

STATEMENT OF CONSULTATION PURSUANT TO C.R.C.P. 121 §1-15(8)

Prior to filing this Motion, Defendant Intervenor’s counsel consulted with the Larimer County Attorney (counsel for Defendant) and counsel for the City of Thornton (Plaintiff). The Larimer County Defendants take no position on this Motion. The City of Thornton opposes.

STATEMENT OF FACTS

1. Save the Poudre is a Colorado non-profit membership organization composed primarily of Larimer County residents, including outdoor recreationists, scientists, property owners, and taxpayers that would be adversely impacted by the construction and operation, as currently proposed by Thornton, of the Thornton Northern Project (“Project” or “Thornton Pipeline”) that is the subject of this litigation. *See*, Exhibit A (Declaration of Gary Wockner); Exhibit B (Declaration of Mark Easter); and Exhibit C (Declaration of Douglas Schwartz). The members of Save the Poudre include residents of the various Larimer County communities that would be adversely affected by the Project, including but not limited to residents of the City of Fort Collins. Exhibit A at page 1, ¶ 2.b.

2. The City of Thornton’s (“Thornton”) 1041 application ultimately advocated for two alternative water pipeline routes: the Douglas Road Alternative, and the County Road 56 Alternative.

3. Most of Save the Poudre’s approximately 600 dues-paying members and approximately 5,000 followers and supporters are residents of Larimer County. Exhibit A at page 1, ¶ 2.b. Members “live, work, and recreate on and around the Cache la Poudre

River (“Poudre River” or “River”) in Larimer County.” *Id.* Some members own property or have residences near the Poudre River in the City of Fort Collins. *Id.* at page 2, ¶ 6. For example, Save the Poudre Board of Director member Douglas Swartz,, an ecologist whose expertise is in Greenhouse Gas Accounting related to land use systems, recreates “on and near the Poudre River in Fort Collins multiple times each week, year-round, including performing bird surveys, running, walking, biking and nature-watching.” Exhibit C at page 1, ¶ 5 and page 2, ¶ 7. He is concerned about how the Project will affect his ability to catch fish and other recreational uses, and states that he will use the Poudre River less often and differently than he does now if the Thornton pipeline is built. Exhibit C at page 2, ¶¶ 6 and 8.

4. Save the Poudre’s members would be uniquely and adversely impacted by construction and operation of either pipeline alternative. More specifically, “members interests in clean water and maintaining flows for swimming, fishing, kayaking, and aesthetic enjoyment would be detrimentally impacted by the Thornton Pipeline[.]” Exhibit A at page 1, ¶ 2.c; Exhibit C at page 2, ¶ 9. Members would benefit if the approximately 13,00 acre feet of Poudre River water to be conveyed to Thornton was run down the Poudre River to increase flows and enhance recreational opportunities and aesthetic enjoyment of nature related to activities in the Poudre River, including usage of the new Poudre River Whitewater Park in downtown Fort Collins. Exhibit A at page 1, ¶ 2.c; Exhibit C at page 1, ¶¶ 5 and 9.

5. If the Larimer County decision is overturned as sought by Plaintiff, Save the Poudre members would suffer unique, particularized, and adverse impacts. According to the Executive Director of Save the Poudre, “members’ interests in clean water for

swimming, fishing, paddling, and aesthetic enjoyment would be detrimentally impacted by the Thornton Pipeline.” Exhibit A at page 1, ¶ 2.c and 2.d. The proposed Pipeline route would divert water at the mouth of Poudre Canyon instead of letting the flows course through the Canyon and the City of Fort Collins. *Id.* at ¶ 3. This would harm the mission of Save the Poudre, which is to protect and restore the Poudre River. *Id.*

