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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

**AVION WATER COMPANY, INC., an
Oregon corporation,**

Plaintiff,

vs.

**SOURCE WEEKLY, an assumed
business name of LAY IT OUT, INC.,
an Oregon corporation,**

Defendant.

Case No. 22CV18513

**DECLARATION OF JASON WICK IN
SUPPORT OF PLAINTIFF AVION
WATER COMPANY, INC.'S MOTION
FOR SUMMARY JUDGMENT**

I, Jason Wick, declare the following statements are true to the best of my knowledge and belief.

1. I am the President of Plaintiff Avion Water Company, Inc. ("Avion"). I make these statements based upon my personal knowledge.

2. Avion was incorporated as a private corporation under the Oregon Business Corporation Act in 1975. Attached as Exhibit 1 is a true and correct copy of Avion's 1975 Articles of Incorporation, which is available on the Oregon Secretary of State's website at <http://records.sos.state.or.us/ORSOSWebDrawer/Recordhtml/4741235>. Avion is presently registered with the Oregon Secretary of State as a domestic business corporation.

3. Prior to its incorporation, Avion was operated by a sole proprietor, Paul Ramsey, under the business name of "Avion Water Company." The purpose of incorporating Avion and transferring the entirety of Avion Water Company's assets,

1 including its water system, to Avion was to “maintain continuity of ownership and
2 operation in the event of the death or incapacity of the present owner.” Attached as
3 Exhibit 2 is a true and correct copy of Public Utilities Commission Order (“PUC”) No.
4 76-031 (UF-3221), explaining the foregoing.

5 4. Jan Wick, my father, purchased Avion in November 1987. Jan Wick has
6 gifted Avion stock to his children and grandchildren throughout the years and reorganized
7 the stock as part of his estate planning in 2012.

8 5. Avion’s current articles of incorporation, dated December 17, 2021,
9 authorize Avion to issue 1,000,000 shares of common stock. Attached as Exhibit 3 is a
10 true and correct copy of Avion’s Third Amended and Restated Articles of Incorporation,
11 which is available on the Oregon Secretary of State’s website at
12 <http://records.sos.state.or.us/ORSOSWebDrawer/Recordhtml/8461305>.

13 6. Avion is presently owned by eight members of the Wick family and NW
14 Natural Water of Oregon, LLC, a domestic limited liability company. Attached as
15 Exhibit 4 is a true and correct copy of the PUC Order approving Avion’s request to issue
16 new stock shares to NW Natural Water of Oregon, LLC, which is available on the PUC
17 website at <https://apps.puc.state.or.us/orders/2022ords/22-197.pdf>. All owners of Avion
18 are private entities.

19 7. Avion’s Board of Directors are appointed by its shareholders. No
20 governmental entity has a say in who Avion appoints to its board of directors or employs
21 as its employees.

22 8. Avion’s day-to-day operations are managed by Avion’s personnel. No
23 governmental entity oversees Avion’s day-to-day operations.

24 9. Avion’s officers and employees are employed and paid by Avion. They
25 are not employed by government, nor paid by government.
26

1 10. Avion does not make any decisions that are binding on government.

2 11. As a regulated public utility, Avion is subject to oversight by the PUC.

3 The PUC is responsible for approving the rates that Avion may charge its customers.

4 12. Avion obtains its water rights through permits or water rights certificates.

5 Attached as Exhibit 5 is a list of Avion’s water right permits, which is available by

6 searching for “Avion” in the Oregon Water Resources Department’s Water Rights

7 Information Query, available at <https://apps.wrd.state.or.us/apps/wr/wrinfo/>.

8 13. Avion does not receive financial support from the government beyond that

9 which would be available to other private businesses. Avion constructs, maintains, and

10 operates its water utility at its own expense.

11 14. Avion’s service territory is approximately 88 square miles. Approximately

12 7.86 square miles (8.94% of Avion’s service territory) are within the Bend city limits.

13 Approximately 80.14 square miles (91.05% of Avion’s service territory) are outside the

14 Bend city limits.

15 15. To operate within Bend city limits, Avion and the City of Bend have

16 executed a franchise agreement. Attached as Exhibit 6 is a true and correct copy of the

17 Avion/City of Bend franchise agreement, along with amendments to the franchise made

18 in 2016, 2018, and 2022.

19 16. Avion does not have a comparable franchise agreement for the 91.05% of

20 its service territory that is located outside the City of Bend.

21 17. Attached as Exhibit 7 is a true and correct copy of defendant’s May 16,

22 2022, purported public records request to Avion.

23 18. Attached as Exhibit 8 is a true and correct copy of Avion’s May 17, 2022,

24 response to defendant’s purported public records request.

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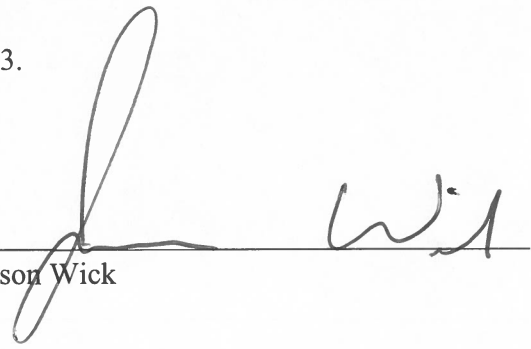
19. Attached as Exhibit 9 is a true and correct copy of defendant's May 19, 2022, petition to the Deschutes County District Attorney.

20. Attached as Exhibit 10 is a true and correct copy of Avion's May 23, 2022, response to defendant's petition to the Deschutes County District Attorney.

21. Attached as Exhibit 11 is a true and correct copy of the Deschutes County District Attorney's May 26, 2022, letter ruling concerning defendant's May 19, 2022, petition.

I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERTAND THEY ARE MADE FOR USE AS EVIDENCE IN COURT AND SUBJECT TO PENALTY FOR PERJURY.

DATED this 5th day of July, 2023.



Jason Wick

112980-15

State of Oregon

Department of Commerce Corporation Division

Certificate of Incorporation

OF

AVION WATER COMPANY

The undersigned, as Corporation Commissioner of the State of Oregon, hereby certifies that duplicate originals of Articles of Incorporation, duly signed and verified pursuant to the provisions of the Oregon Business Corporation Act, have been received in this office and are found to conform to law.

Accordingly, the undersigned, as such Corporation Commissioner, and by virtue of the authority vested in him by law, hereby issues this Certificate of Incorporation and attaches hereto a duplicate original of the Articles of Incorporation.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the seal of the Corporation Division of the Department of Commerce of the State of Oregon this 18th day of December, 1975.



Frank J. Healy
Corporation Commissioner

By
Chief Clerk

Exhibit 1
Page 1 of 4

C-11-B/N/C
4-75

AVION WATER COMPANY, INC.



11298015-17233254

ZIMGNEW

FILE NO. 112980
FILED
IN THE OFFICE OF THE CORPORATION
COMMISSIONER OF THE STATE OF OREGON
FEB 19 1970
FRANK J. HEALY
CORPORATION COMMISSIONER

ARTICLES OF INCORPORATION
OF
AVION WATER COMPANY

We, the undersigned natural persons of the age of twenty-one years or more, acting as incorporators of a corporation under the Oregon Business Corporation Act, adopt the following Articles of Incorporation for such corporation.

ARTICLE I.

The name of the corporation is Avion Water Company and its duration shall be perpetual.

ARTICLE II.

The purposes for which the corporation is organized are: To own and operate a domestic and irrigation water distribution system; the purchase and sale of domestic irrigation water supplies; and perform any and all powers necessary, incidental or convenient to the business, including all powers listed in the Oregon Revised Statutes pertaining to a private corporation.

ARTICLE III.

The aggregate number of shares which the corporation shall have the authority to issue is 500 shares of common stock at no par value.

ARTICLE IV.

The address of the initial registered office of the corporation is 126 N. E. Franklin Avenue, Bend, Oregon, and the name of its initial registered agent at such address is Vernon W. Robinson.

ARTICLE V.

The number of directors constituting the initial Board of Directors is three, and their names are:

Paul C. Ramsay
Lena M. Ramsay addresses same as
Dean L. Rogers below

ARTICLE VI.

The name and address of each incorporator is:


Paul C. Ramsay: 21 Waco Drive
Bend, Oregon 97701

Lena M. Ramsay 21 Waco Drive
Bend, Oregon 97701

Dean L. Rogers Ward Road
Bend, Oregon 97701



PAUL C. RAMSAY



LENA M. RAMSAY



DEAN L. ROGERS

STATE OF OREGON)
) ss.
County of Deschutes)

I, JOYCE H. COPENHAVER, Notary Public for
Oregon, hereby certify that on the 5th day of ^{December}~~October~~, 1975,

112980-15

personally appeared before me PAUL C. RAMSAY, LENA M. RAMSAY
and DEAN L. ROGERS, who being by me first duly sworn, severally
declared that they are the persons who signed the foregoing
documents as incorporators, and that the statements therein
contained are true.

Loiselle Capenlow
NOTARY PUBLIC FOR OREGON
My Commission expires: 11/1/77

BEFORE THE PUBLIC UTILITY COMMISSIONER

OF OREGON

UF-3221

In the Matter of the Application of)
Paul C. Ramsay, dba AVION WATER)
COMPANY, for an Order authorizing)
the sale and transfer of his water)
system to Avion Water Company, an)
Oregon Corporation.)

ORDER

On December 31, 1975, Paul C. Ramsay, dba Avion Water Company (the proprietorship), filed an application pursuant to ORS 757 for an Order authorizing the sale and transfer of his water system to an Oregon corporation (the corporation) also entitled Avion Water Company, and for the corporation to issue 500 shares of its no par value common stock in exchange for the net worth of the proprietorship.

Based upon the application and the records and files of the Commissioner, it is found that:

The proprietorship is a public utility subject to the jurisdiction of the Commissioner. Its utility function consists of furnishing water service to approximately 815 customers in the environs of Bend, Oregon.

The corporation was formed December 18, 1975, by Paul C. Ramsay and Lena M. Ramsay, of 21 Waco Drive, Bend, Oregon, and Dean L. Rogers, of Ward Road, Bend, Oregon. The purposes for which the corporation was organized are: to own and operate a domestic and irrigation water distribution system; to purchase and sell domestic irrigation water supplies; and to perform any and all powers necessary, incidental, or convenient to the business. The corporation is authorized to issue 500 shares of common stock at no par value.

The application conforms with applicable rules and regulations of the Commissioner.

The proposed transaction is to consist of the transfer to the corporation of the water utility property and all other assets and liabilities comprising the proprietorship and the issuance and transfer of 500 shares of no par value common stock by the corporation to Paul C. Ramsay, all to be effective as of January 1, 1976.

The water utility property to be transferred consists of books and records, land, buildings, vehicles, wells, reservoirs, main supply lines, and distribution system, together with hydrants, meters and other appurtenances to a complete water system. The application represents the original cost of the facilities as of November 30, 1975, plus acquisitions, as \$636,554.40, and the total depreciation reserve as \$63,581.64. On the other hand, staff estimates the original cost and depreciation reserve to be \$527,000 and \$53,000, respectively. This order cannot be construed as fixing the original cost and depreciation reserve for the utility property.

The purpose of the transaction is principally to maintain continuity of ownership and operation in the event of the death or incapacity of the present owner. The corporation contemplates no change in the operation of the water system or in the rendition of service.

Such purpose is compatible with the public interest, and the proposed transaction is a reasonable and acceptable method of accomplishing that purpose. The issuance of common stock by the corporation is reasonably required for the acquisition of the net worth of the proprietorship, necessary for the proper performance of the corporation's service as a public utility, and will not impair its ability to perform such service. The issuance of stock in exchange for the net worth of the proprietorship will not result in proceeds that are reasonably chargeable to operating expenses or to income.

From the foregoing, it is concluded that the application described herein should be approved. It is therefore

ORDERED that

1. the application of Paul C. Ramsay, dba Avion Water Company, a proprietorship, filed on December 31, 1975, for authority to sell and transfer his water system to Avion Water Company, a corporation, and for Avion Water Company, a corporation, to issue 500 shares of its no par value common stock in exchange for the net worth of said proprietorship, is hereby granted;
2. Paul C. Ramsay, dba Avion Water Company, a proprietorship, shall file an annual report for

the year 1975 on forms prescribed by the Commissioner by March 31, 1976;

3. Avion Water Company, a corporation, shall file the following:
 - a. notice in writing, within fifteen days of the effective date of the property transfer, adopting the rates, tariffs, rules and regulations of Avion Water Company, a proprietorship, currently on file with the Commissioner; and
 - b. a true copy of the journal entry, within sixty days of the effective date of the property transfer, recording the utility property acquired; and
4. the journal entry required herein shall be based on the staff determination of original cost and depreciation reserve updated to December 31, 1975, subject to modification as required.

