



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

Prior to filing this Motion, the undersigned counsel for The Environmental Group and Save the Colorado consulted with counsel for the Defendants (“Boulder County”) and counsel for the Plaintiff (“Denver Water”). Defendant Boulder County supports this Motion. Plaintiff Denver Water does not oppose this Motion “so long as the intervenors do not delay this case and agree to operate within the established deadlines.”

### **STATEMENT OF FACTS**

1. The Environmental Group and Save the Colorado are each Colorado non-profit membership organizations composed of members including Boulder County residents, property owners, and taxpayers that would be adversely impacted by the construction and operation of the Gross Project that is the subject of this litigation.

Exhibit E hereto, Declaration of Gary Wockner, Save the Colorado.

2. The Gross Project seeks to raise the height Gross Dam located on South Boulder Creek by 131 feet to a height of 471 feet and to expand the areal extent of the associated reservoir. Complaint at p. 3, ¶ 11.

3. Plaintiff Denver Water claims that the Gross Project is exempt from State and County regulation under the 1041 statute and local land use code. Defendant Boulder County asserts that the Project is subject to regulation under its 1041 regulations.

4. Members of The Environmental Group and Save the Colorado own property, have residences, and recreate in close proximity to the Gross Project. See, Exhibit A hereto Declarations of Darcy Phillip; Exhibit B hereto Declaration of William Arntz; Exhibit C hereto Declaration of Timothy Guentner, Exhibit D hereto Declaration of Anna McDermott; and, Exhibit E hereto Declaration of Gary Wockner.

5. These and other members of The Environmental Group and Save the Colorado would be uniquely and adversely impacted by construction and operation of the Gross Project. Members live as close as an 1/8<sup>th</sup> to ¼ mile from the project site. Exhibit D, p. 1, ¶ 3. The members' unique and particularized adverse impacts include: physical loss of private property (Exhibit A, p. 1, ¶4 a); diminution of property values (Exhibit A, p. 2, ¶4 d; Exhibit B, pp. 1-2, ¶¶ 4 a & c; Exhibit C, pp. 9-10, ¶ 4; Exhibit D, pp. 2-3, ¶4); adverse health impacts from air, noise and light pollution (Exhibit A, p. 2, ¶4 c; Exhibit C, pp. 1-6, ¶4 e; Exhibit D, pp. 1-2, ¶¶4 a-e); traffic and safety impacts (Exhibit A, pp. 1-2, ¶4 b; Exhibit B, pp. 1-2, ¶4 a; Exhibit C, p. 9, ¶ 4; Exhibit D, pp. 3-4, ¶¶ 4 g & h.); and, an increase risk of fire (Exhibit C, pp. 6-8, ¶ 4 ) among others.

6. Members of The Environmental Group and Save the Colorado support Boulder County's regulation of the Gross Project through the 1041 process because it would provide an opportunity to evaluate other less harmful alternatives and/or mitigate the impacts to their personal property and quiet enjoyment of the area near the proposed Gross Project.

7. The Environmental Group, Save the Colorado and their members participated in all aspects of the administrative 1041 applicability process before Boulder County supporting regulation of the Gross Project. See, Administrative Record ("AR") at p. 755. See also, Exhibit E, Declaration of Gary Wockner, p. 2, ¶ 5. This participation included submission of written public comments before the Board of County Commissioners of Boulder County ("Board"), as well as providing extensive public testimony before the Board. The Environmental Group, Save the Colorado and their members presented additional legal and technical reasons for regulating the Gross Project

through the 1041 process that were not otherwise presented by the County, other parties to the administrative proceeding, or otherwise documented in Boulder County’s final decision on the matter. Some of the additional reasons for regulation of the Project presented by The Environmental Group, Save the Colorado, and its members include: individual and particularized injuries that would be suffered by landowners, including loss of property, loss of trees and vegetation, loss of use of property, loss of quiet enjoyment of property, loss of access to property, and other particularized and individual interests.

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). The general purpose of the Boulder County Land Use Code is to “protect and promote the health, safety, and general welfare of the present and future inhabitants of Boulder County...” LUC § 1-300, Exhibit F hereto. Similarly, one purpose of Boulder County’s 1041 regulations is to “[p]rotect the public health, safety, welfare and the environment.” LUC § 8-202 B. 19, Exhibit G hereto. Another purpose of the 1041 regulations is to “[r]egulate projects that would otherwise cause excessive noise, water, and/or air pollution, or which would otherwise degrade or threaten the existing environmental quality within the County.” LUC § 8-202 B. 7. *Id.* A 1041 permit applicant is required to participate in a public hearing and notify neighboring property owners of the project. LUC § 8-509 A. Exhibit G hereto. The Board must accept testimony from the public in any such public hearing. LUC § 8-510 B. *Id.*

#### **STANDARD OF REVIEW**

This is an action under C.R.C.P. 106(a)(4) and Rule 57. C.R.C.P. 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” (emphasis added).

