

JUN 17 2021

DEPARTMENT OF  
WATER RESOURCES

S. Bryce Farris, ISB No. 5636  
SAWTOOTH LAW OFFICES, PLLC  
1101 W. River Street, Suite 110  
Boise, Idaho 83702  
T (208) 629-7447  
F (208) 629-7559  
E bryce@sawtoothlaw.com

Attorneys for Gregory B. Johnson and  
Intermountain Sewer & Water, Corp.

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTERS OF APPLICATION FOR  
AMENDMENT OF PERMIT NO. 63-32225  
IN THE NAME OF INTERMOUNTAIN  
SEWER & WATER, CORP. AND  
APPLICATION FOR TRANSFER NO. 83875  
IN THE NAME OF GREGORY B.  
JOHNSON

**MEMORANDUM IN SUPPORT OF  
GREGORY B. JOHNSON'S NOTICE  
OF APPEAL, EXCEPTIONS AND  
PETITION FOR REVIEW OF  
PRELIMINARY ORDER TO THE  
DIRECTOR**

Applicant Gregory B. Johnson, by and through his undersigned counsel of record, hereby submits this *Memorandum in Support of Gregory B. Johnson's Notice of Appeal, Exceptions and Petition for Review of Preliminary Order to the Director*. As the above caption provides, this matter involves both an Application for Amendment of Permit No. 63-32225 in the name of Intermountain Sewer & Water Corp. ("Permit Amendment") and an Application for Transfer No. 83875 in the name of Gregory B. Johnson ("Transfer Application"). The Permit Amendment and Transfer Application were consolidated into one contested case for efficiency and other purposes.<sup>1</sup>

---

<sup>1</sup> Both applications are related to each other in that both intend to utilize the same points of diversions/well to supply municipal and irrigation water to the Mayfield Springs Planned Community. The relationship between the two is more fully explained in the report of Tim Farrell (Exhibit 105) appended to this *Memorandum* as Appendix A.

On June 4, 2021, the hearing officer, Cynthia Bridge-Clark presiding, issued a *Preliminary Order Approving Application for Amendment of Permit with Conditions and Denying Transfer* (“Preliminary Order”). The *Preliminary Order* approved of the Permit Amendment. Thus, this *Notice of Appeal, Exceptions and Petition for Review of Preliminary Order to the Director* does not challenge or appeal the Permit Amendment and/or any portion of the *Preliminary Order* related to the Permit Amendment. The *Preliminary Order* denied the Transfer Application and thus this appeal, exceptions and petition are only related to the Transfer Application which is in the name of Gregory B. Johnson and which was denied in its entirety by the hearing officer.

## **I. BACKGROUND**

The procedural history and background are set forth in the *Preliminary Order*. It is worth adding or reminding the Director that the only witness which presented testimony at the hearing was an expert witness, Tim Farrell, called by the Applicants. Mr. Farrell is a licensed civil engineer with extensive background and experience in wastewater and water development projects. *See Preliminary Order*, p. 6, ¶ 10. Furthermore, the only exhibits offered at the hearing were those offered by the Applicants. In particular, the exhibits offered by the Applicants included the Department’s records and backfiles for the Permit Amendment (Permit No. 63-32225) and the Transfer Application (License No. 63-32616) (Exhibits 101, 102, 103 and 104) and the I-84 Corridor Water Sufficiency Study, including the Final Order Regarding Water Sufficiency issued by Gary Spackman on November 4, 2013 (Exhibit 106). Finally, Applicants offered an expert report prepared by Tim Farrell as to the Permit Amendment and Transfer Application and which provided a summary of Mr. Farrell’s findings, conclusions and opinions (Exhibit 105). For the Director’s ease of reference, a true and correct copy of Mr. Farrell’s report (Exhibit 105) is attached to this *Memorandum* as Appendix A.