Additional concerns include diminishing water quantity and worsening water quality in the Poudre River through Fort Collins. *Id.* at page 2, ¶ 4; Exhibit B at page 1, ¶¶ 4 and 6; Exhibit C at page 1, ¶¶ 3 and 4. Running the water through the Poudre would improve the health of the river ecosystem, and make up for some of the negative impacts stemming from the fact that currently 63% of flows are drained or diverted before the River reaches downtown Fort Collins. Exhibit A at page 3, ¶ 6; Exhibit B at page 1, ¶ 5. Conversely, approving the Thornton Pipeline would add to negative impacts to the “ecological health and beauty of the Poudre River through Fort Collins” and natural areas valued by Save the Poudre members. Exhibit A at page 3, ¶ 7; *see* Exhibit B at page 1, ¶ 4. Existing diversions and unnaturally low flows “negatively impact the downstream riparian ecosystem - fish populations, insects, birds, mammals and the wetland and riparian vegetation along the river - and people who enjoy the river and riparian environment.” Exhibit C at page 1, ¶ 4; and *see* Exhibit B at page 1, ¶¶ 5 and 6 (stating concerns about impacts to fish populations, insects, birds, wetland and riparian vegetation which depend on existing flows, higher nutrient loading, and water quality).

6. Save the Poudre and its members participated in all aspects of the 1041 permit process before Larimer County, during which they opposed the Thornton Pipeline. Exhibit A at pages 2-3, ¶ 5. Save the Poudre members participated in the Working Group

formed by Larimer County to examine Thornton’s proposed project in 2018, including alternative alignments, and that resulted in about half the Working Group advocating for an alignment under which Thornton would use the Poudre River to convey the water under the Project. *Id.*; and *see* Larimer County’s Findings and Resolution Denying the Thornton Water Project 1041 Permit (“Findings”), Exhibit 3 to Thornton’s Complaint, at page 6. Save the Poudre’s participation in the 1041 process included submission of written public comments before the Larimer County Planning Commission (“Commission”) and Board of County Commissioners (“Board”), and providing public testimony before both the Commission and the Board. Through comments, testimony, and participation in the Working Group, Save the Poudre and its members presented legal and technical reasons for denial of Thornton’s 1041 Application that were not documented in Larimer County’s Findings. *See* Exhibit A at pages 2-3, ¶ 5; Exhibit C at page 1, ¶ 6. The reasons for denial presented by Save the Poudre and its members included the benefits to the Poudre River, the environment, economics, recreational uses and aesthetic enjoyment of the River if the Poudre River conveyance alternative was chosen, and other particularized and individual interests. Exhibits A, B, and C *passim*.

7. In consulting with Defendant Larimer County regarding its position on this Motion, the Larimer County attorney stated that the County takes no position on the Motion. In consulting with Plaintiff City of Thornton on this Motion, the City of Thornton stated that it respectfully opposes the Motion.

8. One of the purposes of the State 1041 law is “[t]he protection of ...privately owned land” which “is a matter of public interest...” C.R.S. § 24-65.1-101(1)(a).

9. The Larimer County Code (“LUC”) grants protected rights to residents of Larimer County in land use proceedings, such as 1041 permit processes. More specifically, Section 2.3.1 of the LUC¹ states (underlining emphasis added below):

“The purpose of this code is to preserve, protect and improve the health, safety and general welfare of Larimer County residents and to implement the Larimer County Master Plan adopted Nov. 19, 1997, and any future amendments...

More specifically, this code is intended to: [. . .]

B. Maintain and enhance property values by stabilizing expectations, fostering predictability in land development and establishing a process that efficiently and equitably applies this code to individual sites while respecting property owner rights and the interests of Larimer County citizens. This requires balancing economic development with community values and individual property rights.

C. Promote the economic stability of existing land uses that are consistent with the master plan and protect them from intrusions by incompatible or harmful land uses. LUC §2.3.1 [. . .]

F. Protect critical environmental resources, including wetlands, riparian areas, important wildlife habitats and special places of Larimer County.

The criteria for approval of a 1041 permit found in Section 14.10 (D) of the LUC also confers protected rights to Larimer County residents by ensuring all 1041 permits are “consistent with the master plan...”; “present[] reasonable siting and design alternatives or explain[] why no reasonable alternatives are available”; “conform[s] with adopted county standards, review criteria and mitigation requirements...”; “will not have a significant adverse affect on...land...which the proposal is situated and on lands adjacent to the proposal”; and, “will not negatively impact public health and safety.” LUC § 14.10(D)(1)-4 & (6).²

STANDARD OF REVIEW

¹ Attached as Exhibit D (LUC Section 2.3.1).