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, the Motion to Intervene by The Environmental Group and Save the Colorado should be granted.

a. *The Motion is unopposed.*

Defendant Boulder County supports this Motion to Intervene. Denver Water does not oppose the Motion. Given this non-opposition, the Motion should be granted.

b. *The Motion is timely*

This Motion is timely. Denver Water’s Complaint was filed on April 11, 2019. Boulder County has filed an Answer to the Rule 106 claim and a Motion to Dismiss the Rule 57 claim. The proposed Defendant/Intervenors do not intend to submit any filings

with regard to the Rule 57 Motion to Dismiss. Instead, the proposed Defendant/Intervenors desire to submit a response brief to Denver Water's opening brief in this matter. The administrative record was filed and certified with this Court on May 29, 2019. Denver Water's opening brief is not due until July 10, 2019 and response briefs are not due until 35 days later, or August 14, 2019. As such, this Motion is timely.

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

The interests of The Environmental Group and Save the Colorado involve common issues of fact and law; namely to defend the County's decision that the Gross Project is subject to regulation under the Boulder County 1041 land use process. While The Environmental Group and Save the Colorado raised reasons for regulating the Gross Project under the 1041 process that were not documented in the final decision of the County, the groups will not raise extraneous issues outside the scope of the 1041 regulation. Because the groups already fully participated in the County's 1041 process, neither existing party will be prejudiced by their intervention in this appeal. The groups' early and timely Motion will not unduly delay the prosecution of this case.

d. *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, both the State 1041 law and Boulder County's Land Use Code make clear that protection of private property and public health are major purposes of the 1041 program. The Land Use Code reserves a vital role for the public in 1041 public hearings, testimony, and public notice. In combination, the State 1041 law, the Boulder County LUC, and C.R.C.P. 106 suggest an unconditional right of the public to intervene in litigation resulting from 1041 administrative decisions.

Further, Denver Water's proposed Gross Project could impact numerous parcels of private property in Boulder County. These impacts could include physical "taking" of property by Denver Water, destruction of property and fixtures, and interference with quiet enjoyment of property. Members of The Environmental Group and Save the Colorado own real property that is so situated that the disposition of this action may impair or impede the member's ability to protect those property interests. Exhibits A-E hereto.

Neither existing party will represent the individual and particularized property interests of the organizations' members. Denver Water is trying to gain access to Boulder County private property and thus has interests completely contrary to those of the organizations' members. The County's interests will largely focus on its legal authority to require 1041 permitting and the historic Boulder County zoning documents presented during the administrative hearing.

Because the organizations through their members meet the criteria for intervention by right, this Court should grant the Motion.

- e. *In the alternative, the organizations should be granted permissive intervention.*

In the event the Court finds that the organizations are not entitled to intervention by right, the organizations alternatively request that the Court allow permissive intervention. As noted above, the State 1041 law, Boulder County LUC, and C.R.C.P. 106(b) at a minimum suggest a conditional right to intervene in this proceeding. Further, the defenses the organizations intend to raise have a common question in law and fact with the County's defenses as both parties participated in all aspects of the County

administrative 1041 applicability proceeding. Thus, the Court can alternatively grant the organizations permissive intervention.

### CONCLUSION

For the reasons stated above, the Motion to Intervene should be granted. A proposed Order is filed with this Motion. A proposed Answer is also filed along with this Motion. C.R.C.P. 24(c).<sup>1</sup> If this Motion is granted, the Court should enter an order instructing the Clerk to accept Defendant Inreventors' Answer.

Respectfully submitted this 7th day of June 2019.

/s/ John M. Barth  
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ATTORNEY FOR PROPOSED  
DEFENDANT/INTERVENORS

### CERTIFICATE OF DELIVERY

I hereby certify that on this 7th day of June 2019, a true and correct copy of the foregoing **Proposed Defendant Intervenor The Environmental Group and Save the Colorado'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 BOULDER COUNTY

David Hughes ([dhughes@bouldercounty.org](mailto:dhughes@bouldercounty.org))  
Jasmine Rodenburg ([jrodenburg@bouldercounty.org](mailto:jrodenburg@bouldercounty.org))

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<sup>1</sup>Because the Motion to Dismiss Denver Water's Rule 57 claim remains pending, Defendant/Intervenors' Answer responds solely to the C.R.C.P. 106 claim. Defendant/Intervenors will supplement their Answer as necessary after a ruling on the pending Motion to Dismiss.

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FOR PLAINTIFF CITY AND COUNTY OF DENVER

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/s/ John M. Barth

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