As provided in Mr. Farrell's report (Exhibit 105) and/or as summarized in the hearing officer's *Preliminary Order*, the testimony and evidence presented at hearing provided the following with respect to the Transfer Application:

- The Transfer Application proposes to add three points of diversion (PODs) and to change the place of use (POU) for the existing irrigation water right – Water Right No. 63-32616 (hereinafter referred to as the “Water Right”).<sup>2</sup>
- The Transfer Application does not propose to change any of the other elements to the Water Right, including there will be no change to the 145 acre limit, diversion rate, volume or period of use authorized by the Water Right.<sup>3</sup>
- The irrigation use by the Water Right will be lawns within the Mayfield Springs development. “[T]he total irrigable area including the existing place of use and the Mayfield Springs site cannot exceed 145 acres. Water utilized on the Mayfield Springs site for irrigation will be measured and reported on an annual basis. IDWR will require these measures be incorporated into an approved transfer, with associated annual reporting of place of use and volume. Therefore, concerns related to increasing the irrigation diversion rate and changing the period of use through the transfer are not valid.”<sup>4</sup>

---

<sup>2</sup> *Preliminary Order*, p. 8, ¶18.

<sup>3</sup> *Preliminary Order*, p. 8, ¶ 21.

<sup>4</sup> Exhibit 105, p. 6 of 14.

- The irrigation Water Right and the existing municipal Permit (63-32225) will be diverted from the same pump/PODs “but we will be able to tell exactly how much of the irrigation water right we are using and the municipal right.”<sup>5</sup>
- The Applicant intends to and can monitor and identify the water diverted under the irrigation Water Right by monitoring and identifying to the Department “the number of acres to be irrigated with the irrigation Water Right and where the acres would be located.”<sup>6</sup>
- The amount of water used for the irrigation of lawns can be monitored by calculating evapotranspiration rate and identification of acres.<sup>7</sup>

Thus, it was very clear from the evidence and testimony presented at hearing that while the Transfer Application proposes to utilize the same wells/PODs as the municipal Permit, the acreage limitation, diversion rate, volume and period of use could be measured and monitored to ensure that no enlargement occurred. In fact, there are already specific monitoring conditions which are part of the municipal Permit and the Transfer Application fully anticipates providing such monitoring and measurements relating to use of the irrigation Water Right.

Despite these proposed conditions, the hearing officer denied the Transfer Application in its entirety based upon the general statement that insufficient evidence was provided to ensure that “water diverted under the irrigation right will not, at times, be augmenting municipal demand.”<sup>8</sup>

---

<sup>5</sup> *Preliminary Order*, p. 8, ¶ 22.

<sup>6</sup> *Preliminary Order*, p. 9, ¶ 24.

<sup>7</sup> *Id.*

<sup>8</sup> *Preliminary Order*, p. 13.

This conclusion ignores the undisputed testimony and evidence presented at hearing that the use can and will be measured and monitored to identify the acres being irrigated by the irrigation Water Right and to determine how much of the irrigation Water Right is being used. The hearing officer's conclusion essentially creates a blanket or per se prohibition against multiple water rights with different purposes of use or elements sharing the same PODs based upon a misplaced assumption that such rights cannot be monitored, measured, calculated and administered to ensure that each right complies with its respective elements. This is not and should not be the law of Idaho as it not uncommon for municipalities or other water users to divert different water rights (with different elements such priority dates, purposes of use, periods of use) from the same PODs. The use of separate water rights with the same PODs can and should be allowed based upon appropriate monitoring, measurements or other conditions as necessary.

## **II. ARGUMENT**

### **A. The Hearing Officer Improperly Denied the Transfer Application.**

Despite the above information, including the fact that there was no proposed change to the acreage limitation, diversion rate, volume or period of use, the hearing officer denied the Transfer Application in its entirety because Water Right would use the same points of diversion as the municipal permit. In other words, the hearing officer concluded there was a per se enlargement because of a shared point of diversion even though the Transfer Application and Mr. Farrell's testimony and report clearly provided that the elements of the existing Water Right would not change. Furthermore, the hearing officer ignored Mr. Farrell's testimony that he and/or the applicants intended to monitor and track the use to provide assurance that the acreage, volume and other limitations were met.

