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WATER RESOURCES
WESTERN REGION

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

IN THE MATTER OF APPLICATION FOR
PERMIT NO.

63-34769

IN THE NAME OF KNIFE RIVER
CORPORATION – MOUNTAIN WEST

SUEZ’S PETITION TO INTERVENE

SUEZ Water Idaho Inc. (“SUEZ”), by and through its attorneys Givens Pursley LLP, hereby submits this *Petition to Intervene* (“*Petition*”) in the above-captioned matter pursuant to Rules 350 through 354 of the Idaho Department of Water Resources (“Department” or “IDWR”), IDAPA 37.01.01.350 to 354.

This matter involves Application for Permit No. 63-34769 filed by applicant Knife River Corporation – Mountain West (“Applicant”) on August 19, 2019 (“*Application*”), which requests a ground water permit in Canyon County, Idaho, for 1.00 cfs of commercial use and 0.12 cfs of irrigation. Pioneer Irrigation District (“Pioneer”) timely filed its *Notice of Protest* (“*Protest*”) on

September 23, 2019. A prehearing conference has been set for December 17, 2019. No other dates pertaining to the contested case have been scheduled yet.

SUEZ seeks to participate in the consideration of the *Application* and *Protest* and any further proceedings or appeals in this matter for purposes of addressing Pioneer's contention that the Applicant's proposed groundwater diversions "may injure neighboring unlined Pioneer surface water facilities" *Protest* at 1. This contention—that groundwater pumping may cause "injury" to privately owned surface water facilities—is contrary to Idaho's prior appropriation doctrine and maximum use doctrine. SUEZ seeks intervention because the exercise of its water rights and its ability to acquire new appropriations could be negatively affected if the Department adopts Pioneer's position.¹

STANDARDS

Entities that are not applicants or protestants in a proceeding before the Department who claim a "direct and substantial interest [in the proceeding] may petition for an order from the presiding officer granting intervention to become a party." IDAPA 37.01.01.350. A petition to intervene showing "a direct and substantial interest in any part of the subject matter of a proceeding" that "does not unduly broaden the issues" may be granted by the presiding officer "subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties." IDAPA 37.01.01.353. "Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference,

¹ SUEZ, along with the Cities of Boise, Meridian Caldwell, Eagle, Nampa, and Kuna (collectively, "Municipal Providers") 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* ("Emmert"). In *Emmert*, the Municipal Providers' *Petition to Intervene*, filed July 14, 2017, and *Second Petition to Intervene*, filed August 4, 2017, were denied on July 21, 2017 and October 27, 2017, respectively. Accordingly, in *Emmert* the Department did not consider the Municipal Providers' arguments against concluding that groundwater pumping may cause legal injury to unlined surface water facilities.

whichever is earlier, unless a different time is provided by order or notice.” IDAPA

37.01.01.352.

DISCUSSION

I. SUEZ HAS A DIRECT AND SUBSTANTIAL INTEREST IN THE PROCEEDING.

SUEZ is a regulated public utility that holds surface and ground water rights under which it diverts water for delivery to its customers within its certificated service area, which includes parts of the Cities of Boise, Eagle, Garden City, and Meridian, as well as parts of unincorporated Ada County. SUEZ provides water to customers throughout its service area for various municipal purposes, including domestic in-home use, irrigation of homes and public spaces, commercial use, industrial use, and aesthetic and environmental use, among others.

SUEZ has a substantial and direct interest in this proceeding because of Pioneer’s contention that groundwater pumping can cause legal injury to privately owned surface water facilities. That contention is contrary to Idaho law. If the Department agrees with Pioneer, it could jeopardize the exercise of SUEZ’s existing ground water rights and SUEZ’s ability to obtain new ground water rights. In short, SUEZ’s ground water use may be affected by the precedents that will be set in this matter if the Department agrees with Pioneer.

The Department addressed—and, in SUEZ’s view, incorrectly decided—a similar issue in the *Emmert* proceeding. In *Emmert*, the Boise Project alleged that the applicant’s proposed ground water pumping south of Lake Lowell would induce seepage from the Lake and the delivery system that carries water to the Lake from the point of diversion on the Boise River over 20 miles away. The Hearing Officer in *Emmert* concluded that Boise Project would be injured by Lake Lowell seepage induced by the proposed ground water pumping from the aquifer that is hydraulically connected to the Lake, but would not be injured with respect to the delivery canals

because there was insufficient evidence that the canals were are in direct contact with the aquifer.

Order Granting Petition for Reconsideration; Amended Preliminary Order Rejecting Applications for Permit at 10-11 (July 21, 2017). The Director affirmed the Hearing Officer's decision. *Order Denying Petition to Intervene; Order Affirming Preliminary Order Rejecting Applications for Permit* (Oct. 7, 2017). No party sought judicial review.