Made, entered and effective January 12, 1976



Charles Davis

CHARLES DAVIS
PUBLIC UTILITY COMMISSIONER

Restated Articles of Incorporation - Business/Professional



Secretary of State - Corporation Division - 255 Capitol St. NE, Suite 151 - Salem, OR 97333

FILED: DEC 17, 2021
OREGON SECRETARY OF STATE

11298015-22893554

AVION WATER COMPANY, INC.

RSTART

REGISTRY NUMBER: 112980-15

In accordance with Oregon Revised Statute 192.410-192.490, the information on this application is public. We must release this information to all parties upon request and it will be posted on our website.

For office use only

Please Type or Print Legibly in Black Ink. Attach Additional Sheet if Necessary.

1. NAME OF CORPORATION: Avion Water Company, Inc.

2. NEW NAME OF CORPORATION: (If changed) _____

3. A COPY OF THE RESTATED ARTICLES IS ATTACHED. (Required)

4. CHECK THE APPROPRIATE STATEMENT:

- The restated articles contain amendments which do not require shareholder approval. The date of adoption of the amendments and restated articles was _____. These amendments were duly adopted by the board of directors.
- The restated articles contain amendments which require shareholder approval. The date of adoption of the amendments and restated articles was December 14, 2021.

The vote of the shareholders was as follows:

Class or series of shares	Number of shares outstanding	Number of votes entitled to be cast	Number of votes cast FOR	Number of votes cast AGAINST
Common	91,250	91,250	91,250	0

- The corporation has not issued any shares of stock. Shareholder action was not required to adopt the restated articles. The restated articles were adopted by the Incorporators or by the board of directors.

5. PRINCIPAL PLACE OF BUSINESS (Physical Street Address)

60813 Parrell Road
Bend, OR 97702

6. INDIVIDUAL WITH DIRECT KNOWLEDGE (Name and Address)

Jason J. Wick
60813 Parrell Road
Bend, OR 97702

7. EXECUTION:

I declare as an authorized signer, under penalty of perjury, that this document does not fraudulently conceal, fraudulently obscure, fraudulently alter or otherwise misrepresent the identity of the person or any officers, directors, employees or agents of the corporation. This filing has been examined by me and is, to the best of my knowledge and belief, true, correct, and complete. Making false statements in this document is against the law and may be penalized by fines, imprisonment or both.

DocuSigned by:

1CD5E3BD543D414...

Printed Name:

Jason J. Wick

Title:

President

CONTACT NAME: (To resolve questions with this filing)

Kyle D. Wuepper

PHONE NUMBER: (Include area code)

541-693-0062

FEES

Required Processing Fee \$100

Processing Fees are nonrefundable. Please make check payable to "Corporation Division".

Free copies are available at sos.oregon.gov/business using the Business Name Search program.

**THIRD AMENDED AND RESTATED
ARTICLES OF INCORPORATION
OF
AVION WATER COMPANY, INC.
An Oregon Corporation**

ARTICLE I

The name of the corporation is Avion Water Company, Inc. (the "Corporation").

ARTICLE II

The purpose of the Corporation is to engage in any lawful business.

ARTICLE III

(a) The Corporation is authorized to issue 1,000,000 shares of Common Stock.

(b) At the time these Third Amended and Restated Articles of Incorporation become effective, each outstanding share of Class A Common Stock and Class B Common Stock shall automatically, and without any further action by the Company or any holder thereof, be converted into one share of Common Stock. Any certificate representing Class A Common Stock or Class B Common Stock shall thereafter represent an equivalent number of shares of Common Stock, and the Company shall, upon the delivery of a certificate representing Class A Common Stock or Class B Common Stock, as applicable, for cancellation (or a lost stock indemnity agreement if such certificate has been lost, stolen, destroyed or mutilated), deliver to the holder of such shares a new certificate for the same number of shares of Common Stock.

ARTICLE IV

Any action required or permitted by the Oregon Business Corporation Act to be taken at a shareholders' meeting may be taken without a meeting if the action is taken, in accordance with the Oregon Business Corporation Act, by shareholders having not less than the minimum number of votes that would be necessary to take such action at a meeting at which all shareholders entitled to vote on the action were present and voted.

ARTICLE V

No director of the Corporation shall be personally liable to the Corporation or its shareholders for monetary damages for conduct as a director, provided that this Article shall not eliminate the liability of a director for any act or omission for which such elimination of liability is not permitted under the Oregon Business Corporation Act. No amendment to the Oregon Business Corporation Act that further limits the acts or omissions for which elimination of liability is permitted shall affect the liability of a director for any act or omission which occurs prior to the effective date of the amendment.

ARTICLE VI

(a) The Corporation shall indemnify to the fullest extent not prohibited by law any person who is made, or threatened to be made, a party to an action, suit or proceeding, whether civil, criminal, administrative, investigative or other (including an action, suit or proceeding by or in the right of the Corporation), by reason of the fact that the person is or was a director of the Corporation.

(b) The Corporation may indemnify to the fullest extent not prohibited by law any person who is made, or threatened to be made, a party to an action, suit or proceeding, whether civil, criminal, administrative, investigative or other (including an action, suit or proceeding by or in the right of the Corporation), by reason of the fact that the person is or was an officer, employee or agent of the Corporation or a fiduciary within the meaning of the Employee Retirement Income Security Act of 1974 with respect to any employee benefit plan of the Corporation, or serves or served at the request of the Corporation as a director, officer, employee or agent, or as a fiduciary of an employee benefit plan, of another corporation, partnership, joint venture, trust or other enterprise.

(c) This Article shall not be deemed exclusive of any other provisions for indemnification or advancement of expenses of directors, officers, employees, agents and fiduciaries included in any statute, bylaw, agreement, general or specific action of the board of directors, vote of shareholders or other document or arrangement.

ARTICLE VII

These Third Amended and Restated Articles of Incorporation will become effective on December 17, 2021.

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UF 4330

In the Matter of

AVION WATER COMPANY,

Application to Issue Stock, Bonds, Notes, or
Other Securities.

ORDER

DISPOSITION: STAFF'S RECOMMENDATION ADOPTED

At its public meeting on May 31, 2022, the Public Utility Commission of Oregon adopted Staff's recommendation in this matter. The Staff Report with the recommendation is attached as Appendix A.

BY THE COMMISSION:



A handwritten signature in blue ink, appearing to read "Nolan Moser".

Nolan Moser
Chief Administrative Law Judge

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.

**PUBLIC UTILITY COMMISSION OF OREGON
REDACTED STAFF REPORT
PUBLIC MEETING DATE: May 31, 2022**

REGULAR _____ **CONSENT** X **EFFECTIVE DATE** June 1, 2022

DATE: May 18, 2022

TO: Public Utility Commission

FROM: Russ Beitzel

THROUGH: Bryan Conway, Marc Hellman, and Bruce Hellebuyck **SIGNED**

SUBJECT: AVION WATER COMPANY, INC.:
(Docket No. UF 4330)
Requests authority to issue new stock shares to NW Natural Water of Oregon, LLC.

STAFF RECOMMENDATION:

The Public Utility Commission of Oregon (Commission) should approve Avion Water Company, Inc.'s (Avion) request to issue new stock shares, subject to the following condition:

1. The Commission reserves judgment on the reasonableness for ratemaking purposes of the Company's capital costs, capital structure, and the commissions and expenses incurred for security issuances. In its next rate proceeding, the Company will be required to show that its capital costs, including embedded expenses and capital structure, are just and reasonable.

DISCUSSION:

Issue

Whether the Commission should approve Avion's request to issue additional common stock shares to NW Natural Water of Oregon, LLC (NWN).

Docket No. UF 4330
May 18, 2022
Page 2

Applicable Rule or Law

The Commission possesses the authority to regulate the issuance of utility securities pursuant to ORS 757.405. Pursuant to ORS 757.410, public utilities must obtain Commission approval prior to issuing notes, other evidences of indebtedness, and any security of a public utility.

Pursuant to ORS 757.420, an application for a Commission order approving the issuance of securities must be given priority and be disposed of within 30 days after the filing of the application unless the public utility consents to the extension of that period. ORS 757.430 provides that the Commission may include in its order conditions to approval that it deems are reasonable and necessary.

OAR 860-036-2150 provides that an application by a rate-regulated water utility to issue securities must comply with the rules set forth in OAR 860-027-0030 governing energy and telecommunications utilities. OAR 860-027-0030 specifies the requirements for such application and the exhibits that must be attached to the public utility's application.

Analysis

Background

Avion is a privately owned rate- and service-regulated water utility serving approximately 14,100 domestic water, 410 commercial, and 800 irrigation customers in the vicinity of Bend, Oregon.

Avion submitted its Application to Issue Stock, Bonds, Notes, or Other Securities (Application) on March 29, 2022. Subsequent to its Application, Avion submitted a letter providing the Commission an extension on the 30 day deadline required in ORS 757.420 (above) until the May 31, 2022, Public Meeting.

Currently, the Company's Articles of Incorporation authorizes the issuance of 1,000,000 shares of common stock. Prior to this transaction, the total shares issued and outstanding were 91,250.¹ After this transaction, "NW Natural Water of Oregon's ownership interest and voting power in Avion Water will increase to 40.3% from 37.3%".² This common stock issuance is well within the authorized amount of shares.

¹ See Application, answer to Information Requirement f.

² See Application, answer to Information Requirement h.

Docket No. UF 4330
May 18, 2022
Page 3

Capital Infusion

In its Confidential Attachment No.2 to the Application, the Company states that it will **[Begin Confidential]** [REDACTED] **[End Confidential]**.

In response to an Information Request, Avion indicated it proposes to raise capital funding for the following projects, related to transmission and distribution mains:

- Hwy 20 and Ward Road,
- Hwy 20/22 and Old Bend-Redmond Hwy,
- Knott Road at Robinson Pit, and
- Hunnel Road.

The Company also indicated it expects the entire proceeds from the issuance of new stock will be used on these projects during 2022.³

Public Interest Compliance

Avion states that “Issuance of the Common Stock described herein will aid the Company in further funding its capital program necessary to meet its public utility obligations.”⁴ Staff generally agrees, and notes that issuing common stock is a standard way companies can raise capital funds without obtaining additional debt. Staff finds that the proposal is in the public interest.

Staff requested a list of any costs related to this stock issuance. Avion responded that “There may be de minimis transaction costs associated with this share issuance...”.⁵ Staff notes that this is a private, arm’s length transaction and therefore benefits from not having additional costs typically related to stock issuance (e.g. underwriting fees, SEC registration, etc). Additionally, NWN is already the largest minority shareholder and this transaction only increases their ownership percentage. Because of this relationship the full amount of the proceeds will be used in the improvement of Avion’s infrastructure.⁶

Conclusion

After review of Avion’s Application and IR responses, Staff finds that Avion’s proposal to issue additional shares of common stock is reasonable, and recommends that the Application be approved.

³ See response to IR 04.

⁴ See Application, answer to Information Requirement n.2.

⁵ See response to IR 02.

⁶ See Application, Confidential Exhibit E, page 4.

Docket No. UF 4330
May 18, 2022
Page 4

The Company has reviewed a draft of this memo and voiced no concerns.

PROPOSED COMMISSION MOTION:

Approve Avion's request to issue additional shares of common stock to NW Natural Water of Oregon, LLC, subject to the Condition listed in Staff's recommendation.

