BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR AMENDMENT OF PERMIT NO. 63-32225 IN THE NAME OF INTERMOUNTAIN SEWER & WATER, CORP. AND APPLICATION FOR TRANSFER NO. 83875 IN THE NAME OF GREGORY B. JOHNSON	ORDER ON EXCEPTIONS; FINAL ORDER APPROVING APPLICATION FOR AMENDMENT OF PERMIT WITH CONDITIONS AND DENYING TRANSFER

After considering the evidence in the administrative record in the light of these statutory criteria, the Department finds, concludes, and orders as follows:

PROCEDURAL HISTORY

On January 31, 2020, Intermountain Sewer & Water, Corp. ("Intermountain"), filed with the Idaho Department of Water Resources ("Department" or IDWR) an Application for Amendment of Permit ("Permit Amendment") to add two additional ground water well points of diversion to its Permit No. 63-32225 ("Permit"). The place of use for the Permit is known as the Mayfield Springs Planned Community ("Mayfield Springs").

On the same day, Gregory B. Johnson ("Johnson") filed Application for Transfer No. 83875 ("Transfer Application").[1] The Transfer Application proposed additional ground water well points of diversion ("POD") to Water Right No. 63-32616 ("Water Right"), including two PODs identical to those under the Permit Amendment. The Transfer Application also proposed to add the Mayfield Springs project site to the place of use ("POU") of the Water Right. The Water Right's POU is wholly within Mayfield Springs' boundary.

The Department published notice of both applications on February 20 and 27, 2020. Mary Walsh ("Walsh") filed a protest to the Permit Amendment asserting the addition of the new POD would negatively impact ground water levels in the Mountain Home Groundwater Management Area ("Mountain Home GWMA") and potentially the Cinder Cone Butte Critical Groundwater Management Area ("Cinder Cone CGWMA") and reduce the water available in surrounding domestic wells. Gayle Remine ("Remine"), Lacey Wilde ("Wilde"), and Walsh each filed protests against the Transfer Application asserting use of the additional PODs would negatively impact the Mountain Home GWMA and surrounding domestic wells, and the transfer of irrigation water for use on the Mayfield Springs site would increase water use.[2]

The Department held a pre-hearing conference to discuss both the Permit Amendment and Transfer Application on May 28, 2020, and a status conference on June 5, 2020. At the

[1] Intermountain and Johnson will be referred to collectively as the "Applicants" in this order.

[2] Walsh, Remine, and Wilde will be referred to collectively as the "Protestants" in this order.

status conference, the parties asked to schedule a hearing, to initiate discovery, and to consolidate the Permit Amendment and Transfer Application for purposes of hearing. No party protested the consolidation of the contested applications. Pursuant to Rule 556 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), the Department issued an order on June 19, 2020, consolidating the Permit Amendment and Transfer Application for hearing.

The hearing was held on August 27, 2020, in Boise, Idaho. The Applicants were represented by attorney Bryce Farris of Sawtooth Law Offices, PLLC. The Protestants represented themselves. The only witness at hearing was Tim Farrell ("Farrell") who testified on behalf of the Applicants. Walsh, Remine, and Wilde did not testify, but did cross-examine Farrell.

Applicants' Exhibits 101, 102, 105, and 106 were admitted to the record at hearing. The Department's water right files for the Permit (Ex. IDWR1) and the Water Right (Ex. IDWR2) were identified and admitted at hearing. The hearing officer took official notice of the following Department records: 1) department water right files associated with Permit Nos. 63-32499 and 61-12096, and Water Right Transfer No. 78356; and 2) decisions and orders of the Department pertaining to the I-84 corridor between Boise and Mountain Home (specifically the Department's November 13, 2013, *Final Order Regarding Water Sufficiency* ("I-84 Corridor Order"), the Department's May 31, 2012, memo titled *Sufficiency for Water Right Applications and Transfers Along the I-84 Corridor* ("IDWR I-84 Memo"), the Department's May 7, 1981, *Order Establishing the [Cinder Cone Butte] Critical Groundwater Area*, and the Department's November 9, 1992 *Order Establishing the [Mountain Home] Ground Water Management Area* the Mountain Home Groundwater Management Area).

