions."

On January 29, 2020, the Department issued a preliminary order approving the *Application* and issuing a permit ("*Permit*") with elements and conditions consistent with the *Draft Permit*.

³ The Western Regional Manager' seems to have determined that a contested case can be (and in fact was) concluded by an agreement between the applicant and the protestant without the intervenors stipulating to withdraw or be dismissed as parties. To the extent this is the Department's position, SUEZ disagrees. IDWR's Rules of Procedure provide that intervenors are "parties" to a contested case with authority to "appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments." IDAPA 37.01.01.150, .156, .157. Accordingly, SUEZ does not believe that a contested case can be fully "resolved" if intervenors have not agreed to a resolution (or at least agreed to not oppose it).

For the reasons discussed below, SUEZ does not oppose the settlement reached in the *Settlement* or the *Permit* issued by the Department, but wishes to make a record of those reasons.

DISCUSSION

I. CONDITIONS CONTAINED IN THE SETTLEMENT

Section 1 of the *Settlement* requires the inclusion of the following two conditions on Knife River's *Permit* and any subsequent license:

- a. The right holder shall make full beneficial use of all surface water available to the right holder for irrigation of lands within the authorized place of use for this right. The right holder may divert ground water under this right to irrigate land with appurtenant surface water rights only when the surface water supply is not reasonably sufficient to irrigate the place of use for this water right or is not available due to drought, curtailment by priority, or the seasonal startup and shutoff or maintenance schedule of any irrigation delivery entity. The right holder shall not divert ground water for irrigation purposes under this right if use of the surface water supply is not deliverable due to non-payment of annual assessments without an approved transfer pursuant to Idaho Code 42-222 or other Department approval.
- b. To mitigate for potential injury, the right holder shall drill and case its well to a minimum depth of 200 feet below ground surface.

Settlement at 2.

In addition, Section 1 of the *Settlement* states that any water right permit or subsequent license is subject to the following side agreement between the applicant and the protestant:

- c. If Pioneer Irrigation District has reason to believe that operation of the right holder's well is interfering with, or diminishing the flow of water through or from a District facility or well, Pioneer shall provide written notice of the alleged interference to the right holder specifying the reasons supporting the interference allegation. Upon delivery of this notice, the right holder and Pioneer shall meet within seven (7) business days in a good faith attempt to determine the existence, cause, and potential resolution of the alleged interference. If the right holder and Pioneer are unable to reach an agreement resolving the issue, Pioneer may pursue all legal remedies available to it and the right holder shall not use the Department's issuance of this right as a defense against any Pioneer claims.

Settlement at 2. Pioneer and Knife River evidently do not intend for this requirement in Section 1.c to be included in any permit or license, and it was not included in the *Permit* issued by IDWR.

II. SUEZ’S RESPONSE TO SETTLEMENT REQUIREMENTS AND PERMIT CONDITIONS

A. Section 1.a is unobjectionable.

SUEZ has no objection to including the condition in Section 1.a (or something similar) in Knife River’s permit. This is a standard provision addressing the supplemental nature of the irrigation water use authorized under the permit.

B. The condition in Section 1.b would be objectionable if included in the *Permit*, but it was not.

The condition in Section 1.b would be objectionable in a permit because it requires certain well construction standards “[t]o mitigate for potential injury.” However, Department rules require mitigation only when actual injury is found to occur. IDAPA 37.03.08.045.01.a.iv. Since no actual injury has been determined, IDWR could not include a condition concerning mitigation for “potential injury.”

Moreover, Section 1.b’s condition does not describe what the “potential injury” might be. Perhaps it is intended to relate to traditional “well interference” injury—that is interference caused by a junior well to existing rights at their points of diversion. That would be an acceptable interpretation of the condition in Section 1.b. But an interpretation that the condition is intended to provide mitigation for “potential injury” to Pioneer’s (or anyone else’s) leaky surface water facilities would not be acceptable because, as discussed in SUEZ’s *Petition*, such a condition would be contrary to Idaho law. In short, Idaho water law protects senior water rights

from injury at the point of diversion from a natural water source, but it does not entitle seniors to compensation for seepage out of their leaky facilities induced by lawful ground water pumping. Accordingly, SUEZ would not agree that the condition in Section 1.b should be included on a permit.