UF 4330 PMM confidential



Records/Page:

33 records found

Download

	Contacts	Application	Permit	Certificate	Claim	Decree	Transfers	Status
Select	OWNER: AVION WATER CO. INC. 60813 PARRELL RD BEND, OR 97702	G8668	G8033				▷ T14105 (Changes this right)	NC
Select	OWNER: AVION WATER CO INC. ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10207	G9283					NC
Select	OWNER: AVION WATER CO INC. ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10349	G9972					NC
Select	OWNER: AVION WATER CO INC. ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10347	G11972					NC
Select	OWNER: AVION WATER CO INC. ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G12757	G12330					NC
Select	APPLICANT: AVION WATER CO INC. ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10184	G9946				▷ T10205 (Confirming)	NC
Select	OWNER: AVION WATER CO INC. ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10348	G9971				▷ T7778	NC
Select	APPLICANT: AVION WATER CO INC. ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10421	G9948				▷ T10205 (Confirming)	NC
Select	APPLICANT: AVION WATER CO INC. ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10378	G9975				▷ T10205 (Confirming)	NC
Select	APPLICANT: AVION WATER CO INC. ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702		G9217				▷ T10205 (Confirming)	NC



Records/Page:

33 records found

Download

	Contacts	Application	Permit	Certificate	Claim	Decree	Transfers	Status
Select	APPLICANT: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10242	G9269				▷ T10205 (Confirming)	NC
Select	APPLICANT: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10310	G9320				▷ T10205 (Confirming)	NC
Select	APPLICANT: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10445	G9976				▷ T10205 (Confirming)	NC
Select	APPLICANT: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G15851	G16025				▷ T10488	NC
Select	OWNER: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10371	G9999	84899				NC
Select	OWNER: AVION WATER CO. INC. ▷ 60813 PARRELL RD BEND, OR 97702	G8754	G8258	84898				NC
Select	OWNER: AVION WATER CO. ▷ 60813 PARRELL RD BEND, OR 97702	G10440	G10000	86161				NC
Select	OWNER: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10466	G10019	86875				NC
Select	OWNER: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10599	G9981	87382				NC
Select	OWNER: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10208	G16949	88551				NC



Records/Page:

33 records found

Download

	Contacts	Application	Permit	Certificate	Claim	Decree	Transfers	Status
Select	OWNER: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10263	G9341	91068				NC
Select	ATTENTION: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702 OWNER: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G16060	G17539				▷ T12027	NC
Select	APPLICANT: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G10290	G9398				▷ T12732 (Confirming)	NC
Select	APPLICANT: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G13616	G12936				▷ T12732 (Confirming)	NC
Select	OWNER: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G11741	G11389	93364			▷ T11994 (Confirming)	NC
Select	OWNER: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G18608	G18198					NC
Select	OWNER: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G13446	G18151				▷ T12839	NC
Select	APPLICANT: AVION WATER CO. 60813 PARRELL RD BEND, OR 97702	G17606	G18474				▷ T13352	NC
Select	AGENT: GSI WATER SOLUTIONS ▷ ATTN: ADAM SUSSMAN 1600 SW WESTERN AVENUE SUITE 240 CORVALLIS, OR 97333 APPLICANT: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	LL1872						NC
Select	AGENT: GSI WATER SOLUTIONS INC. ▷ ATTN: OWEN MCMURTREY 1600 SW WESTERN BLVD SUITE 240 CORVALLIS, OR 97333 APPLICANT: AVION WATER CO INC. ▷ ATTN: JASON WICK 60813 PARRELL RD BEND, OR 97702	G19169						NC



Records/Page:

33 records found

Download

	<u>Contacts</u>	<u>Application</u>	<u>Permit</u>	<u>Certificate</u>	<u>Claim</u>	<u>Decree</u>	<u>Transfers</u>	<u>Status</u>
Select	OWNER: ▸ AVION WATER CO. INC. 60813 PARRELL RD BEND, OR 97702	G10617	G9982	95993				NC
Select	OWNER: ▸ AVION WATER CO. INC. 60813 PARRELL RD BEND, OR 97702	G12924	G12788	96354			▸ Transfers (Collapse/Expand)	NC
Select	AGENT: GSI WATER SOLUTIONS ▸ ATTN: TREVOR GRANDY 147 SW SHEVLIN HIXON DR SUITE 201 BEND, OR 97702 APPLICANT: AVION WATER CO. INC. ▸ ATTN: ADAM JACKSON 60813 PARRELL RD BEND, OR 97702	G19346						NC

1 2 3 4

**WATER SERVICE FRANCHISE - AVION WATER COMPANY
(ORDINANCE NO. NS-1514, as amended)**

Section 1: Short Title.

This ordinance shall be known as the "Avion Water Service Franchise." The purpose of this ordinance is to promote and ensure the efficient allocation, regulation and use of domestic water and its provision to Bend residents and to avoid duplication of facilities, capital expenditure and other related resources.

Section 2: Definitions.

For the purpose of this ordinance, the following terms shall have the meaning provided below:

- (1) "City" is the City of Bend, Oregon.
- (2) "Company" is Avion Water Company, the grantee of the rights under this franchise, and its successors or assigns.
- (3) "Council" is the City Council of the City of Bend.
- (4) "Person" means any person, firm, partnership, association, corporation, company or organization of any kind.
- (5) "Facilities" shall mean all real property, fixtures and equipment used by Company in the provision of water services throughout its system, whether located inside or outside of City, and includes, but is not limited to, main transmission lines, distribution systems and all other things used in the provision of water services by Company.
- (6) "Urban Growth Boundary" shall mean those properties within City's present city limits and the Urban Growth Boundary as they now exist and as they may change from time to time in the future.

Section 3: **Grant of Authority.**

City grants to Company the right and privilege to construct, erect, operate and maintain its facilities, in, upon, along, across, above, over and under the streets, alleys, and public ways now laid out or dedicated, and all extensions thereof, and additions thereto, for the provision of water services in City. This franchise is nonexclusive in that the City reserves the right to operate a water system within the public ways and to grant a similar use of streets, alleys and public ways to another person. The City will not serve new customers within the Company's Water Service Area, unless the Company will not serve the customer(s) or the utility is not providing service that meets the standards of a public water utility. The City will not provide service to new customers within the Company's water service area without first providing the Company ten days written notice. This notice shall not be required in the case of an emergency.

Section 4: **Compliance with Laws, Rules and Regulations.**

At all times during the term of this franchise, Company shall comply with all applicable laws, rules and regulations of the United States of America, the State of Oregon, and the City of Bend; including appropriate agencies and subdivisions thereof. Company shall be subject to the lawful exercise of the police power of City and to such reasonable regulations as City may from time to time hereafter adopt. Company shall have 30 days after written notice to remedy any non-compliance. If any non-compliance cannot reasonably be remedied within 30 days, City shall not declare a default for non-compliance provided Company is taking reasonable steps to remedy the non-compliance as soon as is reasonably practicable. This 30 day notice requirement shall not apply in emergency-type situations where the preservation of public health, safety or welfare requires that immediate action be taken.

Section 5: **Company Liability, Indemnification of City and Insurance.**

- (1) Company shall at all times conduct its operations under this franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or City.
- (2) Company shall pay, save harmless and indemnify City from any loss or claim against City on account of or in connection with any activity of Company in the construction, operation or maintenance of its facilities and services.

- (3) This franchise shall not be effective until Company secures, and shall at all times be conditioned upon Company maintaining, a comprehensive liability insurance policy which shall contain the following provisions:
- (a) Bodily injury policy limits of \$500,000 for each person and \$500,000 for each occurrence.
 - (b) Property damage policy limits of \$500,000.
 - (c) An endorsement for completed operations coverage.
 - (d) A designation of City, its officers, agents and employees, as an additional insured for liability arising from or in connection with this franchise.
 - (e) An endorsement requiring 10 days' written notice to City prior to the cancellation of the insurance coverage.
 - (f) A certificate evidencing insurance as described in this ordinance shall be deposited with City.
 - (g) In the event that City's tort liability limits are raised by the Oregon Legislature to exceed the limits described in this Section, Company shall obtain and maintain insurance in the amount of City's tort liability limits.

Section 6:**Facilities and Service Standards.**

For the term of this franchise, Company shall construct, operate and maintain its facilities and provide services as follows:

- (1) Company shall provide its customers with good quality water services; and supply potable water to its customers in compliance with all applicable laws, rules and regulations.
- (2) Company shall construct and maintain those portions of its facilities that are located within the City of Bend and within the Urban Growth Boundary surrounding the City, as it exists and changes, in compliance with City and State standards for the provision of the service. Compliance with City standards shall include, but not be limited to:

- (a) Standards for construction and installation of the water system, including the use of C-900 or ductile iron pipe and restoration of City streets.
 - (b) Provision of standard City fire flows throughout the water system, subject to verification by the Fire Department with notice. At least annually or upon request by the City, the Company will provide the City with a written report of individual hydrant conditions.
 - (c) City inspection and approval of system design and installation pursuant to generally accepted practices and standards in the water utility area.
 - (d) Compliance with City construction standards shall be required only for facilities which are constructed or installed after the commencement of this franchise.
- (3) Company shall maintain and improve its facilities according to generally accepted practices and standards in the regional water utility industry.
- (4) Company's service to properties within the City shall be confined to the properties shown on the map entitled "Water Service Area Exhibit" which is marked EXHIBIT A, Amended July, 2007 attached hereto and incorporated by reference herein. Company shall not serve any other properties within the City. Exhibit A, Amended July, 2007, shall replace the existing water service area allocation between the City of Bend and Company.

[NOTE: Exhibit A is located in City of Bend Ordinance Book directly preceding Ordinance No. NS-2060.]

Company shall not serve any other properties within the Urban Growth Boundary.

- (5) Unless prohibited by law or the Oregon Public Utilities Commission, in cases where City provides sewer services to a Company customer, Company agrees to terminate the service of Company's customer, at the request of City, if the customer becomes delinquent in the payment of the customer's sewer service bill.

Section 7: Company Rules.

Company shall have authority to promulgate such reasonable rules and regulations governing the conduct of its business as shall be reasonably necessary to enable Company to exercise its rights and perform its obligations under this franchise, and to assure uninterrupted service to its customers. Company rules and regulations shall be subject to the provisions of this ordinance and any other governmental regulations. A copy of said rules and all amendments thereto shall be filed with the Office of City Manager.

Section 8: Conditions on Street Occupancy.

Company agrees to comply with the following conditions:

- (1) Use. All facilities installed by Company within the Urban Growth Boundary after the date of this ordinance shall be so located as to cause minimum interference with the proper use of streets, alleys and other public ways and places, and to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, alleys or other public ways or places. Company shall obtain street cut permits for all street cuts and shall comply with the provisions of City's street cut ordinance.
- (2) Restoration. In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Company, Company shall, at its own cost and expense and in a manner approved by City, replace and restore all paving, sidewalk, driveway or surface of any street or alley disturbed, in as good condition as before the disturbance. If Company fails to make restoration as required, City shall cause the repairs to be made at the expense of Company.
- (3) Relocation. City may require Company to change the location of any facility within the public right of way when the public convenience requires such change or removal and the expense thereof shall be paid by Company. City shall give Company reasonable notice of any changes required and Company shall have a reasonable time within which to make the requested change. If Company refuses to make the change requested by City or does not make the change within a reasonable time after the request of City, City may make the change and collect the cost of making said change from Company.

- (4) Placement of Facilities. Company shall not place its facilities where they will interfere with any existing gas, electric or telephone fixture or sewer or water facility. All facilities placed in the City street shall be placed as City directs.

Section 9: **Notice of Intent to Sell.**

Company shall not enter into any binding agreement to sell, assign, dispose of or transfer in any manner whatsoever any interest in this franchise, nor transfer, permit transfer of controlling interest in the Company, without first providing to the City sixty (60) days written notice of Company's intent to sell.

Section 10: **Transfer of Franchise.**

Company shall not sell, assign, dispose of or transfer in any manner whatsoever any interest in this franchise or in the technical facilities used with this franchise, nor transfer or permit transfer of controlling interest in Company without prior written approval of Council. Such approval shall be based upon the following criteria: Company shall be required to demonstrate to the satisfaction of the Council that Company's proposed purchaser, assignee or transferee has such financial and managerial resources as are sufficient to maintain the then current quality of service and to comply fully with the terms of this franchise prior to the Council granting such approval. Such approval, based upon the above criteria, shall not be unreasonably withheld by the Council. If the PUC approves the transfer, the transfer shall be presumed to be reasonable.

Section 11: **City Right in Franchise.**

City shall have the right to inspect all construction or installation of Company facilities, subject to the provisions of this ordinance and to make such inspections as it shall find necessary to ensure compliance with governing laws, rules and regulations.

Section 12: **Franchise Fee.**

Company shall pay the franchise fee established by Section 3.112 of the Bend Code. A comparable fee shall be paid by the City's water utility. For purposes of calculating the franchise fee, the term "gross operating revenue" in Bend Code Section 3.112 shall mean all Company income recognized by the Oregon Public Utility Commission for rate setting purposes. The franchise fee provided herein is subject to Public Utility Commission approval.

Section 13: **Rate and Services Regulation.**

City shall not regulate Company's rates so long as Company's rates are regulated by the Oregon Public Utility Commission or comparable governmental entity.

Section 14: **Company Records and Reports.**

Company shall keep accurate books of account at an office within the State of Oregon throughout the term of this franchise. Company shall produce its books of account for inspection by City at any time during normal business hours, after reasonable notice by City, and City may audit Company's books from time to time. City may require periodic reports from Company relating to its operation and revenue within City. Prior to requesting periodic reports, City shall first review the annual report submitted by Company to the P.U.C.

Section 15: **System Data.**

Company shall maintain, at a local office, current maps and other operational data relating to its facilities and system operations in the City of Bend. City may inspect these maps and data at any time during normal business hours.

Section 16: **Enforcement of Franchise.**

City and Company shall have all remedies provided by law, including termination of this franchise, to enforce the terms and conditions of this franchise. Failure to enforce any provision of this ordinance shall not be construed as a waiver of a breach of any other term, condition or obligation of this ordinance.