On June 4, 2021, the hearing officer issued the *Preliminary Order Approving Amendment of Permit with Conditions and Denying Transfer* ("Preliminary Order").

On June 17, 2021, Johnson filed *Gregory B. Johnson's Notice of Appeal, Exceptions and Petition for Review of Preliminary Order to the Director* and the *Memorandum in Support of Gregory B. Johnson's Notice of Appeal, Exceptions and Petition for Review of Preliminary Order to the Director* ("Exceptions").[3]

EXCEPTIONS

Johnson's Exceptions relate only to the Transfer Application, which was denied by the hearing officer in the Preliminary Order. *Exceptions* at 2; *Preliminary Order* at 13.

The Transfer Application proposes to add three points of diversion (PODs) and change the place of use (POU) for existing irrigation Water Right No. 63-32616 ("Water Right").

[3] On June 18, 2021, Johnson filed Appendix A by email, which counsel for Johnson stated was inadvertently left off the Exceptions filed the previous day. Appendix A was already properly admitted into the record and the Director has considered it on exceptions.

Exceptions at 3. The Transfer Application proposes to commingle irrigation water under the Water Right with municipal water (Permit No. 63-32225) for delivery and use on lawns and landscaping within the planned Mayfield Springs development. *Id.* The Exceptions argue the hearing officer improperly denied the Transfer Application for failing to meet the burden of proving that the commingling of irrigation and municipal water in one water system will not result in enlargement. *Id.* At 5.

1. The Preliminary Order

The Department cannot approve a transfer that results in an enlargement of the original right. Idaho Code § 42-222(1).[4, 5] A water right is enlarged when the total diversion rate, annual diversion volume, or extent of beneficial use exceeds the amounts or beneficial use authorized under the water right prior to proposed transfer.

The hearing officer concluded approval of the Transfer Application may result in enlargement of the Water Right because:

> [Intermountain] will not have control over how much water is used to irrigate the residential land or whether or when the acres are irrigated, even if the intended acres are identified. Insufficient evidence was provided to demonstrate how Intermountain will ensure that water diverted under the irrigation right will not, at times, be augmenting municipal demand.

Preliminary Order at 13. In other words, the hearing officer concluded Johnson failed to sufficiently show he will be able to limit the authorized use of the Water Right—irrigation—once it is commingled with municipal water. Within the municipal water system, the ultimate water use will be controlled by the end user (i.e., the owners of the residential, commercial, or other non-irrigation land uses receiving the commingled irrigation and municipal water). If the irrigation water right cannot be monitored and measured to show it is being used pursuant to its authorized use, the use could exceed the amount of beneficial use authorized under the right prior to the proposed transfer. This is enlargement.

Johnson argued he will monitor the annual volume limit and season of use to prevent enlargement. The hearing officer concluded the proposed monitoring would be insufficient to prevent enlargement. The hearing officer concluded the Water Right may only be applied to meet irrigation crop demands and irrigation system requirements during the irrigation season. *Id.* Diversion would historically have ceased at the end of the irrigation season until the next irrigation season. During the irrigation season, the Water Right would not be diverted during harvest and high precipitation events. *Id.* Therefore, if irrigation water is commingled into the

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[4] "The director of the department of water resources shall examine all the evidence and available information and shall approve the [transfer] in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right . . . ." Idaho Code § 42-222(1).

[5] "[T]here is *per se* injury to junior water rights holders anytime an enlargement receives priority." *A & B Irrigation Dist. v. Aberdeen–American Falls Ground Water Dist.,* 141 Idaho 746, 753, 118 P.3d 78, 85 (2005).

municipal system during times when the residential and commercial places of use were not being irrigated (e.g., during high precipitation events), monitoring of annual volume limits cannot ensure the irrigation Water Right is not being applied to non-irrigation municipal uses. *Id.* Additionally, monitoring the Water Right's annual volume limits does not establish actual irrigation use once irrigation water is commingled into the municipal system. Johnson failed to establish that irrigation water will not be used for non-irrigation components of municipal use when irrigation ceases or is reduced. Therefore, an enlargement could result from the unauthorized change in use.