Additionally, for the hearing officer to suggest that the Applicant did not meet its burden is incorrect and ignores the only evidence and testimony presented at hearing that there would be no enlargement because the use could be and would be tracked and monitored to ensure that no enlargement would occur.<sup>9</sup> Again, the municipal Permit already includes specific conditions requiring a monitoring plan and the hearing officer acknowledged these conditions were already in place. *See* Preliminary Order, p. 5. As the conditions provide, and as the testimony and report of Mr. Farrell further provides: “Water utilized on the Mayfield Springs site for irrigation will be measured and reported on an annual basis. IDWR will require these measures be incorporated into an approved transfer, with associated annual reporting of place of use and volume. Therefore, concerns related to increasing the irrigation diversion rate and changing the period of use through the transfer are not valid.” *See* Exhibit 105, p. 6. The Director should reverse the hearing officer’s denial of the Transfer Application and instead approve the Transfer Application by requiring monitoring and other conditions to monitor and track the use to ensure that the acreage, diversion rate, volume, period of use and other limitations in the Water Right are met.

**B. Commingling Water Rights at the Same PODs can be Monitored and Tracked.**

When the Applicant initially consulted with the Department as to how to best proceed with the use of the existing irrigation Water Right as part of the Mayfield Springs Planned Community

---

<sup>9</sup> Other than the enlargement concerns, the hearing officer did not conclude that any other burdens or requirements of the Transfer Application had not been met and in fact concluded that the additional points of diversion and the use thereof met all of the necessary burdens and requirements as the hearing officer approved of the Permit Amendment to add the additional PODs. Thus, the only issue for the Transfer Application is whether the use of the same PODs for the Water Right and municipal Permit can be monitored and tracked to ensure that the respective rights do not exceed their respective elements or limitations (which they can based upon the monitoring and reporting suggested by Mr. Farrell).



and in conjunction with the municipal Permit it specifically asked Department staff whether it was necessary to change the purpose of use of the irrigation Water Right to a municipal purpose. The response the Applicant received was that no such change was necessary so long as the Applicant could identify the specific place of use that will be irrigated.<sup>10</sup> While such consultation and response from Department staff may or may not be binding on the Department or now the Director, the point is that the proposed transfer to use a common point of diversion is not per se an enlargement so long as the irrigated acres can be identified. As provided by the Applicant's expert, 145 acres can and will be identified and the Applicant can monitor and report the use of water during the irrigation season to ensure that irrigation place of use does not exceed the existing irrigable acre limitation. Furthermore, use of the irrigation Water Right would be limited to the irrigation season and period of use provided on the existing Water Right. The Applicant can monitor and report the use to ensure that any additional use is limited to the irrigation season as provided by the existing elements of the Water Right.

The hearing officer acknowledged the testimony of Mr. Farrell that it is not uncommon for municipalities or other water users to commingle water rights and that the total diversion rate and volume can be measured to ensure that the elements of each right are not enlarged.<sup>11</sup> Yet, the hearing officer apparently ignored or discounted the testimony because specific details about the

---

<sup>10</sup> Correspondence between the Department and the Applicant's representatives is already part of the record/backfile for Permit No. 63-32225 (*See* Exhibit 103 and official notice of the backfile) as the Applicant submitted a request for Extension of Time to the Department and on September 10, 2019 the Applicant submitted supplemental information to the Department supporting said request. Correspondence with the Department, which was intended to provide the timeframe Applicant had been pursuing this matter in support of the extension request is attached as Exhibit D to the September 10, 2019 supplemental letter.

