

Miller, Nick

From: Michael P. Lawrence <mpl@givenspursley.com>
Sent: Tuesday, March 03, 2020 5:58 PM
To: Miller, Nick
Cc: Keen, Shelley; Dittus, Roger; John M. Marshall Esq. (john@jmarshalllaw.com); Cooper, Catherine
Subject: RE: Lexington Hills Inc Suez Transfer 82161 [IWOV-GPDMS.FID739356]
Attachments: 15032998_1_Transfer 72181 - Brockway to IDWR enclosing amended application 2005-10-24.PDF; 15033015_1_Transfer 72181 - IDWR to Brockway re retaining irrigation use 2005-11-15.PDF; 136544_1_Dreher to Creamer re Irrigation rights in Municipal Systems 1998-04-07.PDF

Nick,

Thank you for being patient while awaiting SUEZ's response to your email below.

SUEZ requests option 1 in your email below: "Ask for a quick decision on the transfer application as is – No change in nature of use, just a change in point of diversion to the two SUEZ intakes, and a change in place of use to the acreage proposed in the September 12 letter."

SUEZ believes that the City of Mountain Home's Transfer No. 72128 (cited in your email below) is precedent that demonstrates the Department's policy requiring approval SUEZ's Transfer No. 82161. Like SUEZ's proposed transfer, the City of Mountain Home's transfer involved authorizing the diversion of irrigation water rights into the City's municipal supply system for irrigation of lands within the City's service area. That transfer was approved by Director Spackman (when he was Chief of IDWR's Water Allocation Bureau) for the full quantities and acreage limits authorized by the irrigation rights prior to the transfer. And to protect against enlargement or unauthorized use, it included conditions requiring the City to report irrigated acres within the City's service area and the volumes of water diverted.

IDWR's made its policy clear in processing the City's transfer. Documents in IDWR's files for the City's transfer show that the Department actually promoted leaving the nature of use as irrigation instead of changing it to municipal, as the City originally intended. In an October 24, 2005 cover letter enclosing the City's amended application (copy attached), the City's consultant states that the application was amended "to reflect that there is no change in the nature of use of the irrigation right" and that this amendment was "[b]ased on our telephone conversation" and "is in concert with our discussions with the Director on October 12, 2005."

IDWR's policy was further explained in a November 15, 2005 letter from IDWR to the City's consultant (copy attached). In that letter, the Department acknowledged that "the Director has addressed such a scenario [i.e. using irrigation rights in a municipal system] with United Water Idaho," which of course is SUEZ's old name. The Department cited the April 7, 1998 letter from then-Director Karl Dreher to my partner Michael Creamer (copy attached) for the principles that "IDWR has long recognized that a water right with an irrigation purpose of use may be used for the irrigation of lawns, gardens, parks and landscaping" and that "[t]he fact that the irrigation water may be co-mingled and distributed through a municipal system that also delivers water for other municipal purposes, does not alone necessitate a change in the nature of use of the water right from irrigation to municipal." However, "annual reporting of appropriate measurements and accounting procedures," like those included in the City's Transfer No. 72128, are required.

SUEZ applied for Transfer No. 82161 based on its understanding of Department precedent and policy, as is reflected in the City's approved transfer. SUEZ is entitled to have its transfer approved consistent with such precedent and policy.

Please let me know if you need anything further from SUEZ to continue processing the transfer application.

Thanks,

MICHAEL P. LAWRENCE
GIVENS PURSLEY LLP

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From: Miller, Nick <Nick.Miller@idwr.idaho.gov>
Sent: Friday, November 15, 2019 1:27 PM
To: Cooper, Catherine <cathy.cooper@suez.com>; Michael P. Lawrence <mpl@givenspursley.com>
Cc: Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Dittus, Roger <roger.dittus@suez.com>
Subject: RE: Lexington Hills Inc Suez Transfer 82161

Cathy,

We got together on Friday and did a little research on whether the department has approved prior transfer applications proposing a change from irrigation use to municipal use (or delivery of an irrigation right through the municipal system) without requiring the volume to be reduced to the historic consumptive use. Most of the examples we can find are those where the municipal applicant changed the nature of use from "irrigation" to "municipal" to take advantage of the place of use benefits of a municipal provider. There has been some variability over time and among our offices in how the department has handled enlargement concerns. In some approval instances, the municipal use is qualified with measuring and reporting conditions intended to limit enlargement, and in other situations those conditions were not used. Some examples are:

- City of Mountain Home Transfer 72128 See right no. 61-2167
- City of Coeur d'Alene Transfer 75824 See right no. 95-2164
- City of Jerome Transfer 78803 See right no. 36-8111
- City of Sugar City Transfer 82051 See right no. 22-14304

Despite the examples of approval without the volume reduction, the department's written policy in Transfer Memo #24 is to require the volume reduction to prevent enlargement. There may be enlargement possibilities that were not identified and addressed in the instances of approval. A review of the department's practice and policy is needed with the aim of formulating a new policy. However, it may take a few weeks to craft a policy. So, as I see it your options include the following:

1. Ask for a quick decision on the transfer application as is – No change in nature of use, just a change in point of diversion to the two SUEZ intakes, and a change in place of use to the acreage proposed in the September 12 letter. A quick decision by the department is not likely to result in approval of the transfer due to concerns about enlargement, but you will get a decision without readvertising and you would have a process to appeal the decision.
2. Amend the application to describe a nature of use change to municipal. This would trigger re-advertising, and the approval quantity would be reduced to the historical consumptive use

(approximately 475 acre-feet). The WD63 accounting issue we discussed could be made part of the review process.

3. Amend the application to describe a nature of use change to municipal and await development of the department's policy. This would trigger readvertising and the approval quantity could still be reduced to the historical consumptive use (approximately 475 acre-feet) if the department policy goes that way, rather than something that allows you to transfer all of the diversion volume and protect against enlargement some other way.
4. Withdraw the application
5. Await the department policy and see how that turns out before making a decision.

I realize you need to make some kind of decision before December, so I hope this information helps you do so.

Nick.

From: Miller, Nick

Sent: Tuesday, November 12, 2019 5:41 PM

To: 'Cooper, Catherine' <cathy.cooper@suez.com>; Michael Lawrence (MPL@givenspursley.com) <MPL@givenspursley.com>

Cc: Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Dittus, Roger <roger.dittus@suez.com>

Subject: RE: Lexington Hills Inc Suez Transfer 82161

Hi Cathy,

I'm in the process of summarizing some internal discussion we had last week on this. I should be able to get you some options on the transfer sometime tomorrow.

Nick.

From: Cooper, Catherine [<mailto:cathy.cooper@suez.com>]

Sent: Tuesday, November 12, 2019 8:27 AM

To: Miller, Nick <Nick.Miller@idwr.idaho.gov>; Michael Lawrence (MPL@givenspursley.com) <MPL@givenspursley.com>

Cc: Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Dittus, Roger <roger.dittus@suez.com>

Subject: Re: Lexington Hills Inc Suez Transfer 82161

Hi Nick. Any further information on the questions related to the transfer? We need to make some budget decisions.

Thanks,
Cathy

From: Miller, Nick <Nick.Miller@idwr.idaho.gov>

Sent: Tuesday, November 5, 2019 5:11 PM

To: Michael Lawrence (MPL@givenspursley.com) <MPL@givenspursley.com>

Cc: Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Dittus, Roger <roger.dittus@suez.com>; Cooper, Catherine <cathy.cooper@suez.com>

Subject: RE: Lexington Hills Inc Suez Transfer 82161

Hi Mike,

Following up on our meeting this afternoon, I spoke with Matt Anders regarding the ability to accommodate later start dates for a water right in the accounting. Generally speaking, all other things being equal, a diversion accrues to the most senior right first. He and I agreed that it is not a normal practice for people to choose whether to divert their junior rights ahead of their senior rights, but we both understand that it would do you no good to utilize that senior right when you have junior rights available. That said, the accounting can easily handle a water right with either a later season of use start date. This can be implemented either as a fixed date or a rule-based date, such as the day after the day of allocation, for example.

So, in short, the concept of conditioning the right so the season of use is tied to the day of allocation will work with the accounting.

I do not yet have much to say about the other questions related to the transfer (as a change in nature of use or not, and whether or not it needs to be re-advertised, conditioning, etc...). I believe Shelley and I and some others are meeting tomorrow, so I expect we will know more after that.

Nick.



BROCKWAY
ENGINEERING
P.L.L.C.