Next, the hearing officer concluded Johnson did not establish that future priority administration of water rights bearing different priority dates will not result in enlargement. The priority date for the municipal Permit is in 2005. The priority date for the irrigation Water Right is in 1974. Therefore, if there is priority administration in the Mountain Home GWMA, and diversion under the municipal Permit is curtailed, water may continue to be delivered in priority under the irrigation Water Right's 1974 priority date. *Id.* The result: the irrigation Water Right, still in priority, would be delivered for all municipal purposes, not just irrigation. *Id.*[6] Johnson failed to show that if priority administration occurred, the irrigation Water Right would not be enlarged through continued use in terms of water rights with priority dates between September 16, 1974 and October 17, 2005. *Preliminary Order* at 13.

Finally, the hearing officer concluded that while there may be monitoring and reporting conditions that *could* be applied to the transfer, Johnson did not submit evidence of such conditions. *Id.* Instead, Johnson's expert testified that water application limitations, individual yard acreage restrictions, and monitoring procedures, will be controlled by to-be-established Covenants, Conditions, and Restrictions, rather than through the water right approval process. *See infra Finding of Fact* No. 23.

2. Johnson's Arguments on Exceptions

Johnson disagrees with the hearing officer's conclusions related to enlargement:

> [I]t was very clear from the evidence and testimony presented at hearing that while the Transfer Application proposes to utilize the same wells/PODs as the municipal Permit, the acreage limitation [145 acres], diversion rate, volume and period of use could be measured and monitored to ensure that no enlargement occurred.

Exceptions at 4. By denying the transfer, Johnson argues the hearing officer created a "per se prohibition against multiple water rights with different purposes of use or elements sharing the same PODs . . . ." *Id.* At 5. Johnson argues the evidence in the record shows that water used for irrigation at Mayfield Springs for irrigation will be measured and reported to IDWR on an annual basis, and, therefore, "concerns related to increasing the irrigation diversion rate and changing the period of use through the transfer are not valid." *Id.* At 6.

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[6] Because the POU related to the irrigation Water Right and municipal Permit are both within a GWMA, priority administration is also more likely. *See infra Finding of Fact* no. 30.

Johnson argues he met his burden by agreeing to: (1) monitor and measure the annual volume of irrigation water used under the Water Right; (2) identify and report the acres to be irrigated; and (3) maintain the existing irrigation Water Right season and period of use. *Id.* At 7. Johnson's argument that more specific details about the monitoring methods for the commingled water rights are unnecessary and "misses the point" because monitoring and reporting can and will occur and a one size fits all solution is unreasonable in Idaho. *Id.* At 8-9.

3. Analysis

The Director is not persuaded by Johnson's Exceptions and the findings and conclusions of the hearing officer's Preliminary Order are sustained.

The hearing officer has not imposed a per se prohibition on the commingling of water rights with different uses sharing the same PODs. The Director agrees with the hearing officer's conclusion that Johnson failed to satisfy his burden of *proving* enlargement will not occur if irrigation water is commingled with municipal water in a municipal water system if the Transfer Application were approved. Johnson bears the burden of submitting sufficient information to prove non-enlargement. *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 421, 18 P.3d 219, 226 (Idaho 2001). However, there may be circumstances where irrigation water and municipal water could be commingled while still preventing enlargement.

The Director agrees with the hearing officer's conclusion and concern that monitoring the Water Right based on authorized annual volume limits may result in water, diverted pursuant to an irrigation Water Right, being applied to municipal uses. *Preliminary Order* at 13. Johnson argues that by identifying, monitoring, measuring, and reporting volume and the acres to be irrigated while also following the existing Water Right season of use, enlargement will be prevented. *Exceptions* at Attachment A, p. 5. The Director disagrees.