Section 17: **Franchise Term.**

This franchise is granted for a term of 20 years beginning with the acceptance by Company of the amendment to the franchise adopted by the Bend City Council in July, 2007.

Section 18: **Acceptance of Franchise.**

Within 30 days from the effective date of this ordinance, Company shall file with the City Recorder a written, unconditional acceptance of this franchise and all of its terms and conditions. If Company fails to do so, this ordinance shall be void and of no effect whatsoever.

Section 19: **Franchise a Contract.**

City and Company intend that this franchise shall constitute a contractual obligation between City and Company with respect to Company's service and facilities outside of City and within the Urban Growth Boundary. The parties contemplate that the City's corporate limits will expand through annexation within the Urban Growth Boundary throughout the term of this franchise through City's annexation of properties within the Urban Growth Boundary. The parties intend that the terms and conditions of this franchise shall apply to Company's activities outside the City limits, but within the Urban Growth Boundary, as a contractual obligation so that as properties served by Company are annexed there will not be any significant difference in facilities or service standards.

Section 20: **Constitutionality.**

If any section, subsection, sentence, clause or portion of this ordinance is for any reason held invalid or is rendered unconstitutional by court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the constitutionality of the remaining portion hereof. If for any reason the franchise fee is invalidated or amended by the act of any court or governmental agency, then the highest reasonable franchise fee allowed by law shall be the franchise fee allowed by this franchise.

[Section 11-20.1 through 11-20.19 added by Ordinance No. NS-1514, passed June 20, 1990]

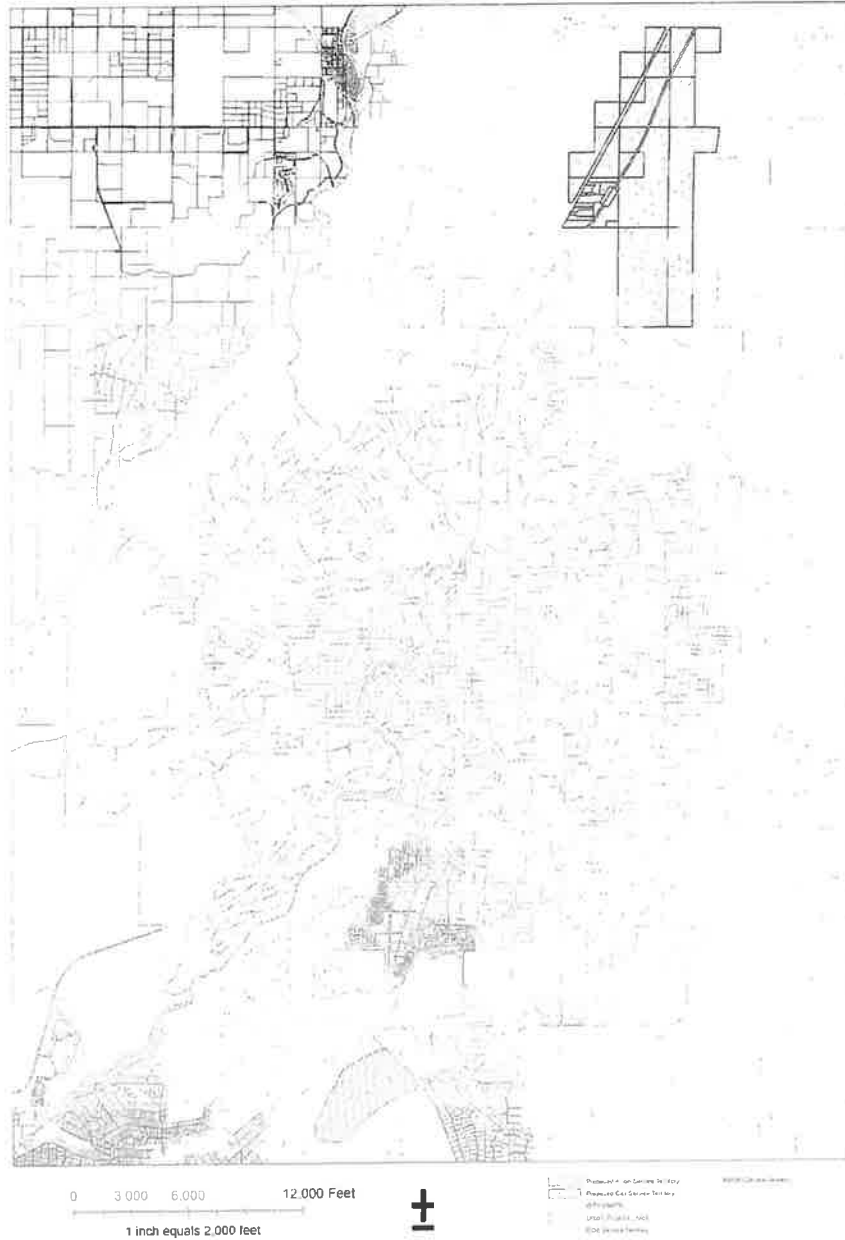
[Sections 11-20.6 and 11-20.16 amended by Ordinance No. NS-1549, passed November 6, 1991]

[Section 11.20.1 through 11.20.20 amended by Ordinance No. NS-1748, passed June 7, 2000]

[Section 12 amended by Ordinance No. NS-1997, passed February 1, 2006]

[Sections 6 and 17 amended by Ord. Ns-2060, passed July 2, 2007]

**Avion Water Company Inc / City of Bend
Proposed Service Territory Exchange 2007**



[Exhibit A Amended by Ord. NS-2060, passed July 2, 2007]

ORDINANCE NO. 2284

AN ORDINANCE AMENDING THE FRANCHISE AGREEMENTS WITH AVION WATER COMPANY AND ROATS WATER SYSTEM, INC. BY AMENDING THE SERVICE TERRITORY OF THE FRANCHISEES

Findings

- A. The City has, by ordinance, granted franchises to Roats Water System, Inc. (Roats) and Avion Water Company (Avion) to provide water service within specific areas in the City.
- B. Each franchise includes an Exhibit A that shows the water service territory of the franchisee.
- C. The City of Bend has entered into agreements with both Roats and Avion to transfer water service territory to the two franchisees. This will increase their service territory and the franchise agreements need to be amended to reflect the enlarged service territory.
- D. The need to coordinate several actions relating to the transfer of assets and obtain needed approvals from other governmental entities has created a need to adopt this ordinance and make it effective to avoid an inconsistency in legal obligations, which could affect the legal authority for water service in the transferred areas.

Based on these findings, **THE CITY OF BEND ORDAINS AS FOLLOWS:**

- Section 1: Section 6(4) of Ordinance NS-1747 Water Service Franchise – Roats Water System, Inc., is amended to read:

Company's service to properties within the City shall be confined to the properties shown on the attached Exhibit A. Company shall not serve any other properties within the City except by written agreement with the City.

- Section 2: Exhibit A to Ordinance NS-1747 is amended by deleting the Existing Exhibit A and replacing it with Exhibit A to this Ordinance.

- Section 3. Section 6(4) of Ordinance No. NS-1514 Water Service Franchise – Avion Water Company is amended to read:

Company's service to properties within the City shall be confined to the properties shown on the attached Exhibit A. Company shall not serve any other properties within the City except by written agreement with the City.

- Section 4. Exhibit A to Ordinance NS-1514 is amended by deleting the existing Exhibit A and replacing it with Exhibit A to this Ordinance.

Section 5. This ordinance is effective (1) 30 days after adoption or (2) when all conditions to the agreements mentioned in Recital C are met and the transfer of service areas occurs, whichever occurs last.

First Reading: December 7, 2016

Second Reading and Adoption by Roll Call: December 21, 2016


Yes: Jim Clinton, Mayor
Doug Knight
Sally Russell
Nathan Boddie

No: Barb Campbell



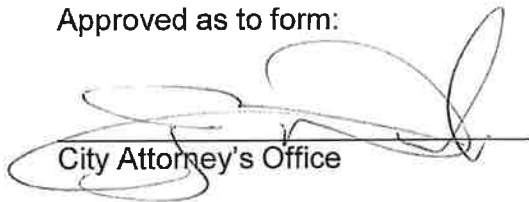
Jim Clinton, Mayor

ATTEST:



Robyn Christie, City Recorder

Approved as to form:



City Attorney's Office

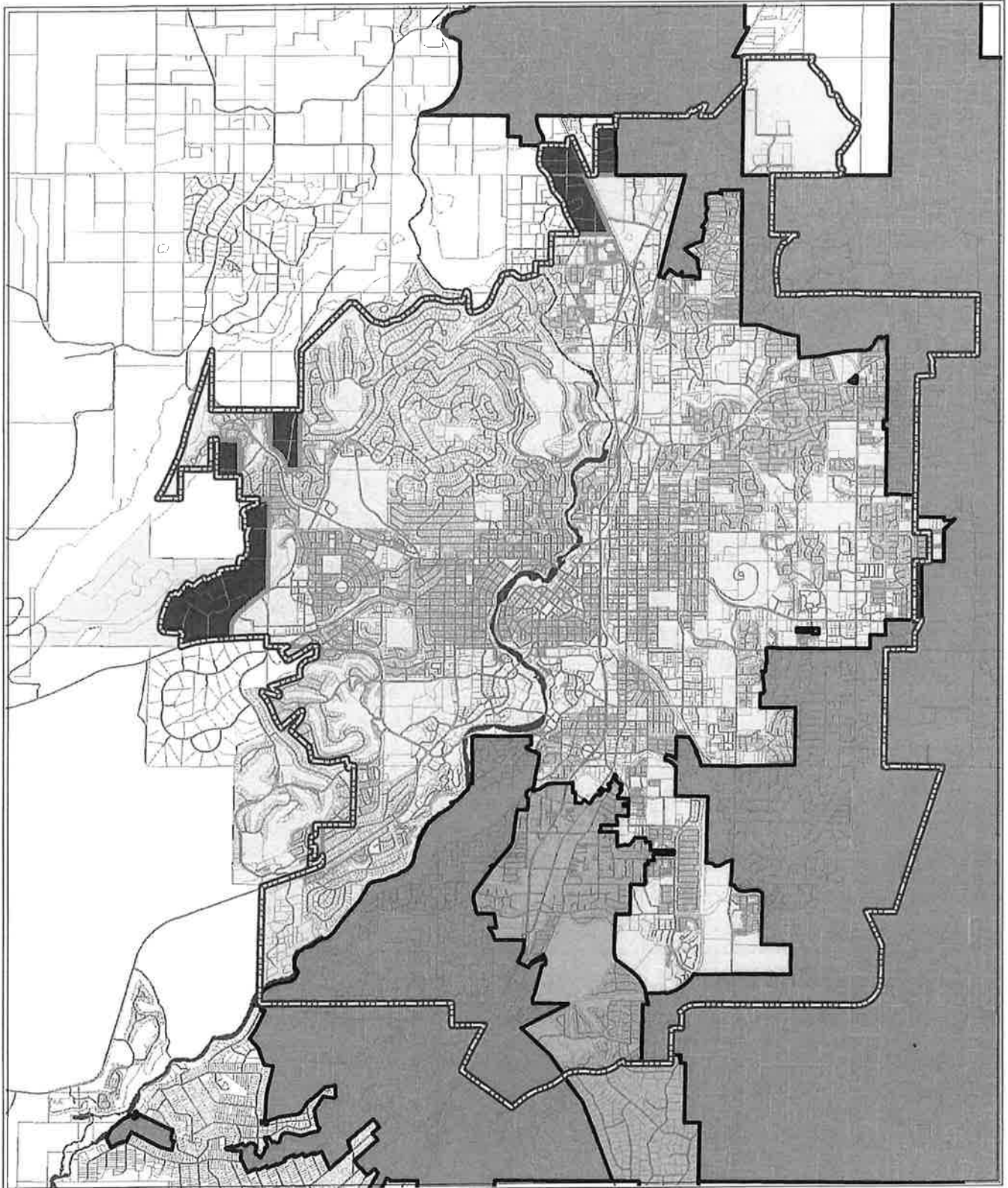








EXHIBIT - A

-  Proposed UGB Expansion
-  City Limit
-  Prop COB Service Area Add (UGB Expansion)
-  City of Bend Water Service
-  Avion Water System
-  Roats Water System

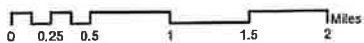


Exhibit 6

Page 12 of 21

ORDINANCE NO. 2312

AN ORDINANCE AMENDING THE FRANCHISE AGREEMENT WITH AVION WATER COMPANY BY AMENDING THE SERVICE TERRITORY OF THE FRANCHISE

Findings

- A. The City has granted a franchise to Avion Water Company (Avion) to provide water service within specific areas in the City by ordinance No. NS-1514, last amended by NS-2284.
- B. Avion's service to properties within the City is confined to the service territory approved by the City.
- C. The Bend-La Pine School District (BLSD) is developing a site in southeast Bend for a new high school and middle school. The site is located on the Deschutes County Assessor's Tax Map as Tax Lot 1812160000100, Deschutes County, Oregon. The site address is 60925 15th Street Bend, Oregon 97702.
- D. The southern portion of the site, where the high school will be constructed, is within Avion's current water service territory. The northern portion of the site, which will eventually see the development of a middle school, is in the City's water service territory. The City Engineer has determined it is appropriate for the City to serve the northern part of the site, and for Avion to serve the southern portion of the site.
- E. The development of the site will include a new collector road between SE 15th St. and Brosterhaus Road.
- F. The City is willing to expand Avion's service territory (and adjust its own) by moving the service territory boundary to the north to include the new collector road. Doing so will facilitate water service to the new high school within Avion's current service territory.
- G. The City Council finds that the expansion of Avion's service territory to facilitate water service to the high school is reasonable, and that doing so will not negatively impact the City's water utility operations or business.
- H. To adjust the service territory, an amendment to the Avion franchise agreement to expand the service territory as shown in the attached Exhibit A is required.