Hydraulics

Hydrology

Water Resources

RECEIVED
OCT 31 2005
WATER RESOURCES
WESTERN REGION

October 24, 2005

John Westra, Regional Manager
Western Region
Idaho Department of Water Resources
2735 Airport Way
Boise, ID 83705-5082

Re: Revised Application for Transfer - City of Mountain Home
Water Rights 61-2167, 61-2210

Dear John:

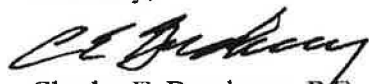
Based on our telephone conversation on October 24, 2005, I am submitting revised documents to amend or change the transfer for the City of Mountain Home to reflect that there is no change in the nature of use of the irrigation right. This is in concert with our discussions with the Director on October 12, 2005.

I have revised Part 1 of the transfer to reflect that the purpose of the transfer is to provide irrigation water for the City to meet current and future summertime demands and Part 3 of the transfer to reflect no change in the nature of use of the water rights thereby maintaining the discharge rate of 7.32 cfs and annual volume of 1800 acre feet for both water rights.

In addition, I revised the narrative supporting the transfer application to reflect the same changes. The remainder of the application IE: the Part 2's do not need revision. Please note that Mayor Joe B. McNeal has signed the revised application for the City and it has been properly notarized.

If you would assemble the revised application and proceed with processing as soon as possible, it would be appreciated.

Sincerely,



Charles E. Brockway, P.E.

CHARLES E.
BROCKWAY,
PH.D., P.E.

CHARLES G.
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PH.D., P.E.

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cc: James Bledsoe - Keller Engineering
Jay Friedly, Attorney - City of Mountain Home



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region, 2735 Airport Way, Boise, Idaho 83705-5082 - (208) 334-2190

FAX (208) 334-2348

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

November 15, 2005

Charles E. Brockway
Brockway Engineering
2016 N. Washington St., Suite 4
Twin Falls, ID 83301

Re: City of Mountain Home Transfer No. 72128

Dear Mr. Brockway:

The amended application for transfer you recently submitted for the City of Mountain Home proposes the nature of use under rights 61-2167 and 61-2210 be retained as irrigation rather than municipal use as originally filed.

In the parallel review of this proposal with department personnel at the State Office, it was brought to our attention that the Director has addressed such a scenario with United Water Idaho. In a letter to UWID's attorney, the Director stated IDWR has long recognized that a water right with an irrigation purpose of use may be used for the irrigation of lawns, gardens, parks and landscaping. The fact that the irrigation water may be co-mingled and distributed through a municipal system that also delivers water for other municipal purposes, does not alone necessitate a change in the nature of use of the water right from irrigation to municipal. However, the Director went on to say that a key factor in not requiring a change in the nature of use of the water right from irrigation to municipal is that the applicant provide annual reporting of appropriate measurements and accounting procedures to demonstrate that the additional water diverted is necessary to satisfy increased summer demand for irrigation water through the municipal system on lands for which the right is authorized to be used. In order to satisfy this accounting requirement, it may be necessary for City of Mountain Home to demonstrate through representative metering the amount of co-mingled irrigation water that is withdrawn from its municipal delivery system for irrigation use on lands authorized under the rights.

Provided that an appropriate accounting is made of the amounts of water diverted and used for irrigation, a municipal water provider may divert irrigation water into its common municipal delivery system and deliver the irrigation component for irrigation purposes. However, establishing an appropriate measurement and accounting procedure in accordance with the policies and provisions of chapters 6 and 7, Title 42, **Idaho Code**, is necessary.

Charles E. Brockway
November 15, 2005
Page 2

Please submit the requested information to allow final evaluation of the transfer application to be completed. You may seek additional time to provide the information by making a written request to delay or interrupt processing. Your written response including the requested information, or a request for more time to seek the information must be received within thirty (30)-days of the date of this letter. The application will be voided or removed from our records without a timely reply.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel A. Nelson", with a long horizontal flourish extending to the right.

DANIEL A. NELSON
Sr. Water Resource Agent

Michael C. Creamer, Esq

April 7, 1998

Page 2

the permit to be used by UWID to meet summer irrigation demands within its municipal delivery system. The issue is unique in that no case law has been identified addressing this issue aside from the unreported district court decision from Colorado cited in your letter, In re: Concerning the Application for Water Rights of the City of Arvada in Jefferson and Adams Counties, Case Nos. W-8083-75 and W-8762-77 (Colo. Dist. Court, Water Division No. 1, Sept 9, 1992). Although the question may be unique, determination of the applicability of Idaho Code § 42-211 to the situation described does not appear difficult.

Idaho Code § 42-211 provides that when a permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, the permit holder shall file an application for amendment with IDWR. The filing requirement under Idaho Code § 42-211 is similar to that under Idaho Code § 42-222 which requires a person entitled to the use of water under a license, decree or beneficial use claim to obtain the approval of IDWR before changing the point of diversion, place of use, period of use or nature of use of all or part of the water right.