In this case, Applicant's expert Farrell testified that Intermountain will not control how much water is used to irrigate the residential land or whether or when the designated 145 acres are irrigated. *Preliminary Order* at 13. Farrell admitted more specific conditions will be developed through future localized water application limitations—individual yard acreage restrictions and monitoring procedures through Covenants, Conditions, and Restrictions, *rather than through the water right approval process. See infra Finding of Fact* no. 23. Therefore, Johnson admits additional conditions will be required to understand how, whether, and when the irrigation Water Right is being used in the commingled system. However, Johnson chose not to submit this information and evidence within the transfer application process.

The act of commingling irrigation water for end use by residential irrigators means control over the irrigation water is turned over to the end user. The Director is unaware of a scenario where this lack of control over end use may be satisfactorily monitored and measured to prevent enlargement. The water right holder may divert irrigation water into the municipal system and not know whether municipal use is being augmented by the introduction of the irrigation water. Having the irrigation water in the system means the water user may actually

divert less under other municipal entitlements, and the irrigation water will be used to augment municipal use. Exceeding the beneficial use authorized and historically accomplished is enlargement.

In this case, irrigation water may only be applied when it is needed. When it is raining, or when crops are being harvested, irrigation would not occur, and the unused irrigation water would be available to satisfy other water rights. The record does not establish how much water irrigates the residential land or how, whether, or when the active 104 acres are being irrigated. Again, the end users (future homeowners) will control water use decisions and the water delivery system operator will not know whether the reduced demand in the municipal system is due to less irrigation or less use for other components of the municipal use. Therefore, neither Intermountain nor the Department will know whether to attribute the volume still being diverted to the Water Right or to the Permit. Without separating delivery of the irrigation Water Right to the authorized irrigated places of use from delivery of the municipal Permit to its place of use, the Department cannot determine whether the irrigation Water Right will augment municipal demand under the municipal Permit. Therefore, again, enlargement remains a potential physical reality if the Transfer Application were approved.

Retaining the historic annual diversion volume limit does not prevent a portion of the irrigation water volume from being distributed to other components of the Applicants' municipal use, when the entire amount is not needed for irrigation of the approved place of use. Allowing such a change in use is disallowed under Idaho law. Idaho Code § 42-104.

Further, other components of the municipal water use may consume, either now or in the future, more water than irrigation. The Department "may consider consumptive use . . . as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." Idaho Code § 42-222(1). The Applicant cannot ensure water diverted into its municipal water system will be used only for the irrigation component of its municipal water use, therefore it cannot ensure the water will not be fully consumed by non-irrigation components of the municipal use. Consumptive use in excess of historic irrigation consumption is enlargement.[7]

The commingling of water rights with different uses and different priority dates may also affect future priority administration. The Applicant's 2005 municipal water right could be curtailed leaving the 1974 priority irrigation right to fill the system. The Director is unaware of any condition or monitoring and measurement plan that will both (1) prevent injury to water users with priority dates between 1974 and 2005, and (2) control end user use of irrigation water for municipal in-house uses. If administration occurred, there would be no way to ensure the irrigation Water Right still in priority would not be delivered and applied to the fully array of municipal water uses, including in-house municipal purposes. *Id.*

Johnson also implicitly argues that because the evidence he presented was undisputed, it may not be disputed by the hearing officer or the Director. To the contrary, the Director is

[7] To prevent enlargement of the historic consumptive use, the Water Right could be changed to municipal purposes and its annual diversion volume reduced to its historic consumptive use.

statutorily required to examine all evidence of whether the proposed transfer will cause enlargement, not just evidence brought forth by an applicant. Idaho Code § 42-222(1); *Barron* at 226, 421. There are other water rights that could be affected if an enlargement resulted from granting the Transfer Application.