Based on these findings, **THE CITY OF BEND ORDAINS AS FOLLOWS:**

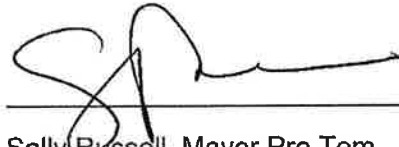
- Section 1: The Avion franchise agreement is amended as shown on attached Exhibit A to include the new collector road; City staff are authorized to carry out any actions necessary to effectuate the amendment to the Avion service territory in a manner consistent with this ordinance.
- Section 2: This ordinance is effective (1) 30 days after adoption.

First Reading: August 1, 2018

Second Reading and Adoption by Roll Call: August 15, 2018


YES: Sally Russell
Bruce Abernethy
Bill Moseley
Justin Livingston
Barb Campbell

NO: none



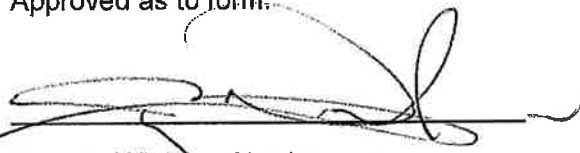
Sally Russell, Mayor Pro Tem

ATTEST:

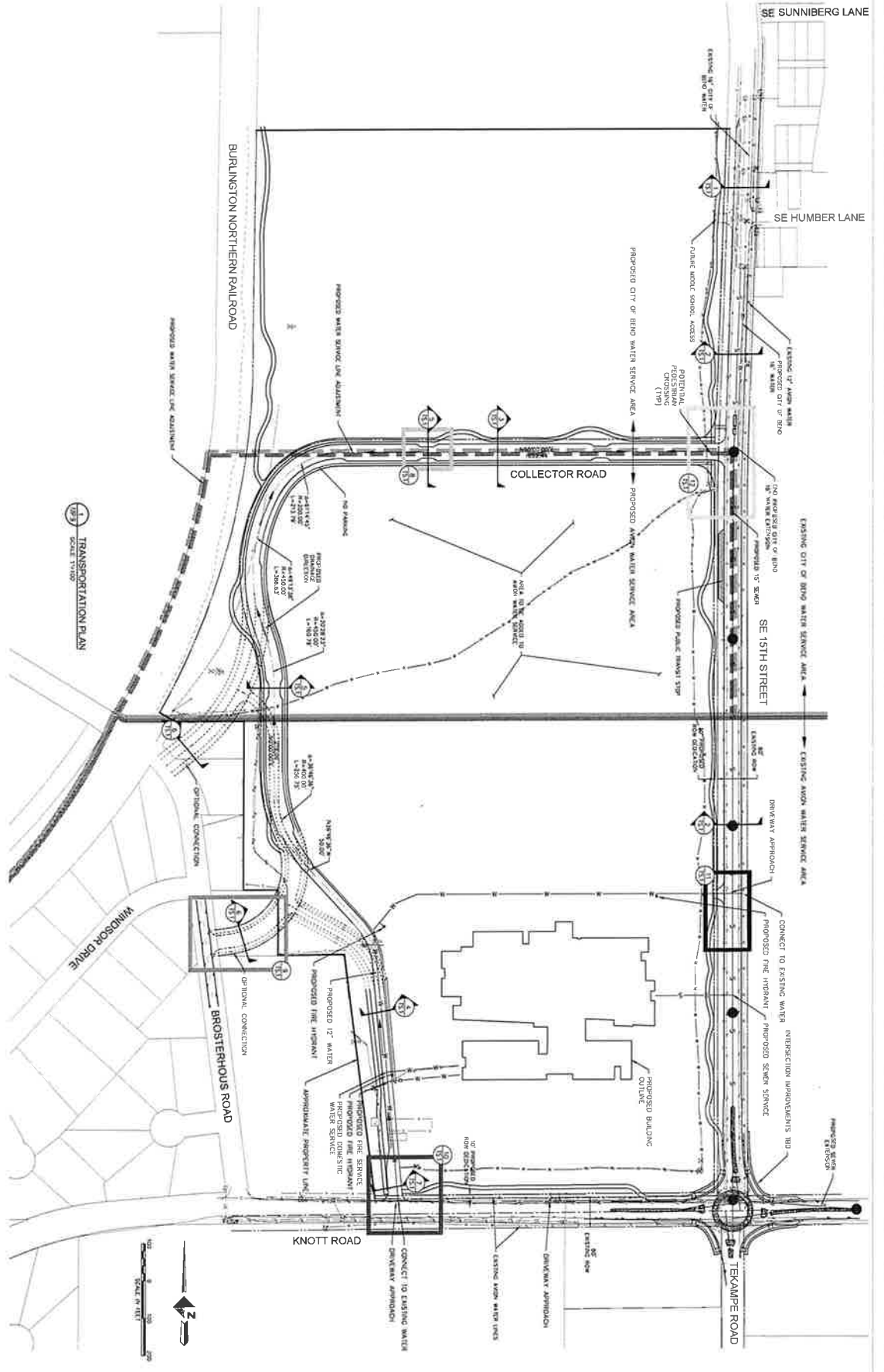


Robyn Christie, City of Bend Recorder

Approved as to form:



Mary A. Winters, City Attorney



TRANSPORTATION PLAN
SCALE 1"=100'



No.	Description	Date

PROJECT NUMBER: 1570
DATE: 03/27/18

100% SCHEMATIC DESIGN

TRANSPORTATION PLAN

MP.9

15TH ST & KNOTT RD
BEND, OR 97702

**BEND LAPINE SCHOOLS
NEW BEND HIGH SCHOOL**

DOWL

803 SW Sherman #200
Bend, Oregon 97702
541-333-4712

BBT
Exhibit 6

600 SW Simpson Ave. Suite 100
Bend, Oregon 97702
541-333-4712 Fax 541-333-8333

NOT FOR CONSTRUCTION

Page 15 of 21

ORDINANCE NO. 2452

AN ORDINANCE AMENDING THE FRANCHISE AGREEMENT WITH AVION WATER COMPANY BY AMENDING THE SERVICE TERRITORY

Findings

A. The City granted a franchise to Avion Water Company (Avion) to provide water service within specific areas in the City by Ordinance No. NS-1514. The franchise has been amended at various times, most recently in 2018 by Ordinance NS-2312.

B. Avion's service to properties within the City is confined to the service territory approved by the City.

C. Both the City and Avion have an interest in adjusting Avion's service territory. The proposed adjustment would facilitate development in the North Triangle Urban Growth Boundary (UGB) expansion area by capitalizing on existing City water utility infrastructure and capacity, and would consolidate water service with Avion as the single water provider in the Easton master planned area.

D. The City is willing to adjust Avion's service territory (and adjust its own) by changing the service territory as reflected on Exhibits A and B, maps of the new Avion service territory that would be effectuated by this ordinance.

E. Avion is willing and able to provide water service to the properties within its new service territory as reflected on Exhibits A and B.

G. The City Council finds that the changes to Avion's service territory reflected on Exhibits A and B are reasonable, and that doing so will not negatively impact the City's water utility operations or business, and will not negatively impact City water utility customers.

H. To adjust the service territory, the Council desires to amend the Avion franchise by adding and incorporating Exhibits A and B to reflect the updated service territory.

Based on these findings, **THE CITY OF BEND ORDAINS AS FOLLOWS:**

Section 1: Exhibits A and B are added and incorporated to the City of Bend's franchise with Avion Water Company to update the service territory granted by the City to Avion.


Section 2: This ordinance is effective (1) 30 days after adoption.

First Reading: August 3, 2022

Second Reading and Adoption by Roll Call: August 17, 2022

YES: Mayor Gena Goodman-Campbell
Councilor Anthony Broadman
Councilor Barb Campbell
Councilor Melanie Kebler
Councilor Megan Perkins
Councilor Stephen Sehgal
Councilor Mo Mitchell

NO: none



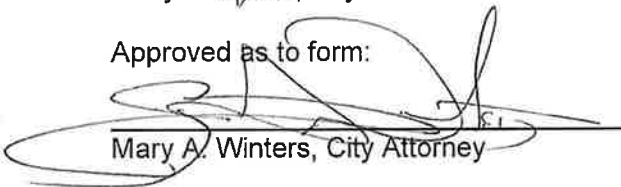
Gena Goodman-Campbell, Mayor

ATTEST:



Robyn Christie, City Recorder

Approved as to form:



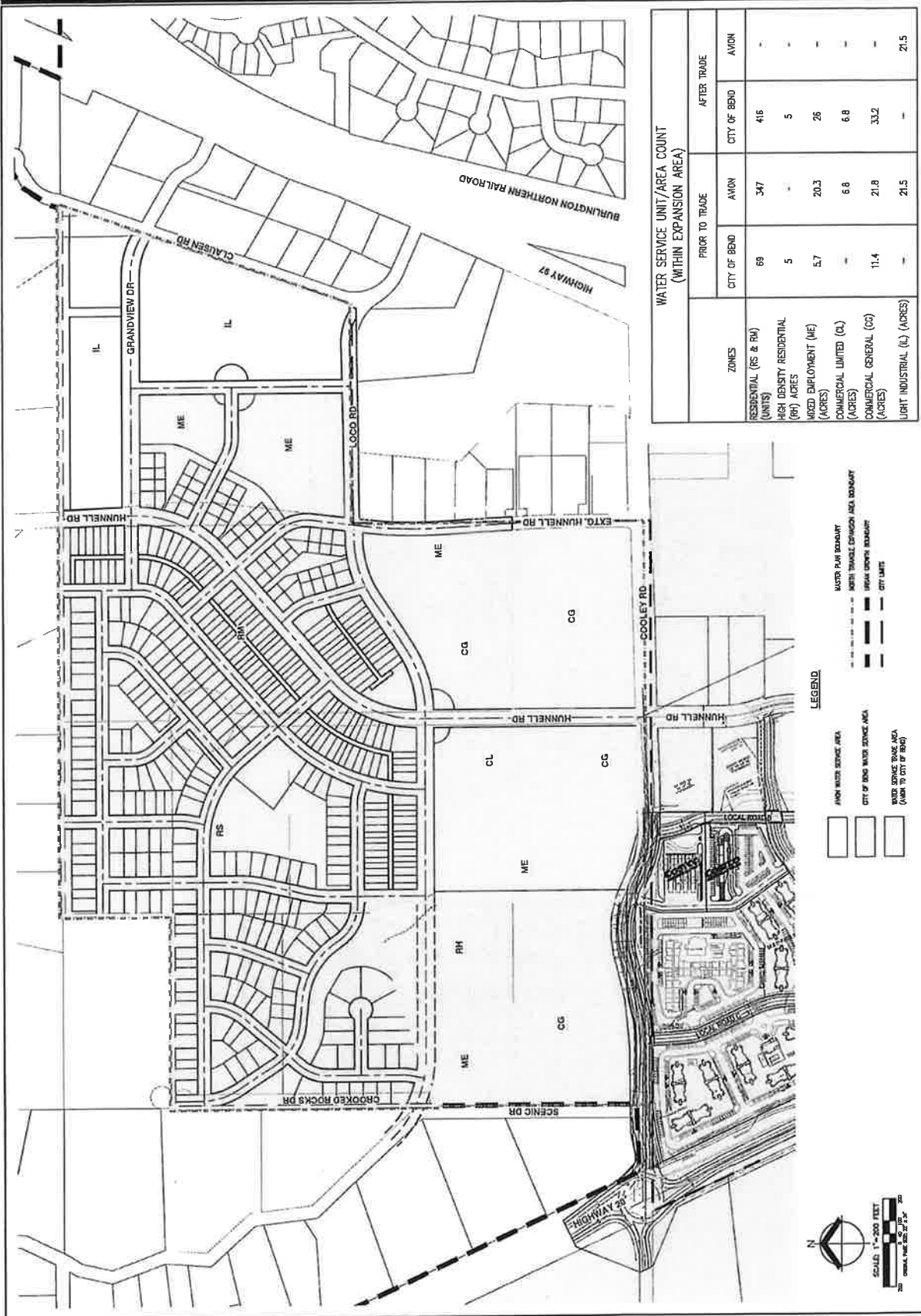
Mary A. Winters, City Attorney

CARAWAY WATER SERVICE TRADE AREA
 BEND, OREGON

CONSTRUCTION
 PERMITS
 2/1/2022

DATE: 2/1/2022
 DRAWN BY: JRM
 CHECKED BY: JRM

EXHIBIT B



LEGEND

- AMON WATER SERVICE AREA
- CITY OF BEND WATER SERVICE AREA
- WATER SERVICE TRADE AREA (WITHIN 1/4 MILE OF BOUNDARY)
- WATER PLAN BOUNDARY
- WATER TRADE EXPANSION AREA BOUNDARY
- LOCAL SERVICE BOUNDARY
- CITY LIMITS