Fortunately, this concern is resolved by the language used in the *Permit*. Instead of using the language in Section 1.b's condition, the *Permit* contains the following condition:

The well used as a point of diversion for this water right shall be constructed and maintained with unperforated casing and sealed into the first significant confining layer located 200 feet or more below ground surface.

SUEZ understands that the Department used this condition (which is based on IDWR's standard condition no. 165⁴) to avoid raising the issues described above concerning Section 1.b's "[t]o mitigate for potential injury" language. Based on this understanding, this condition is acceptable to SUEZ because it does not implicate alleged injury to privately held surface water facilities.

⁴ IDWR's standard condition no. 165 states "To prevent injury to prior water rights appropriating water from the Boise River and/or the underlying shallow aquifer tributary to the Boise River, the new well used as a point of diversion for this water right shall be constructed and maintained with unperforated casing and sealed into the first significant confining layer located 200 feet or more below ground surface." *See, e.g.,* Water Permit No. 63-34702 (approved Dec. 26, 2019). SUEZ understands that this condition is imposed on new Basin 63 permits to divert ground water shallower than 200 feet below ground surface upstream of Star Bridge. SUEZ further understands that this condition is based on the provisions in the Department's February 22, 2008 *Amended Application Processing Memorandum No. 59* ("*Star Bridge Memo*") that require mitigation for new consumptive uses of ground water upstream of Star Bridge because the Department believes "ground water shallower than 200 feet below ground surface is probably tributary to the Boise River upstream from Star Bridge." *Star Bridge Memo* at 1. Because Knife River's *Permit* does not authorize ground water diversions upstream from Star Bridge, condition no. 165's first clause ("To prevent injury to prior water rights appropriating water from the Boise River and/or the underlying shallow aquifer tributary to the Boise River") does not apply and IDWR property did not include it in the *Permit*.

C. Section 1.c would be objectionable if included in the *Permit*, but it was not.

Section 1.c is a private agreement enforceable by the parties to the *Settlement* (i.e. Knife River and Pioneer). It would be objectionable in a permit because it sets forth a process that the Department does not have authority to enforce. Indeed, Knife River and Pioneer appear to recognize that this condition would not be appropriate to include in a permit because (unlike the conditions in Sections 1.a and 1.b) their *Settlement* does not contemplate that it would be included.

Appropriately, the *Permit* issued by IDWR does not include the condition in the *Settlement*'s Section 1.c. Instead, the *Permit* contains this condition:

The diversion and use of water described in this right may be subject to additional conditions and limitations agreed to by the protestant and the right holder under a separate agreement to which the Department is not a party. Because the Department is not a party, the Department is not responsible for enforcement of any aspect of the agreement not specifically addressed in other conditions herein. Enforcement of those portions of the agreement not specifically addressed in other conditions shall be the responsibility of the protestant and the water right holder.

SUEZ understands that this is a standard condition included in permits when parties agree to terms in a private settlement agreement that cannot be enforced by IDWR. This condition is acceptable to SUEZ based on SUEZ's understanding that the Department has not endorsed or agreed to the terms of the private agreement and will play no role in their enforcement.


SUEZ anticipates and reserves the right to participate in any proceedings concerning "alleged interference" that Pioneer might initiate under the condition in Section 1.c of the *Settlement*. To that end, SUEZ requests that IDWR provide SUEZ with specific notice of any future proceedings concerning Knife River's permit.

CONCLUSION

For the reasons stated above, SUEZ does not oppose the *Settlement* entered into between Knife River and Pioneer, and does not oppose the *Permit* issued by the Department in this matter.

Respectfully submitted this 30th day of January, 2020.

GIVENS PURSLEY LLP

By 
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By 
Michael P. Lawrence

Attorneys for Intervenor SUEZ Water Idaho Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2020, the foregoing, together with any appendices or exhibits, was filed, served, and copied as shown below.

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