Finally, Johnson argues the Transfer Application should be approved because prior water right transfer applications have been approved with the monitoring and reporting conditions he desires. *Exceptions* at 4. The Director disagrees. Historic conditions imposed in prior water transfer cases do not control which conditions might be attached to a transfer, or prevent a reasoned departure in this or future water right transfer applications. *See Building Contractors Ass'n of Southwestern Idaho v. Idaho Public Utilities Com'n*, 151 Idaho 10, 15, 253 P.3d 684, 689 *quoting Intermountain Gas Co. v. Idaho Public Utilities Commission*, 97 Idaho 113, 540 P.2d 775, 781 (Idaho 1975) (Regulatory bodies perform both legislative and judicial functions and do not have to decide all future similar cases in the same way as they have in the past. If the departure is adequately explained—it is not arbitrary or capricious.). There is no one-size-fits-all set of conditions or a universal solution in relation to the prevention of enlargement in water transfer proceedings, and the applicant maintains the statutory burden of proving that no enlargement will occur. The Director is not responsible for introducing potential conditions or other measures that might prevent enlargement.

In the past, the Department has allowed water rights for irrigation purposes to be commingled into municipal water systems. This policy is explained in a letter written by former IDWR Director Karl Dreher in 1998:

> The fact that irrigation water may be commingled and distributed through a municipal system that also delivers water for other municipal purposes, does not alone necessitate a change in the nature of use of the water right from irrigation to municipal. A key factor in not requiring a chance in the nature of use of the water right from irrigation to municipal is that [the right holder] provide annual reporting of appropriate measurements and accounting procedures to demonstrate that the additional water diverted is necessary to satisfy increased summer demand for irrigation water through the municipal system on lands for which the [water right] is authorized to be used.

Letter from Director Karl J. Dreher to Michael C. Creamer, p. 2 (Apr. 7. 1998).

Transfer No. 78273, in the name of the City of Mountain Home ("Mountain Home Transfer") is an example of this historic policy. The Mountain Home Transfer adopts the intent of Director Dreher's letter through two conditions attached to Water Right Nos. 61-2167, 61-2188, 61-2210, 61-7151, 61-7172F, and 61-7439. The conditions control how Mountain Home submits data to the Department attempting to show non-enlargement of irrigation water rights commingled with municipal water rights in a municipal water system.

Condition 12 of the six (6) water rights states:

> Starting January 15, 2016, and continuing every January 15 until notified by the department, the right holder shall submit a report annually to the department demonstrating that the water diverted under rights 61-2167, 61-2188, 61-2210, 61-7151, 61-7172F, and 61-7439 is necessary to satisfy the demands for municipal type irrigation use during the authorized period of use. The annual report shall include the maximum weekly volume diverted for all purposes during both the irrigation season and the non-irrigation season. The annual report shall also include the total volume diverted for all purposes during both the irrigation season and non-irrigation season. After specific notification by the department, the right holder shall provide to the department any date used to compile the report.

Condition 13 states:

> Every five (5) years, or more or less frequently if deemed necessary by the department, the right holder shall submit analysis, based on a current aerial photo, of the number of acres irrigated for municipal type irrigation within the authorized place use that are not already covered by Mountain Home Irrigation District or other surface water rights.

With these conditions, Mountain Home retained full volume limits and maintained the irrigation nature of use on the six (6) water rights.

As required by the conditions, the Department analyzes the data submitted by Mountain Home in an attempt to conclude if enlargement of the six irrigation rights are being enlarged. Over the last six (6) years, these efforts have not yielded a conclusive enlargement determination. In other words, data submitted as required by the conditions have been insufficient for the Department to determine whether the number of irrigated acres has increased or a change to a more consumptive use under any one specific water right has occurred. For the reasons stated above, both outcomes may allow enlargement. Therefore, the Department should no longer allow such conditioning or continue policies proven to allow the potential for enlargement.

The Director concludes no current condition or monitoring and measuring plan employed in past transfer approvals definitively prevents enlargement upon the commingling of irrigation water into a municipal water system.

The Transfer Application should be denied. The hearing officer's preliminary order is sustained and remains substantively the same below.

GOVERNING LAW AND EVALUATION CRITERIA

1. Application for Amendment of Permit

Idaho Code § 42-211 sets forth the standards for evaluating an application for amendment of a permit:

> Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment..." and "it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder. The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny same.

The Department may consider whether an application for amendment of a permit is in the local public interest. *Hardy v. Higginson*, 123 Idaho 485 (1993).