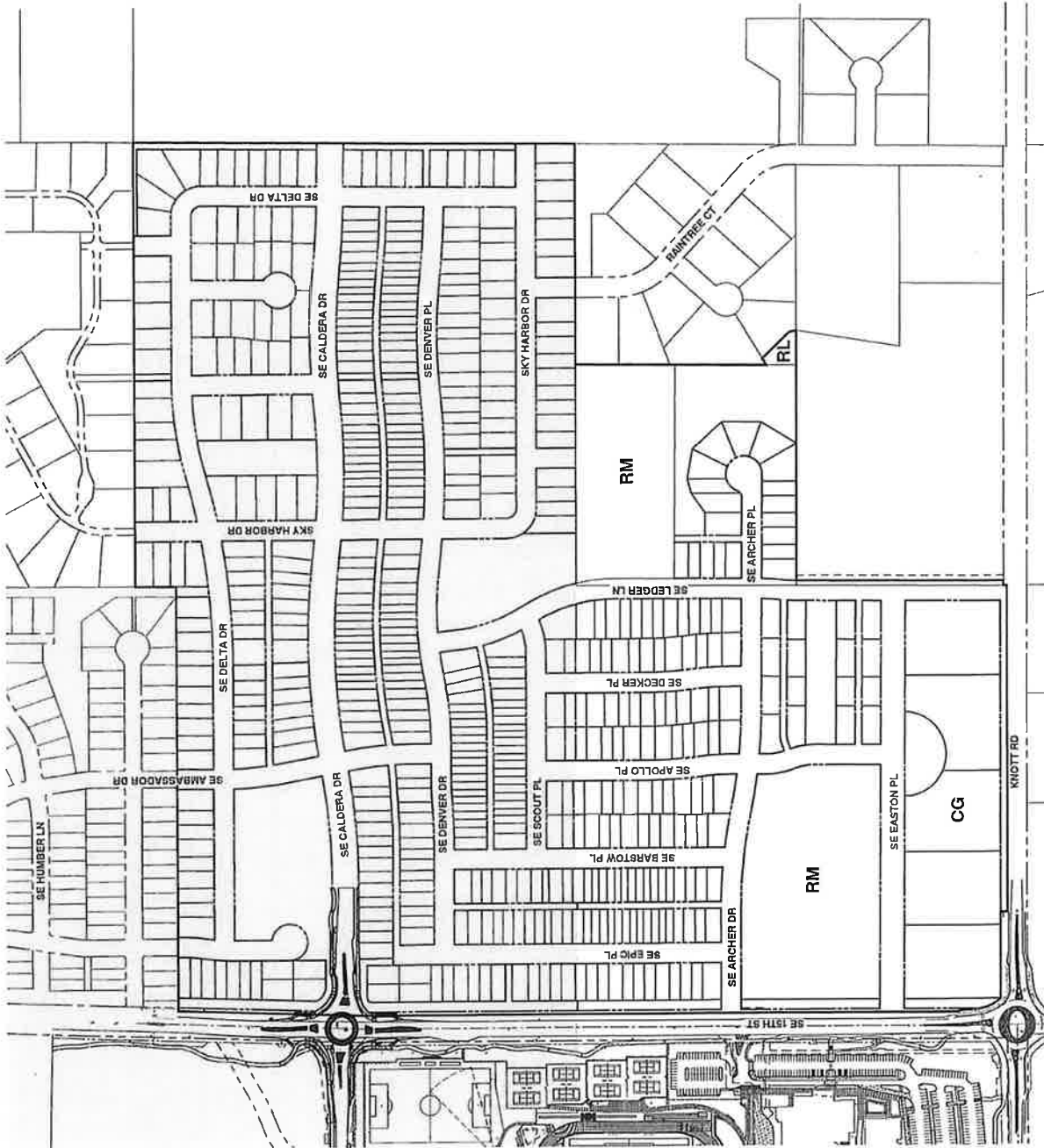
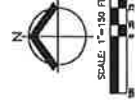
SCALE: 1" = 200 FEET
 GRAPHIC SCALE: 0' 50' 100' 150' 200'

EASTON WATER SERVICE TRADE AREA
 EASTON
 BEND, OREGON

EXHIBIT A

DATE: 7/10/2022
 DRAWN BY: [Name]
 CHECKED BY: [Name]
 SCALE: 1" = 150 FEET

ZONES	PRIOR TO TRADE		AFTER TRADE	
	CITY OF BEND	AVON	CITY OF BEND	AVON
RESIDENTIAL LOW DENSITY (RL) ACRES	-	0.2	-	0.2
RESIDENTIAL STANDARD DENSITY (RS) UNITS	416	138	22	532
RESIDENTIAL MEDIUM DENSITY (RM) ACRES	-	17.6	-	17.6
COMMERCIAL GENERAL (CG) ACRES	-	10.1	-	10.1



From: Hanna Merzbach <merzbachhanna@gmail.com>
Sent: Monday, May 16, 2022 2:52 PM
To: Jason Wick; Kyle Wuepper
Subject: Source Weekly public records request: Avion top water users
Attachments: 5-16-22 Source Weekly Record Request Letter_Fee Waiver — Avion Water.pdf

Hi there,

I am writing to send over a public records request for my Source Weekly story. I'm requesting Avion's top 15 urban water users from the calendar year 2021, along with the number of gallons they used and the amount they spent.

After consulting with Oregon's [public records advocate](#), we concluded that Avion should indeed be subject to public records requests since it 1) provides a public service 2) is regulated by the Public Utilities Commission and 3) has contracts with the City of Bend.

According to public record law, you must respond within 5 business days and send over the records within 15 days, unless you issue a denial, in which case this would go to the DA to make a final decision.

I also request a fee waiver in my letter, since we are requesting these records in the public's interest.

Let me know if you have any questions -- thanks!

--

Hanna Merzbach | Journalist

Pronouns: she/her

Follow me on [Twitter](#) or connect on [LinkedIn](#).

hannamerzbach.com

Current time zone: PST

Phone: +1 (818) 415-3506



May 16, 2022
Jason Wick
60813 Parrell Rd,
Bend, OR 97702

Dear Jason Wick,

Pursuant to the state open records law Or. Rev. Stat. Secs. 192.001 to 192.990, I write to request a digital copy of records with the street addresses of Avion Water Company's 15 top urban water users in the calendar year 2021 in Deschutes County, along with the number of gallons they used and the amount they spent on water. The Source Weekly, a Bend-based publication, will be publishing a story in June with the top urban water users in Deschutes County, in an effort to hold our community accountable for water use amid the drought.

According to ORS 192.355(28), public utility districts can release water customers' street addresses, number of gallons used and amount spent on water. Since Avion Water provides a public service, is regulated by the Oregon Public Utilities Commission and has contractual agreements with the City of Bend, the company is functionally considered a public body and is subject to public records requests, according to the [Office of the Attorney General](#) (see page 3).

Since the release of these records are in the public interest, I request a fee waiver. I am requesting a small amount of documents, which should not take up too much of the company's resources to obtain.

As provided by the open records law, I will expect your acknowledgment of receipt within 5 business days, and I expect the records within 15 business days, or by June 5 — though **I would appreciate the records by May 23 to meet my deadline**. See Or. Rev. Stat. Sec. 192.324 and 192.329.

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

I would note that willful violation of the open records law can result in the award of litigation costs, disbursements and reasonable attorney fees. See Or. Rev. Stat. Sec. 192.431(3).

Thank you for your assistance.

Sincerely,
Hanna Merzbach — 8184153506



May 17, 2022

Kyle D. Wuepper
kwuepper@brixlaw.com

VIA EMAIL (merzbachhanna@gmail.com)

Hanna Merzbach
The Source Weekly
merzbachhanna@gmail.com

RE: Avion Water Company, Inc.
Source Weekly Public Records Request

Ms. Merzbach,

As you know, Brix Law LLP represents Avion Water Company, Inc., an Oregon corporation ("Avion").

Pursuant to ORS 192 (the "Public Records Law") you have made a public records request to Avion for the disclosure of certain personal information of Avion's water users. The Public Records Law only confers a right to inspect the public records of a public body in Oregon. It is our belief, however, that Avion is not subject to the Public Records Law because Avion is a private body and does not sufficiently meet the factors to be considered a functional equivalent of a public body.

In *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994), the Oregon Supreme Court considered a set of factors to determine whether a private body was the functional equivalent of a public body, and therefore subject to the Public Records Law. In the event of a petition for disclosure of records under the Public Records Law the request will likely be reviewed under the same factors cited in *Marks*.

We believe it is plainly evident that Avion would not meet the standard to be considered the functional equivalent of a public body, according to the following analysis used in *Marks*:

1. **Was Avion created by government?** No, Avion is a privately held Oregon corporation, it is not a government body.
2. **Are Avion's functions traditionally associated with state government?** Possibly, however, the provision of utilities has been historically shared by both public and private entities.
3. **What is the scope of Avion's authority? Does Avion have the authority to make binding decisions on government?** Avion's scope of authority is limited to the provision of utilities to its customers; Avion does not exercise authority that controls any aspect of state government.

{00172973;2}

4. **Does Avion receive support from state government?** No, Avion does not receive public funds and is wholly funded by private means. Avion relies on revenue from its customers to support its business.
5. **What is the scope of governmental control over Avion?** Avion is subject to government regulation as a public utility; however, there is no direct governmental control over Avion's management, operations, or internal governance. Avion's board of directors are independent, private individuals with no connection to government.
6. **Are Avion's officers and employees either state government officials or public employees?** No, Avion's officers and employees are private individuals with no connection to government.

Under the factors cited in *Marks*, Avion possesses, at best, only two characteristics of an entity that is the functional equivalent of a public body. Avion's utility services could be seen as traditionally associated with public bodies, and Avion is subject to governmental regulations related to utilities. However, on balance and given the complete absence of the remaining characteristics, we believe that Avion is not a public body, or the functional equivalent of a public body, for the purposes of the Public Records Law. Avion is an independent, private utility, created and funded by private entities, managed and operated by private individuals, without direct government control, and which performs no governmental decision-making function and possesses no authority over state government.

Thus, in conclusion, we are confident that upon a petition for review that it would be determined that Avion is not subject to the Public Records Law.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Kyle D. Wuepper
KDW:nsl

cc: Client

May 19, 2022

Hanna Merzbach — Source Weekly
merzbachhanna@gmail.com
818-415-3506

District Attorney John Hummel
1164 NW Bond Street
Bend, OR 97701

Dear District Attorney John Hummel,

I write to petition Avion Water Company's denial of my public records request. I am an independent journalist writing a story for the Source Weekly on the top water users in Deschutes County, in an attempt to hold our community accountable amid the drought. On May 16, I requested the following records from Avion Water Company:

1. Street addresses for Avion's 15 top urban water users of the calendar year 2021
2. Number of gallons used by those customers in 2021
3. Amount of money spent on water by those customers in 2021

According to ORS 192.355(28), public utility districts can release water customers' street addresses, number of gallons used and amount spent on water. Oregon's public records advocate also determined this to be accurate (see email attached).

Additionally, although Avion is not technically a public company, I argue it should be functionally considered a public body and be subject to public records requests because it 1) provides a public service often provided by a public body 2) is regulated by a public body (the Oregon Public Utilities Commission) and has contractual agreements with a public body (the City of Bend). According to the Attorney General's [Public Records Manual](#) (see pg. 3), Avion Water has two of the six characteristics considered when determining if a private body is subject to public records requests. It's important to note that the manual does not state that companies must possess all of these characteristics to be considered public.