<sup>11</sup> *Preliminary Order*, p. 9, ¶ 25.

monitoring methods for these other users was not provided.<sup>12</sup> First of all, it is not disputed that other municipalities and water users combine or commingle water rights with differing elements, including priority date, period or purposes of use into the same or a common point of diversion. For example, SUEZ Water diverts irrigation water rights into its Marden Treatment Plant during the irrigation season for use and delivery to its municipal customers for irrigation purposes. Moreover, the Simplot/Micron diversion at Surprise Valley diverts a variety of water rights, for a variety of purposes such as irrigation, recharge and industrial uses. In these instances, the amounts diverted can be measured, monitored, reported, and conditioned to ensure that the water rights do not exceed the existing elements.<sup>13</sup> While each molecule of each water right cannot be color coded red, green and yellow to identify the exact molecule is being use for a specific use or purpose, the acres, diversion rate, volume and other elements can be measured or identified and then reported to the Department to ensure that the elements are not enlarged. This Transfer Application requests nothing different.

To the extent the hearing officer contends that specific monitoring methods for these were not or should have been provided such a contention is misplaced and misses the point. The specific monitoring is not necessary as the point is that monitoring and report can occur, as necessary for that specific water right, and it does not have to be a one size fits all. Instead, the point is that the Applicant can and will identify the acres to be irrigated with the Water Right and then monitor and

---

<sup>12</sup> *Id.*

<sup>13</sup> These examples are simply two instances which are common and known in the Treasure Valley which have differing uses sharing the same point of diversion, well or pump station. There are countless other water users, such as farmers, canal companies and irrigation districts which have multiple water rights with differing elements, uses or priority dates which share the same point of diversion and can be regulated, measured and administered to ensure each specific water rights is limited to its specific elements.



report the diversion rate and volume of water used during the irrigation season to ensure that the elements are not enlarged or exceeded. The hearing officer erred in denying the Transfer Application in its entirety without consideration of such monitoring and reporting requirements which may be necessary to address any enlargement concerns.

### **III. CONCLUSION**

The hearing officer improperly denied the Transfer Application based upon a misplaced and unreasonable conclusion that Transfer Application would result in an enlargement. The Transfer Application does not intend to change the acreage, diversion rate, volume or period of use for the irrigation Water Right and proper monitoring or other conditions can be provided to ensure that the use does not result in an enlargement. The only evidence or testimony presented was that the Applicant can and will track such use to prevent injury or enlargement and the hearing officer ignored such evidence by creating a blanket or per se prohibition of utilizing separate water rights with a common point of diversion. Accordingly, and based upon *Notice of Appeal, Exceptions and Petition for Review of Preliminary Order*, and the arguments contained herein, Gregory B. Johnson requests that the Director reverse the hearing officer and approve of the Transfer Application in its entirety.

DATED this 17<sup>th</sup> day of June, 2021.

SAWTOOTH LAW OFFICES, PLLC

By 

S. Bryce Farris  
Attorneys for Gregory B. Johnson and  
Intermountain Sewer & Water, Corp.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17<sup>th</sup> day of June, 2021, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF NOTICE OF APPEAL, EXCEPTIONS AND PETITION FOR REVIEW OF PRELIMINARY ORDER TO THE DIRECTOR to be served by the method indicated below, and addressed to the following:

Director  
Idaho Department of Water Resources  
322 E. Front Street, Suite 648  
Boise, ID 83702-7371  
T (208) 287-4800  
E gary.spackman@idwr.idaho.gov

☒ U.S. Mail, Postage Prepaid  
☒ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☐ Email / CM/ECF

Mary Walsh  
1650 W. Targee St. # 50028  
Boise, ID 83705-5641  
E mary.walsh@deq.idaho.gov

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ Email / CM/ECF

Lacey Wilde  
165 E. Fawn Dr.  
Boise, ID 83716  
E wildelacey@gmail.com

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ Email / CM/ECF

Gayle Remine  
25 S. Regina Rd.  
Boise, ID 83716  
E gayleremine@att.net

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
☒ Email / CM/ECF



S. Bryce Farris