2. Applications to Change a Water Right ("Transfer Application")

Idaho Code § 42-222(1) sets forth the criteria used for evaluating transfer applications:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the POU is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the

original right even though more acres may be irrigated, if no other water rights are injured thereby.

3. Burden of Proof

The Applicants bear the burden of proof for all of the pertinent criteria listed in Idaho Code §§ 42-211 and 42-222. *See Barron* at 420.

FINDINGS OF FACT

1. The Mayfield Springs Planned Community ("Mayfield Springs") is located in Ada County within Sections 34 and 35, T1NR4E.[8] The project site for the planned community is owned by Mayfield Development, LLC.

2. Intermountain owns and operates a public water supply system. The Permit, owned by Intermountain, authorizes diversion from ground water for municipal use within Intermountain's public water supply system. The permitted POU is generally located within Sections 27, 28, 29, 32, 33, 34, 35, and Section 2, T1SR4E, and includes all of Mayfield Springs. Ex. IDWR1.

3. The Permit has a priority date of September 16, 2005. It authorizes a diversion rate of 10 cfs for municipal use from January 1 to December 31, and an annual diversion volume limit of 1,815 af. Five PODs in sections 28 and 33 are currently authorized under the permit. Ex. IDWR1. One production well and one monitoring well have been constructed in Section 33. Ex. 105. Pumping capacity and other tests have been performed on the existing production well, but water has not been diverted for municipal use under the Permit. *Testimony of Farrell.*

4. The Water Right is owned by Johnson and authorizes irrigation from ground water of up to 145 acres, of which 104 acres are currently being irrigated with 41 acres leased to the Idaho Water Supply Bank. Ex. 105 and Ex. IDWR2. The Water Right has a priority date of October 17, 1974, and has one POD in the NESW of Section 28. *Id.*

5. Johnson is the authorized agent of Intermountain and Mayfield Development, LLC. Ex. 105.

[8] Unless otherwise noted, all legal descriptions in this order are within Township 1 North, Range 4 East, B.M.

6. The elements of the Permit and Water Right are described in the table below:

Identification No.	Priority Date	Source	Beneficial Use	Period of Use	Diversion Rate	Annual Volume
Permit 63-32225	9/16/2005	Ground Water	Municipal	1/01-12/31	10 cfs	1,815 AFA
Water Right License 63-32616*	10/17/1974	Ground Water	Irrigation	3/15-11/15	2.37 cfs	651.3 AFA
*A portion of the *Water Right* is leased to the Water Supply Bank, expiration date 12/31/22: 0.67 cfs and 184.2 AFA.						

I. Permit Amendment

7. The Permit was approved with the following conditions related to monitoring and use:

> Condition 6: Prior to the diversion of water in connection with this right, the right holder shall provide the department with a plan for monitoring ground water levels in the vicinity of the POU for this water right. The monitoring should occur in parallel with development and production and should include identification of non-productions wells and timelines for measuring and reporting. The right holder shall not divert water in connection with this right until the monitoring plan is approved by the Department. Failure to comply with the monitoring plan once it is accepted shall be cause for the Department to cancel or revoke this right.
>
> Condition 8: After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.
>
> Condition 10: Common areas, parks, school grounds, golf courses, and any other large parcels may only be irrigated under this water right with wastewater that has been previously beneficially used for potable or culinary purposes, has been treated in a wastewater treatment plant, and is delivered from the wastewater treatment plant to the parcel to be irrigated.
>
> Condition 11: Water diverted under this right may be used for direct irrigation of up to 1/2 acre per residential lot upon which a home has been constructed.

These conditions, in part, allow the Department to monitor impacts of the water use under the Permit on nearby wells or water users. Intermountain has not asked for these conditions to be removed from the Permit.

8. Intermountain filed the Permit Amendment to add two new PODs ("new well 1" and "new well 2") in Sections 34 and 35 respectively, within the Mayfield Springs project area. The application states:

> The new PODs would allow new municipal wells to be located on the Mayfield Springs property, resulting in new municipal wells being constructed and operated within the boundaries of the planned community. The new PODs would also provide greater separation distance from existing wells .... The intent of the amendment is to optimize water availability in the local area and efficiently use the available water on the project site. The allowable diversion rate, volume, and period of use will not change from the existing permit.