On May 18, Avion's lawyer —Kyle Wuepper — denied my request, saying "Avion is a private body and does not sufficiently meet the factors to be considered a functional equivalent of a public body." I have attached a copy of my initial records request, along with the denial letter.

I argue that it is in the public's interest for Avion Water to release these records. I have requested similar records from Bend Water and Redmond Water, both of whom will be providing these records. As of 2015, with 22,000 customers, Avion Water was the [second largest water provider](#) in Deschutes County (behind Bend Water, but ahead of Redmond). Since it provides a public service to such a large portion of the community, I believe it should have to provide the same records that its public counterparts do.

It is also imperative to release these records because the west is in the worst drought it's seen in [1200 years](#). Governor Kate Brown also gave Deschutes County a [drought designation](#) this April, and the cities of Bend and Redmond are both running [water conservation campaigns](#). While irrigation accounts for the majority of the water in the basin, it is nearly impossible to track where all of this water goes and identify its largest users: Municipal use is one factor we can track in order to hold our community accountable.

According to the Attorney General, you have 15 days to respond to this petition, so by June 2nd.

Sincerely,
Hanna Merzbach



May 23, 2022

Kyle D. Wuepper
kwuepper@brixlaw.com

VIA EMAIL (John.Hummel@dcda.us)

John Hummel
Deschutes County District Attorney
1164 NW Bond St.
Bend, OR 97703
Email: John.Hummel@dcda.us

RE: Avion Water Company, Inc.
Source Weekly Public Records Request Denial Petition Response

Mr. Hummel,

As you know, Brix Law LLP represents Avion Water Company, Inc., an Oregon corporation ("Avion").

Hanna Merzbach, in her capacity as a journalist with the Source Weekly, made a public records request to Avion pursuant to ORS 192 (the "Public Records Law") for the disclosure of certain personal information of Avion's water users. The items requested were (1) street addresses for Avion's 15 top residential water users of the calendar year 2021; (2) number of gallons used by those customers in 2021; and (3) amount of money spent on water by those customers in 2021.

The Public Records Law confers a right to Oregon citizens to inspect the public records of a "public body" in Oregon. A "public body" is defined in ORS 192.311(4) as "every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state."

Private bodies are normally considered, by definition, outside of the purview of the Public Records Law. Avion, as an Oregon privately held corporation, is a private body.

The Oregon Supreme Court in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994) established a set of factors to determine whether a private body is the functional equivalent of a public body, and therefore subject to the disclosure requirements of the Public Records Law; however, this is the exception—not the rule. The factors cited in *Marks* used to analyze the entity's character and the nature of its relationship with government are: (i) the entity's origin (was it created by government or was it created independently?); (ii) the nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly

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performed by a private entity?); (iii) the scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?); (iv) the nature and level of any governmental financial and nonfinancial support; (v) the scope of governmental control over the entity; and (vi) the status of the entity's officers and employees (are they public employees?).

As applied to the factors cited in *Marks*, the factual circumstances of Avion's entity status are as follows:

1. **Was Avion created by government?** No, Avion is a privately held Oregon corporation, it is not a government body.
2. **Are Avion's functions traditionally associated with state government?** Possibly; however, the provision of utilities has been historically shared by both public and private entities.
3. **What is the scope of Avion's authority? Does Avion have the authority to make binding decisions on government?** Avion's scope of authority is limited to the provision of utilities to its customers; Avion does not exercise authority that controls any aspect of state government.
4. **Does Avion receive support from state government?** No, Avion does not receive public funds and is wholly funded by private means. Avion relies on revenue from its customers to support its business.
5. **What is the scope of governmental control over Avion?** Avion is subject to government regulation as a public utility; however, there is no direct governmental control over Avion's management, operations, or internal governance. Avion's board of directors are independent, private individuals with no connection to government.
6. **Are Avion's officers and employees either state government officials or public employees?** No, Avion's officers and employees are private individuals with no connection to government.

Avion does not sufficiently meet the 'totality-of-circumstances' standard established in *Marks* to be considered the functional equivalent of a public body. Under the *Marks* factors, Avion possesses, at most, only two characteristics of an entity that is the functional equivalent of a public body: (i) Avion's utility services could be seen as traditionally associated with public bodies, and (ii) Avion is subject to governmental regulation related to utilities. On balance, however, and given the complete absence of the remaining characteristics, it is clear that Avion is not the functional equivalent of a public body. Avion is an independent, private utility, created and funded by private entities, managed and operated by private individuals, without direct government control, and which performs no governmental decision-making function and possesses no authority over state government. Therefore, because Avion is neither a public body nor the functional equivalent of a public body, Avion is not subject to the Public Records Law.

Even if, in the alternative, Avion were found to be the functional equivalent of a public body, we believe that the items requested by Ms. Merzbach are subject to the exemption under ORS 192.355(28), which states that, "[t]he following public records are exempt from disclosure under ORS 192.311 to 192.478: Personally identifiable information about customers of a municipal electric utility or a people's utility district or the names, dates of birth, driver license numbers, telephone numbers, electronic mail addresses or Social Security numbers of customers who receive water, sewer or storm drain services from a public body as defined in ORS 174.109."

The express intent of the statutory exemption under ORS 192.355(28) is to protect the personal information of utility customers from needless disclosure. A journalistic fishing expedition intended only to 'name-and-shame' Oregon citizens is the exact sort of circumstance for which the exemption was created.

Avion is dedicated to balancing the needs of its water customers with the preservation and stewardship of Oregon's precious natural resources. For this reason, Avion consistently strives to serve its customers as efficiently as possible. Nevertheless, Avion does not view the public shaming of Oregon citizens as a reasonable or necessary element of this mission, and will vehemently defend the privacy and personal information of its customers.

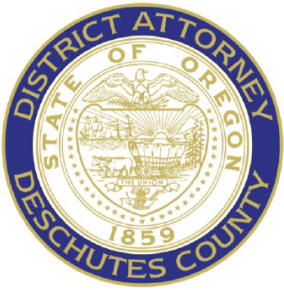
Please do not hesitate to contact me if you have any questions.

Sincerely,



Kyle D. Wuepper
KDW:ncsl

cc: Client
Hanna Merzbach (merzbachhanna@gmail.com)



John Hummel District Attorney

1164 NW Bond Street • Bend, Oregon 97701
(541) 388-6520 • Fax: (541) 330-4691
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May 26, 2022

Kyle Wuepper
Attorney for Avion Water Company
kwuepper@brixlaw.com

Hanna Merzbach
The Source Weekly
merzbachhanna@gmail.com

Dear. Mr. Wuepper and Ms. Merzbach:

Thank you for your prompt and insightful presentation of the issues. This letter constitutes my ruling in the matter of the Source Weekly's appeal of Avion's denial of their recent public records request.

BACKGROUND

- The Source Weekly, a newspaper in Deschutes County, requested, pursuant to Oregon's Public Records Law, the following records from Avion: street addresses for Avion's top 15 residential water users in calendar year 2021; The number of gallons of water used by these customers in 2021; the amount of money spent on water by these customers in 2021.
- In their response to the Source, Avion declined to provide the requested records and asserted that they are not subject to Oregon's Public Records Law because they are neither a public body or the functional equivalent of a public body.
- Pursuant to ORS 192.415, on May 19, 2022, the Source petitioned my office to review Avion's denial of their public records request.
- In their response to the Source's appeal (May 23, 2022 letter to me with copy to the Source), Avion reiterated their argument that they are not a public body, nor are they the functional equivalent of a public body, thus they are not subject to Oregon's public records law. Avion also advanced a new argument: Assuming arguendo that Avion is found to be the functional equivalent of a public body, the records requested by the Source are nonetheless exempt from disclosure based on ORS 192.355(28) which on its face exempts from disclosure certain personally identifiable information of customers of public utilities.

ANALYSIS

Avion argues that they are not subject to Oregon's Public Records law because they are not a public body, nor are they the functional equivalent of a public body. They also argue in the alternative that if they are found to be a public body, the records requested in this matter are exempt from disclosure per the terms of ORS 192.355(28).

I. Is Avion a Public Body? If Not, Are They the Functional Equivalent of One?

The answer to the first question is straightforward: No, per the terms of Oregon's Public Records law, Avion does not meet the definition of a public body¹, and the Source does not dispute this. Avion is a private company that provides water to customers who pay Avion for the water they use; they are not a government utility.

The parties focused their arguments on the issue of whether Avion is the "functional equivalent" of a public body. The parties are correct to cite to the Oregon Supreme Court case of *Marks School Fact-Finding Team*, 319 OR 451 (1994) as the seminal case on the issue of whether a non-public entity is the functional equivalent of a public body such that they must comply with Oregon's Public Record's law. The parties understand this case and accurately described the court's analysis, so I will jump right to the holding of the Court:

[W]e hold that the determination of whether a particular entity is a "public body" * * * will depend on the character of that entity and the nature and attributes of that entity's relationship with government and governmental decision-making. In determining the proper characterization of a particular entity, the following factors * * * are relevant, although no single factor is either indispensable or dispositive:

- (1) The entity's origin (e.g., whether the entity was created by government or had some origin independent of government).
- (2) The nature of the function assigned to and performed by the entity (e.g., whether that function is one traditionally associated with government or is one commonly performed by private entities).
- (3) The scope of the authority granted to and exercised by the entity (e.g., does the entity have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations).
- (4) The nature and level of government financial involvement with the entity. (Financial support may include *** payment of the entity's members or fees as well as provision of facilities, supplies, and other nonmonetary support.)

¹ "Public body" includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any public agency of this state." ORS 192.311(4)

(5) The nature and scope of government control over the entity's operation.

(6) The status of the entity's officers and employees (e.g., whether the officers and employees are government officials or government employees).

Id. at 463

With this framework and guidance in mind, here's my analysis:

- **Avion's origin (e.g., whether Avion was created by government or had some origin independent of government)**
 - There is no evidence in the record regarding Avion being created by government, or having an origin that is anything but what they describe on their website: a private company formed in 1968 to provide water to a subdivision in SE Bend.
 - This factor militates against a finding of Avion being the functional equivalent of a public body.

- **The nature of the function assigned to and performed by Avion (e.g., whether that function is one traditionally associated with government or is one commonly performed by private entities)**
 - Oregon State Government has a long history of providing water to Oregonians and regulating the use of water consumed by Oregonians. As described in detail in the *History of the Oregon Public Utility Commission*, which is attached to this opinion (Exhibit 1) and incorporated as part of my ruling: "Utility regulation in Oregon has its roots in statutes adopted by the Provincial Government to the Oregon Territory prior to statehood." <https://www.oregon.gov/puc/about-us/Pages/History.aspx>

While Avion is correct to point out that the provision of utilities has been historically *shared* by both public and private entities, it is traditionally *associated* with government, as government water utilities provide water to over 80 percent of US residents.

 - This factor is supportive of a finding of Avion being the functional equivalent of a public body.

- **The scope of the authority granted to and exercised by Avion (e.g., does Avion have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations)**
 - Avion has the authority to establish water utility rates for their customers. While this authority is broad, it is not absolute, as it is tempered by the fact that Oregon's Public Utility Commission (PUC) exercises "rate regulation" authority over Avion and other private water utilities (ORS 757.061).

This PUC oversight authority, while significant, does not serve to vitiate Avion of the “scope of authority” that the Supreme Court had in mind in *Marks* for this prong of their “functional equivalent” test. In this prong, the Court is interested in an assessment of whether a non-governmental actor merely makes a nonbinding recommendation to a government body, or whether they on their own issue a decision that will impact the public. The Court was not concerned with whether a decision issued by a nongovernmental actor is subject to post hoc regulatory review.

- This factor is supportive of a finding of Avion being the functional equivalent of a public body.
- **The nature and level of government financial involvement with Avion. (Financial support may include payment of Avion’s members or fees as well as provision of facilities, supplies, and other nonmonetary support)**
 - There is no evidence in the record of government financial involvement with Avion, but there is evidence of significant nonmonetary governmental support provided to Avion. Specifically, Avion entered into a franchise agreement with the City of Bend (“Avion Water Service Franchise”) that grants two significant nonmonetary supports to Avion:
 - The City of Bend granted Avion the right and privilege to construct and operate its facilities on, over, and under City streets and rights of way.
 - The City of Bend agreed to not serve new customers within Avion’s service area unless Avion chose not to continue to serve the customers or Avion’s provision of service was inadequate.
 - Avion points out that this franchise agreement only applies to their operations within the City of Bend, and that they have numerous customers outside of the city limits of Bend. Fair enough, however, this factor is concerned with the nature and level of government nonmonetary support provided to Avion. This step of the *Marks* test does not ask if nonmonetary financial support provided to Avion constitutes all of the support required to operate Avion. Nor does it ask if any of the government support received by Avion is limited by geography or some other factor. This step of the *Marks* test requires me to assess whether Avion has received any government support, and if they have, to assess the nature and level of this support.