Under the factual scenario described in your letter, UWID proposes contracting with the U.S. Bureau of Reclamation for the use of a portion of the water authorized to be diverted under permit no. 63-03618 without seeking any change in the point of diversion, place of use, period of use or nature of use under the water right. Under this factual scenario, the permit amendment requirements of Idaho Code § 42-211 would not pertain.

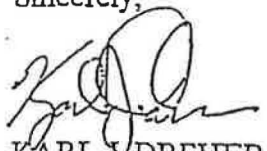
IDWR has long recognized that a water right with an irrigation purpose of use may be used for the irrigation of lawns, gardens, parks and landscaping. The fact that the irrigation water may be commingled and distributed through a municipal system that also delivers water for other municipal purposes, does not alone necessitate a change in the nature of use of the water right from irrigation to municipal. A key factor in not requiring a change in the nature of use of the water right from irrigation to municipal is that UWID provide annual reporting of appropriate measurements and accounting procedures to demonstrate that the additional water diverted is necessary to satisfy increased summer demand for irrigation water through the municipal system on lands for which the permit is authorized to be used. In order to satisfy this accounting requirement, it may be necessary for UWID to demonstrate through representative metering the amount of commingled irrigation water that is withdrawn from its municipal delivery system for irrigation use on lands authorized under the permit.

In conclusion, IDWR shares the view expressed in your letter that provided an appropriate accounting is made of the amounts of water diverted and used for irrigation, a municipal water provider may divert irrigation water into its common municipal delivery system and deliver the irrigation component for irrigation purposes. While no change in the irrigation water right would be required under the provisions of Idaho Code §§ 42-211 or 42-222, it would

Michael C. Creamer, Esq
April 7, 1998
Page 3

be necessary to establish an appropriate measurement and accounting procedure in accordance with the policies and provisions of chapters 6 and 7, title 42, Idaho Code.

Sincerely,



KARL J. DREHER
Director

cc: John W. Keys, III
Tony Sullins
Gary Spackman

Miller, Nick

From: Miller, Nick
Sent: Monday, June 17, 2019 1:30 PM
To: Michael Lawrence (MPL@givenspursley.com)
Subject: Lexington Hills Inc Suez Transfer 82161

Hi Mike,

I received your voicemail from Wednesday and I was not able to get this out on Thursday before I was out of the office on Friday. I apologize for not getting to this sooner.

This transfer proposes to change the POU and POD for water right 63-123F (136.8 acres of irrigation from the Boise River). The proposal is to change the POD from Farmer's Union Ditch and to instead describe two points of diversion from the Boise River owned and operated by SUEZ and that divert water into Suez's municipal distribution system. The proposal is to change the POU from the existing location at the Lexington Hills subdivision and instead deliver the water to any 136.8 acres within Suez's municipal service area.

As you are aware, the department cannot approve of a transfer that will result in a water right not in conformance with statutes, and it must evaluate enlargement in any transfer application. In this case, I see a couple of concerns in those regards.

First, the proposal to describe the place of use for the irrigation right as Suez's municipal service area does not comply with the "generally described place of use" that is authorized for irrigation rights under 42-219. The right does seem to qualify for a generally described place of use, and it was decreed that way, but a generally described place of use is not the same as a municipal service area as defined in 42-202B(9). To equate the two and issue an irrigation right with a municipal service area place of use suggests that the place of use for the resulting irrigation right would be subject to growth or would otherwise change as the municipal service area is authorized to change under Idaho Law. While irrigation is one of the uses included under the "Municipal Purposes" definition in 42-202B(6), the right was not developed as a municipal right by a municipal provider, so it does not qualify for the place of use to be described as the municipal service area.

The more pressing concern is the potential for enlargement when an irrigation right is diverted into a municipal system without any way to ensure that the right is not being used for something other than irrigation of a specific 136.8 acres within the place of use. If Suez does not define a specific place of use, then use under the right has a high potential to be enlarged and no opportunity to verify that it is not being enlarged.

In short, the department would not approve the transfer as the application is written. You do have options for changing the application to address these concerns. This includes changing the proposed place of use to one that is defined, such as a specific golf course, park, or other defined set of irrigated acres. There is also the option of proposing a nature of use change to municipal, which would also involve a reduction in the quantity as we have discussed.

Let me know how you would like to proceed.

Nick.