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Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 82405

In the name of Gardner Farms

)
)
) **PETITION TO INTERVENE**
)
)
) Fee Category: Exempt
) Idaho Code § 67-2301

CITY OF POCA TELLO (the “City”), by and through its attorneys of record, files this
Petition to Intervene to the approval of the above-numbered Application for Transfer filed by
GARDNER FARMS (the “Applicant”).

INTRODUCTION

The City seeks to intervene in this matter in order to preserve its interests in the
continued viability of ground water transfers within the Eastern Snake Plain Aquifer (ESPA).
The two Protests filed in this matter have the potential to change the way mitigation for
ground water transfers is calculated that could discourage or prevent such transfers. On this
basis, as explained fully herein, the City requests that its Petition to Intervene be granted.

BACKGROUND

The Applicant filed Application for Transfer No. 82405 on May 25, 2018, seeking to transfer 736 acre-feet of ground water per year to Global Ag Properties for irrigation purposes.

On or about July 9, 2018, two separate Protests were filed. One was filed by Idaho Power Company, and stated that mitigation could be required for the proposed transfer. The second was filed by several irrigation districts and canal companies,¹ referred to as the Surface Water Coalition, and alleged that Applicant failed to provide evidence supporting the conclusion that the transfer would not harm senior water rights, that Applicant did not explain how mitigation would be addressed, and other claims related to the transfer's adequacy under Idaho Code section 42-222.

A prehearing conference was held on August 10, 2018, and a subsequent status conference was held on September 19, 2018. The City learned only subsequent to these conferences that the Idaho Power Company and Surface Water Coalition are, in essence, using their Protests to challenge the Idaho Department of Water Resources' (IDWR) Transfer Processing Memorandum No. 24, specifically the "transfer tool" used to analyze ground water to ground water transfers, referenced on pages 12 through 13. The Applicant relied on this transfer tool when preparing its Application for Transfer.

In the past, the City has used ground water transfers from agricultural entities to expand its water rights portfolio to meet increasing demand from growth within the City, and likely will look to make similar transfers in the future. These prior transfers relied in part on

¹ The protestants are A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, and Minidoka Irrigation District.

the IDWR's transfer tool. To the extent the Department's procedures used to evaluate ground water rights transfers and specifically the mitigation that the transferee is charged with as a condition of transfer, Pocatello has an interest in participating to ensure transfer procedures are reasonable and consistent with statutory standards and current Department regulatory and administrative practices.

LEGAL STANDARD

Persons who are not currently a party "to a proceeding 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, if a formal hearing is required by statute to be held in the proceeding." IDWR Rule 350. The presiding officer will grant the petition to intervene, provided the intervenor "shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues... unless the [intervenor's] interest is adequately represented by existing parties." IDWR Rule 354.

ARGUMENT

As detailed below, the City satisfies the requirements for intervention in this matter and its petition to intervene should be granted.

A. The City Has a Direct and Substantial Interest in the Subject Matter of This Proceeding

The City has a direct and substantial interest in the subject matter of this proceeding, specifically with regard to the validity and sufficiency of the IDWR's transfer tool. The transfer tool provides a framework for evaluating when transfer impacts are "de minimis," limiting or eliminating mitigation obligations as a condition of transfer. *See generally*, IDWR Transfer Processing Memo No. 24.

The transfer tool facilitates ground water-to-ground water transfers by avoiding the need to expend significant resources securing mitigation water when the impact of the transfer meets the Transfer Tool criteria. This makes ground water-to-ground water transfers one of the most economical means for water users, such as the City, to supplement their current water supply portfolios. The City anticipates substantial near-term population growth, and has a substantial and direct interest in avoiding unnecessary expenditures related to ground water to ground water transfers. The City also has an interest in ensuring that proceedings to approve such transfers are streamlined and efficient.

B. The City's Intervention Will Not Unduly Broaden the Issues in This Proceeding

The City will not unduly broaden the issues in this proceeding because its interest in intervening is to protect the utility of the ground water-to-ground water transfer process, which was put at issue by the existing protestants' positions in this proceeding. The City's focus is on ensuring that ground water-to-ground water transfers can be accomplished without costly and unnecessary mitigation. This issue is squarely within the bounds of the Application for Transfer and the two Protests filed in this matter. For this reason, the City's intervention will not unduly broaden the issues in this proceeding.

C. Current Parties Do Not Represent the City's Interests

The City's interests are not adequately represented by any of the current parties to this proceeding. The Applicant is an agricultural water user, unlike the City which provides municipal water supply. Additionally, the City stands to benefit from ground water-to-ground water transfers that change the use of water from agricultural uses to municipal uses. The City's interests are not represented by, and indeed are potentially adverse to, those of Protestants Idaho Power Company and Surface Water Coalition. As explained in their

Protests, Idaho Power Company and Surface Water Coalition are contesting the Applicant's reliance on the IDWR's transfer tool to determine mitigation amounts. The City's interest is in protecting efficient and cost-effective mechanisms for ground-water to-ground water transfers.

If the pending petition to intervene filed by the Idaho Ground Water Appropriators, Inc. (IGWA) is granted, IGWA would also not adequately represent the City's interests. IGWA consists of ground water and irrigation districts that provide irrigation water to agricultural lands within the ESPA. The City, in contrast, provides municipal water supplies, which have been or will be increased through ground water-to-ground water transfers.

D. The City's Petition Should Not Be Denied for Timeliness

To be considered timely, a petition 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, whichever is earlier . . ." IDWR Rule 352. However, "[p]etitions not timely filed must state a substantial reason for delay."

While a prehearing conference has been conducted in this proceeding, little further activity has occurred, and no formal hearing date has been set. Furthermore, the City did not learn that the Protests filed in this proceeding would involve questions about the validity of the transfer tool described in IDWR Transfer Processing Memo No. 24 until after the prehearing conference was conducted. The City did not anticipate that the application filed by the Applicant would raise such questions. Additionally, the City agrees to comply with all orders and notices entered in this matter prior to the filing of the City's petition.

The City believes there is good cause for its delay in filing its petition to intervene and that its intervention will not prejudice the parties to this action. On this basis, the City's petition should not be denied based on timeliness.

CONCLUSION

The City has a direct and substantial interest in the proceeding, particularly as it relates to the validity of the transfer tool. The City's intervention will not unduly broaden the issues in this proceeding, and no current parties represent the City's interest. Finally, the City's petition should not be denied based on timeliness considering the circumstances in this case.

The City therefore satisfies the requirements for intervention and respectfully requests that its petition to intervene be granted.

Respectfully submitted this 18th day of January 2019.

SOMACH SIMMONS & DUNN



By _____

Sarah A. Klahn

#54963

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2019, I caused to be served a true and correct copy of the foregoing **CITY OF POCA TELLO'S MOTION TO INTERVENE**, by hand-delivering or depositing same in the U.S. Mail, postage prepaid, as indicated addressed to the following:



Sarah Klahn
Somach Simmons & Dunn

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