As mentioned in footnote 1 above, SUEZ (together with a number of other municipal providers) unsuccessfully attempted to intervene in *Emmert*. Thus, there is little reason to believe that the Hearing Officer or the Director reviewed SUEZ's arguments.

Pioneer's protest in this matter seeks to extend the flawed decision in *Emmert* to leaky canals located north of Lake Lowell, and closer to the heart of the Treasure Valley and SUEZ's service area. If Pioneer is successful, the same reasoning could be used to assert that SUEZ's pumping pursuant to existing and future ground water rights requires mitigation for induced seepage from the myriad canals overlying aquifers on which SUEZ relies. SUEZ could be significantly impacted by any such decision. This threat to SUEZ's current and future ground water use constitutes SUEZ's substantial and direct interest in this proceeding.

The concerns raised by SUEZ in this *Petition* are not unique; they are applicable to all municipal providers and, indeed, to all ground water users across the State. Through its intervention, SUEZ seeks to address significant legal and policy considerations that the Department should weigh before making a decision in this matter.

II. SUEZ ACCEPTS THE CASE AS IT FINDS IT.

SUEZ does not seek to broaden the issues in this proceeding. SUEZ desires to participate in this proceeding because it is concerned with the asserted basis of Pioneer's *Protest*, which is that the ground water pumping that allegedly induces seepage from surface water facilities

constitutes legal injury requiring denial of ground water right applications or curtailment of existing ground water rights unless mitigation is provided. These issues already are present in this proceeding by virtue of Pioneer's *Protest*, so SUEZ would not be broadening the scope of the proceeding if this *Petition* is granted.

III. SUEZ'S INTERESTS ARE NOT ADEQUATELY REPRESENTED BY EXISTING PARTIES.

SUEZ's interests are directly adverse to those of the Pioneer. Although SUEZ's interests presumably are generally aligned with those of the Applicant, the Applicant is unable to adequately represent SUEZ's interests. Applicant is a private business seeking water for a for-profit enterprise (*i.e.*, production and sale of concrete), whereas SUEZ is a regulated public utility that has an obligation to provide water to individual and business customers in its service area, now and in the future. SUEZ diverts and delivers vastly more ground water from many more wells—roughly 80 of them—than does Applicant, which holds only a handful of water rights. Moreover, because it is obligated to serve whoever moves into its service area, SUEZ must continually plan for future growth, which includes the acquisition of additional ground water rights.

The imposition of permit conditions in an approval of the *Application*—such as mitigation of ground water diversions, as ultimately required in *Emmert*—to resolve the *Protest* might be palatable (albeit undesirable) to the Applicant. However, resolving the *Protest* by providing for mitigation could create a precedent that might be applied to future ground water permits that SUEZ applies for. And a determination by the Department that legal injury requiring mitigation occurs when ground water pumping induces seepage from surface water facilities could put SUEZ's ground water rights at greater risk in a delivery call. Because SUEZ's business is the provision of water and it depends on many wells and water rights, such

mitigation requirements would be far more burdensome and carry far greater consequences for SUEZ and the many thousands of citizens and businesses they serve than they would be for the Applicant. In fact, if mitigation water is not available in a particular year, mitigation conditions could inflict economic penalties on SUEZ because it cannot simply “take the hit” and forgo diversion for a season under their existing rights, as the Applicant might be able to do. Rather, SUEZ has an ongoing obligation to serve its customers.

In short, the Applicant does not adequately represent SUEZ’s interests in this matter or in regards to the troubling precedent the resolution of this *Application* and *Protest* could set. SUEZ must participate in this contested case so it can defend its rights and interests.

IV. SUEZ’S PETITION IS TIMELY.

Rule 352 provides that petitions to intervene “must be filed at least 14 days before the date set for a formal hearing, or by the date of the prehearing conference, whichever is earlier.” IDAPA 37.01.01.352. A prehearing conference has been set for December 17, 2019. No other dates pertaining to the contested case have been scheduled yet. This *Petition* is thus timely.

CONCLUSION

SUEZ has established a direct and substantial interest in this proceeding, is not seeking to broaden the issues in this matter, and neither the Applicant nor Pioneer adequately represents its interests in this proceeding. Further, SUEZ’s briefing will be valuable in assisting the Hearing Officer to consider the long-term effects and policy considerations related to the issues of ground water pumping impacts on surface water facilities. Accordingly, the Hearing Officer should grant SUEZ’s *Petition to Intervene*.

Respectfully submitted this 12th day of December, 2019.

GIVENS PURSLEY LLP

By 
Michael P. Lawrence
Attorneys for SUEZ Water Idaho Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December, 2019, the foregoing was filed, served, and copied as follows:

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