Ex. 105 and *Testimony of Farrell.*

9. The Permit POU includes an area larger than the Mayfield Springs project area. Ex. 105. As the consulting hydrologists and engineers, SPF Water Engineering filed the original application for permit on behalf of Intermountain and did not include PODs located within Mayfield Springs.

10. The only witness, Farrell, is Vice President of the Civil Engineering consulting firm Mountain Waterworks, which focuses primarily on wastewater and water development projects. *Testimony of Farrell.* Farrell testified he is now the project manager for the Mayfield Springs Planned Community project. Farrell's expert opinions are contained in a report submitted on June 29, 2020 (Ex. 105). He is a Licensed Professional Civil Engineer with drinking water treatment and distribution licenses, and has professional experience in water system operations, utility rate and budget analysis, new water system planning and development, engineering and water infrastructure design, water rights, well permitting, and operation and maintenance of water utilities. As the sole witness in this proceeding, his testimony is undisputed.

11. Farrell testified that when Mountain Waterworks became the consultant for Intermountain, and upon review of the scope of the project, Mountain Waterworks decided it would be "prudent to add PODs that are located within the planned community development and have the wells, storage tanks, and boosters all contained within the development. So it was an engineering and planning decision to file the amendment of permit, not to develop more water or use it in any other way." *Id.* Farrell testified they would prefer to contain the "backbone infrastructure" including wastewater treatment, ground water supply, storage for fire protection, and pumping facilities within the Mayfield Springs project. *Id.*

12. Farrell also testified that any of the authorized Permit PODs could be developed now; however, when Mountain Waterworks became involved:

> [W]e thought it would be better, for several reasons, to add PODs and have the initial wells drilled within the planned community versus on the other side of the private developments and then pipe the water down Desert Wind Road or across

> property to this project…If these new PODs were approved we would start with, more than likely, in [sections] 34 and 35 to drill the wells there.

Id.

13. Three of the existing Permit PODs are located north of Indian Creek (SENW, NWNE, and NWSE Section 28) and two are located south of Indian Creek (SESE Section 28 and NENW Section 33). *Id.* Farrell stated his preference to develop wells further from Indian Creek which receives recharge from Indian Creek drainage, and further from and "down gradient" from the existing homes than the locations of the permitted PODs. *Id.* The IDWR I-84 Memo states the general groundwater flow direction in the regional aquifer is to the southwest towards the Snake River. *IDWR I-84 Memo*. Farrell testified that in his professional opinion the locations of the proposed PODs will have less of a potential impact on the existing homeowner wells than the existing Permit POD locations. *Testimony of Farrell.* The proposed new PODs are located further from the protestant's properties and further south of Indian Creek than the existing PODs. *Id.* and Ex. 105, fig. 1. He also testified a longer pipeline from the existing Permit PODs to the project would be more costly. *Testimony of Farrell.*

14. Farrell testified Intermountain does not propose to change any of the current Permit conditions, including the authorized quantity. *Testimony of Farrell and see* Findings of Fact 7, above. As conditioned in the Permit, wastewater (treated potable and culinary water) will be used to irrigate common areas, parks, school grounds, golf courses, and any other large parcels. *Testimony of Farrell.* Municipal ground water will be used only for in-home use and irrigation of residential lawns. *Id.*

15. Farrell stated he anticipates Permit condition no. 6 would apply to the Amended Permit and Intermountain would submit a plan for monitoring ground water levels that would include installation of well transducers in each well and a "human interface" to track ground water level trends over time, water utilization, instantaneous power, and pumping rates for individual wells. *Testimony of Farrell.* The monitoring plan must be approved by the Department and Intermountain will have to develop a Water Facility Plan as required by the Idaho Department of Environmental Quality (DEQ). *Id.* Farrell testified that he recently developed a ground water monitoring plan for the "Simco wells" in the vicinity which includes instrumentation and reporting requirements that could apply at the Permit Amendment and Mayfield Springs project. *Id.* The monitoring plan will identify changing conditions in the aquifer and alert homeowners and Department to reductions in water supply to existing homes and the area. *Id.*