I find that the franchise agreement between Avion and the City of Bend constitutes the type of nonmonetary support contemplated by the Supreme Court in *Marks*. I also find that this level of nonmonetary government support is significant.
 - This factor is supportive of a finding of Avion being the functional equivalent of a public body.

- **The nature and scope of government control over Avion’s operation**
 - Avion has the authority to establish service rules and regulations related to provision of water to their customers, however, this authority is limited by the Oregon Public Utility Commission’s “service regulation” authority. See ORS 757.061(1)(b). Here are a few examples of the numerous types of government control exercised by the Public Utility Commission (PUC) over Avion and other private water utilities:
 - Requirement for Avion to keep and maintain certain records. (ORS 757.125);
 - Requirement for Avion to keep “filing schedules” in their office. (ORS 757.240);
 - Requirement for Avion to conduct testing of appliances used for the measuring of service, when requested by the PUC. (ORS 757.255);
 - Requirement for Avion to obtain preapproval from the PUC prior to disposal, mortgage, or encumbrance of certain operative utility property or consolidation with another utility. (ORS 757.480).
 - This factor is supportive of a finding of Avion being the functional equivalent of a public utility.
- **The status of Avion's officers and employees (e.g., whether the officers and employees are government officials or government employees)**
 - There is no evidence in the record of Avion officers or employees being government officials or government employees.
 - This factor militates against a finding of Avion being the functional equivalent of a public body.

Having applied the *Marks* functional equivalence test, I conclude that four of the factors are supportive of Avion being the functional equivalent of a public utility and two of the factors militate against such a finding. Math, however, is an inappropriate discipline for deciding this case. In other words, an analysis that was limited to deeming a 4-2 “score” a “win” for the Source Weekly would be counter to the guidance provided by the Supreme Court in *Marks*. As stated earlier in this opinion, the Supreme Court emphasized that all factors are relevant to a functional equivalence analysis, and none are dispositive: “In determining the proper characterization of a particular entity, the [six] factors * * * are relevant, although no single factor is either indispensable or dispositive * * *” *Marks* at 464, FN 9.

At the end of the day, rulings in functional equivalence cases must focus on the relative importance of each factor to the unique circumstances present in each case, and apply a totality of the circumstances standard. This means that in some reviews, while only one factor may be supportive of an entity being the functional equivalent of a public body, and five factors, for example, may militate against such a ruling, the appropriate ruling might nonetheless be that the entity is the functional equivalent of a public body because the facts of the one favorable factor are particularly compelling.

Likewise, in some cases, five factors, for example, might be supportive of an entity being the functional equivalent of a public body and only one factor might militate against such a finding, yet the appropriate

ruling might nonetheless be that the entity is not the functional equivalent of a public body because the facts of the five factors in favor of functional equivalence might not be particularly compelling and the facts of the one factor on the other side of the equation might be strikingly significant.

Additionally, when I decide this matter, I must consider that I am required to read the public records law broadly, in furtherance of the Oregon Legislature’s underlying policy in favor of disclosure².

After considering everything just discussed, and dissecting and analyzing the specific facts in each of the six factors, I find that the facts present in the four factors that are in favor of a finding of Avion being the functional equivalent of a public body provide the most accurate characterization of Avion’s status. In other words, I find that for the purposes of the Source Weekly’s public records request in this matter, Avion is the functional equivalent of a public body.

Factors I found to be particularly persuasive, included: the provision of water utility service to the public is traditionally associated with the government, to a significant degree (over 80 percent of US customers receive their water from the government). The City of Bend entered into a franchise agreement with Avion that provides Avion with an exclusive agreement to provide water service in a particular geographic area of the City and authorizes Avion to use City streets and rights-of-way to do it. Avion sets their own water rates. Avion is regulated by the Oregon Public Utility Commission. Additionally, we’re in the West, we’re in a drought³, and this request relates to water usage.

II. Are the Records Exempt from Disclosure Per ORS 192.355(28)?

In addition to arguing that they are not a public body subject to Oregon’s public records law, Avion argues that even if they are deemed to be a public body, the records requested by the Source Weekly are exempt from disclosure per the terms of ORS 192.355(28). This statute states:

The following public records are exempt from disclosure under ORS 192.311 to 192.478: Personally identifiable information about customers of a municipal electric utility or a people’s utility district or the names, dates of birth, driver license numbers, telephone numbers, electronic mail addresses or Social Security numbers of customers who receive water, sewer or storm drain services from a public body as defined in ORS 174.109. * * *

The Source Weekly asked Avion for the service addresses of the 15 largest users of water in 2021, the number of gallons used by those customers in 2021, and the amount of money spent on water by these 15 customers in 2021.

² “Reading the provisions broadly is also consistent with the legislative policy underlying the Inspection of Public Records law, as that policy has been explained by the Supreme Court. * * * The Inspection of Public Records law is built on the underlying policy that favors disclosure of public records. Oregon has a strong and enduring policy that public records and governmental activities be open to the public.” *Bialostosky v. Cummings* 319 Or App 352, 359 (2022) (Internal citations omitted).

³ The worst in 1,200 years. <https://www.npr.org/2022/02/14/1080302434/study-finds-western-megadrought-is-the-worst-in-1-200-years>

Avion argues that the addressees of their water customers constitute personally identifiable information, thus they are prohibited by Oregon law from providing the Source with the addresses of their 15 largest users of water.

Avion does not articulate how the exemption in ORS 192.355(25) applies to the non-address requests made by the Source Weekly: the amount of gallons of water consumed by Avion's top 15 users and the amount of money spent on water by these 15 customers.

Regarding the Source Weekly's request for the amount of gallons of water used by Avion's top 15 residential customers in 2021, and the amount of money each of these 15 customers spent on water, there is no credible argument to be made that ORS 192.355(28) exempts this information from disclosure.⁴ I find this exemption does not apply to the number of gallons of water consumed in 2021 by Avion's top 15 residential consumers of water, nor does it apply to the amount of money spent on water by these customers in 2021.

The issue of whether this exemption bars the release of the addresses of Avion's top 15 consumers of water is a more interesting question, and one that reasonable people can disagree on. Obviously, residential addresses are not one of the specific categories of personally identifiable information listed in the statute, yet one can colorably argue that the list is not exclusive, and residential addresses should be considered included in the statute's purview of personally identifiable information.

When deciding which of these two reasonable arguments should carry the day, I am guided Oregon's public records law which places the burden of persuasion on Avion. "The burden is on [Avion] to sustain its action⁵." ORS 192.411(1)

Because Avion and the Source Weekly both make persuasive arguments, and neither argument convinces me that is more likely than not the accurate legal analysis, I find that Avion did not carry their burden of persuasion in this matter. In other words, because Avion failed to convince me that residential addresses of their water users constitute a type of personally identifiable information that falls within the purview of ORS 192.355(25), I find that these residential addresses are not exempt from disclosure by this statute.

CONCLUSION

For the purposes of the Source Weekly's public records request at issue in this case, Avion is the functional equivalent of a public body, thus they are subject to Oregon's public records law.

⁴ Nor does Avion attempt to make such an argument. Avion's exemption argument is implicitly focused on the disclosure of the addresses of the top 15 consumers of water; Avion did not directly address the issue of whether the usage numbers, and fees paid, could be released without being connected to particular addresses.

⁵ I did not apply this burden to the initial question of whether Avion is the functional equivalent of a public body. Having determined that they are, it is appropriate at this step of my review to place the burden of persuasion on Avion.

The personally identifiable information exemption contained in ORS 192.355(28) does apply to the records requested by the Source Weekly, thus, Avion must provide the Source with the records they requested.

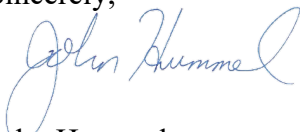
The default length of time to comply with public records appeal orders, per ORS 192.407(3)(a), is seven days, however, the statute grants me authority to extend the deadline to a date I “conclude is appropriate.” Because ORS 192.368 provides a mechanism for members of the public to request their home addresses not be disclosed by a public body, if disclosure would imperil the personal safety of the individual or a family member residing with them, I extend the deadline for Avion to comply with this order, but only as to the part of my order that requires the disclosure of addresses (my order to disclose water usage and money spent on water will adhere to the default length of seven days). This time extension will afford Avion sufficient time to process exemption requests from any of their 15 top water users who believe their personal safety would be at risk if their address was released by Avion⁶.

By 5:00 PM on June 2, 2022, Avion must either provide the Source Weekly with records that contain the number of gallons used in 2021 by the 15 largest residential users of water and the amount of money spent on water in 2021 by these 15 customers⁷, or seek review of my decision in Deschutes County Circuit Court.

By 5:00 PM on June 16, 2022, Avion must either provide the Source Weekly with records that contain the service addresses of their 15 largest users of residential water in 2021, or seek review of my decision in Deschutes County Circuit Court.

Thank you again for your timely submission of pleadings and for your professional interactions during this process.

Sincerely,



John Hummel
District Attorney

⁶ If any of these 15 customers request an exemption, and if Avion grants any exemption request pursuant to ORS 192.368, the Source of course has the legal right to seek review of the decision by filing a petition with my office.

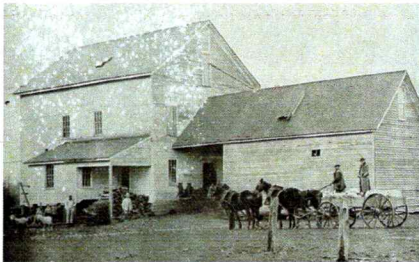
⁷ Avion never addressed whether they are in possession of responsive records. It is reasonable to assume that a water utility is in possession of records that contain the quantity of water consumed by their customers and the amount of money spent by their customers to purchase water.

History of the Oregon Public Utility Commission

About Our Past

Utility regulation in Oregon has its roots in statutes adopted by the Provincial Government to the Oregon Territory prior to statehood.

July 5, 1843—the first act regulating a “public utility” enacted by the then “Provincial Government,” six years before the Territorial Government was established. This included regulating mills and millers.



Boston Mill, Albany, Oregon—1892

First built in 1853, then rebuilt in 1862 after a fire. It is the oldest continually operating water powered grist mill in Oregon.

October 19, 1876—the first instance in Oregon history of the regulation of a utility by a commission at the recommendation of Governor L.F. Grover and enacted by the Legislature. It was designed to effectively regulate the activities of the Locks Company.

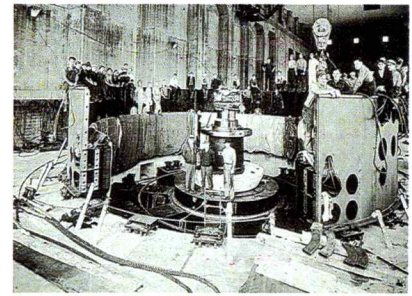
October 10, 1898—the Board of Railroad Commissioners was abolished, leaving the responsibility of accepting annual reports from regulated entities to be completed by the Secretary of State’s Office.

February 19, 1907—The Railroad Commission was created with an elected three member board.

November 29, 1912—The Railroad Commission’s jurisdiction was extended to include utilities and transportation regulation with the addition of the “Public Utility Act of 1911.” This act was the first place in Oregon history to mention the regulation of telephone service.

July 1, 1915—February 28, 1931—the Railroad Commission was renamed the Public Service Commission of Oregon.

March 1, 1931—The Commission dropped from three members to one and the name was changed to the Public Utilities Commissioner, which was appointed by the governor.

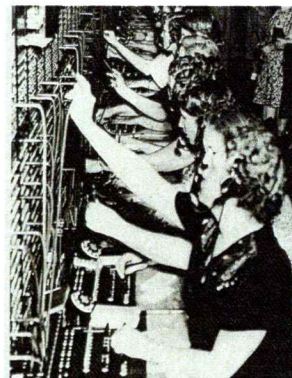


Bonneville Dam Turbine being assembled, which was completed in 1937.

1986—Oregon voters approved a ballot measure changing the office back to a three-person, Governor-appointed Commission and changing the name to the Public Utility Commission of Oregon.

1995—Congress deregulated much of the transportation industry. The regulation of motor transportation and rail safety was transferred to the Oregon Department of Transportation.

1999—House Bill 3615 gave the Governor the authority to appoint the Commission Chair.



Telephone operators demonstrating the switchboard of early years.

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CERTIFICATE OF SERVICE

I certify that on July 5, 2023, I served or caused to be served a true and complete copy of the foregoing **DECLARATION OF JASON WICK IN SUPPORT OF PLAINTIFF AVION WATER COMPANY, INC.’S MOTION FOR SUMMARY JUDGMENT** on the party or parties listed below as follows:

- Via the Court’s Efiling System
- Via First-Class Mail, Postage Prepaid
- Via Email

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