² Attached as Exhibit E (LUC Section 14.10).

This is an action under C.R.C.P. 106(a)(4). Rule 106(b) states, “[a] timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and such amendment shall relate back to the date of filing of the original complaint.”

C.R.C.P. 24 governs party intervention. Rule 24(a) allows intervention by right when: 1) a statute grants an unconditional right to intervene; or 2) when the intervenor claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may impair or impede the intervenor’s ability to protect that interest unless that interest is adequately represented by the existing parties. Rule 24 also allows permissive intervention by “anyone” when 1) a statute confers a conditional right to intervene; or, when the intervenor claim or defense and the main action have a common question in law or fact. The court also can determine whether the motion to intervene is timely and whether it will unduly delay or prejudice the rights of the original parties. *Id.*

ARGUMENT

For the reasons stated below, Save the Poudre’s Motion to Intervene should be granted.

a. *The Motion is timely.*

This Motion is timely. Thornton’s Complaint was filed on April 16, 2019. The case was recently reassigned to this Court. The County filed an Answer to the Complaint on June 3, 2019. The only pending motion is the Motion to Intervene filed by No Pipe Dream subsequent to the County Answer. No substantive briefs have been filed.

b. *The intervention will not unduly delay or prejudice the parties.*

Save the Poudre's interest involves common issues of fact and law; namely to defend the County's decision that Thornton's 1041 application did not meet the LUC 1041 criteria. While Save the Poudre raised reasons for denying the 1041 permit that were not documented in the County's F&R, Save the Poudre will not raise extraneous issues outside the scope of the 1041 permitting process. Because Save the Poudre fully participated in the County's 1041 permitting process, neither existing party will be prejudiced by its intervention in this appeal. Save the Poudre's early and timely Motion will not unduly delay the prosecution of this case.

c. *Rule 106 and the LUC allow intervention by right.*

As noted above, C.R.C.P. 106(b) specifically allows, without condition, the addition of parties in this action. Further, as noted above, the State 1041 law and Larimer County LUC express protected rights to Larimer County residents and property owners. In combination, the State 1041 laws, Larimer County LUC, and Rule 106 express an unconditional right of Save the Poudre and its members to intervene in this action.

Thornton's proposed pipeline alternatives will significantly affect the environment of Larimer County, at the same time it would miss a unique opportunity to restore a semblance of natural flows in the Poudre River. Exhibit B at page 1, ¶ 3; Exhibit C at page 1, ¶ 3. The construction impacts would be detrimental to the interests of Save the Poudre and its members; whereas the environmental, ecological, recreational, and associated aesthetic and economic benefits of a healthier river would be foregone were Plaintiff to prevail. Save the Poudre members own real property in locations that would benefit from a positive outcome in this case, and be negatively affected were Thornton to prevail. *See* Exhibit A at page 3, ¶ 6; Exhibit B at page 1, ¶ 5; Exhibit C at page 1, ¶¶ 5, 6

(stating, among other things, concerns about materials to be used for the pipeline and greenhouse gas emissions associated with the pipeline). Save the Poudre is prepared to participate as to whether the requested permits are consistent with the Larimer County Master Plan (“Master Plan”); the availability of reasonable siting and design alternatives; conformity with county standards and review criteria; the efficacy of mitigation; and adverse impacts to lands and the environment in Larimer County, among other issues. Save the Poudre’s interests are consistent with that part of the County’s Findings citing to the Master Plan provision that: “Natural and cultural resources shall be identified, conserved and protected, and long-term cumulative impacts shall be monitored[.]” Findings at page 6.

Neither existing party will represent the individual and particularized recreational, aesthetic, economic, or environmental interests of Save the Poudre members, nor would proposed Defendant-Intervenor No Pipe Dream (motion pending), which is primarily concerned with private property that would be impacted by Thornton’s proposed pipeline route in Larimer County. Thornton seeks to avoid pursuing what Save the Poudre considers to be the environmentally and economically preferred alternative of conveying water in the Poudre River, and thus has interests completely contrary to those of Save the Poudre and its members. The County’s interests will largely focus on defending the Commissioners’ decision, including legal deference owed to County decision-making and its discretion to deny the 1041 permit. Save the Poudre’s concerns and expertise are focused on a subset of concerns going to science, ecology, environment, economics, outdoor recreation, wildlife, biodiversity, restoration, and aesthetic concerns; and the organization’s continued participation is important as to these issues.

Precedent supports allowing environmental organizations to intervene in State 1041 litigation involving disputes going to water rights and conveying water subject to such rights, including a case where the county from which the water would be diverted (Eagle County) denied a permit to cities seeking to convey the water for use outside the basin of origin. See City of Colorado Springs v Board of Commissioners of Eagle County, 895 P.2d 1105 (Colo.App. 1994)(Rehearing Denied Dec. 15, 1994. Certiorari Denied June 5, 1995). Two of the parties to that case were the Sierra Club Legal Defense Fund and the Holy Cross Wilderness Defense Fund, both defendant-intervenors. The plaintiff cities in City of Colorado Springs held water rights in the Holy Cross Wilderness Area, and had applied to Eagle County for a special use permit “to conduct a major extension of an existing water collection system, and a permit to conduct a municipal water project, pursuant to regulations enacted under [Colorado’s 1041 statutes].” 895 P.2d at 1109. Eagle County denied the permits after a series of public hearings, and the cities then filed the litigation protesting the denial. *Id.*

Because Save the Poudre and its members meet the criteria for intervention by right, this Court should grant the Motion.

- d. *In the alternative, Save the Poudre should be granted permissive intervention.*

In the event the Court finds that Save the Poudre is not entitled to intervention by right, the organization alternatively requests that the Court allow permissive intervention. As noted above, Colorado’s 1041 law, the Larimer County LUC, and C.R.C.P. 106(b) at a minimum allow a conditional or permissive right to intervene in this proceeding. The defenses and argument Save the Poudre intend to raise or present have a common question in law or fact with the County’s defenses as both parties participated in all

aspects of the Larimer County 1041 permit proceeding. Thus, the Court can also grant Save the Poudre permissive intervention.

CONCLUSION

Save the Poudre and its members played an integral role throughout the Larimer County 1041 permitting process. State law and Defendant's local land use ordinances guarantee the right of public participation in the administrative 1041 process. Those public participation rights should be extended when the administrative 1041 process results in litigation. For the reasons stated above, Save the Poudre's Motion to Intervene should be granted. A proposed Order is also being filed with this Motion.

Finally, a proposed Answer is being filed with this Motion. C.R.C.P. 24(c). If this Motion is granted, the Court should enter an order directing the clerk of the court to accept Save the Poudre's Answer to the Complaint.

Respectfully submitted this 17th day of June 2019.

/s/ Mike Chiropolos
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ATTORNEY FOR DEFENDANT
INTERVENOR SAVE THE POUUDRE

CERTIFICATE OF DELIVERY

I hereby certify that on June 17, 2019, a true and correct copy of the foregoing **Defendant Intervenor Save the Poudre's Motion to Intervene Pursuant to C.R.C.P. 106(b) and C.R.C.P. 24** was sent via Colorado Courts E-filing System and/or by email to the following:

FOR DEFENDANT BOARD OF COUNTY COMMISSIONERS OF LARIMER
COUNTY :

Jeannine Haag @ jeanninehaag@larimer.org

William Ressue @ wressue@larimer.org

FOR PLAINTIFF CITY OF THORNTON:

Luis A. Corchado @ luis.corchado@cityofthornton.net

Joanne Herlihy @ joanne.herlihy@cityofthornton.net

A courtesy copy was also sent to the attorney for proposed Defendant-Intervenor NO
PIPE DEAM (Motion pending):

John M. Barth @ barthlawoffice@gmail.com

/s/ Mike Chiropolos

Mike Chiropolos