16. Farrell stated DEQ requires a minimum of two wells and pumping redundancy for systems with greater than twenty-five (25) service connections; therefore, it is likely Mayfield Springs will require at least three wells. *Id.* Farrell testified Intermountain is planning to develop three to five municipal wells depending on their productivity, and recommends prioritizing development of new wells 1 and 2. *Id.* Water delivery from

wells within the Mayfield Springs project area is more efficient, less likely to have an impact on the water supply for existing residences, and will likely result in the development of fewer wells. *Id.*

17. Farrell testified that it is unlikely all of the PODs authorized under the Permit Amendment would be pumping at the same time. *Id.* For systems similar to the proposed water distribution system, a single well at a time will pump water into a storage tank and a booster pump will pressurize the system, limiting the amount of time the wells will be pumping. *Id.* Farrell stated there will not be significant pumping from the wells until several hundred homes are constructed and most of the pumping that will occur will deliver water from the storage tanks. *Id.* This type of system operation will likely reduce the possibility of pumping impacts at the proposed PODs and on existing residences. *Id.*

II. Transfer Application

18. Johnson filed the Transfer Application with the Department to add three PODs to the Water Right and change the existing POU to include the Mayfield Springs project site. One of the three proposed PODs is located northwest of the Mayfield Springs site (SESE of Section 28) and was constructed under the Permit ("existing well"). Ex. 105 and Ex. IDWR2. Pumping capacity and other tests have been performed on the existing well, but water has not been diverted for use. Testimony by Farrell. The other two proposed PODs are the same PODs proposed in the Permit Amendment (new wells 1 and 2) and are located within the Mayfield Springs property in Sections 34 and 35. Ex. 105 and Ex. IDWR2.

19. The Transfer Application proposes to use water under the Water Right for irrigation purposes within Mayfield Springs in areas not irrigated with wastewater. Common areas will be irrigated with wastewater under the Permit. Testimony of Farrell. Farrell testified use of the irrigation Water Right for residential lawns will reduce the amount of municipal water used for residential lawn irrigation, while the common areas will be irrigated with treated wastewater. *Id.* The Transfer Application states: "The water right is planned to be used to supplement/supply irrigation needs within the new planned community. Wastewater reuse is to be utilized to irrigate common areas as the community grows . . . . The transfer would allow irrigation water to be supplied from the Mayfield Springs existing and planned municipal wells and used on project site." Ex. 105.

20. Farrell testified:

> We are not just moving the water from one place of use to another place of use...we want to be able to irrigate the fields and [use the irrigation water] if there is a demand in the subdivision. That is the most efficient use of that water. It will minimize the withdrawals on the Permit, if we use this irrigation water right to feed the [residential] irrigation then we don't need to use the municipal right to feed the [residential] irrigation, so it is less water over time.

Testimony of Farrell.

21. The Transfer Application does not propose a change in the 145 acre limit, diversion rate, volume, or period of use authorized under the Water Right. Ex. 105 and Ex. IDWR2.

22. Farrell testified water diverted under the irrigation Water Right and the municipal Permit will be commingled and diverted from the same well. *Testimony of Farrell.* There is "no way to count molecules of irrigation [water] but we will be able to tell exactly how much of the irrigation water right we are using and the municipal right, so together will have a water balance and will be able to track that pretty closely." *Id.*

23. Farrell stated municipal water use under the Permit includes in-home use and residential yard irrigation. *Id.* Farrell testified, based on professional experience, "in-home use in neighborhoods is relatively consistent . . . but the variable is the irrigation component of the yard irrigation." *Id.* He stated water application limitations, individual yard acreage restrictions and monitoring procedures will be controlled through Covenants, Conditions, and Restrictions rather than through the water right approval process. *Id.*

24. Johnson proposes monitoring the water diverted under the Water Right for irrigation by identifying and reporting to the Department the number of acres to be irrigated with the irrigation Water Right and where the acres would be located. *Id.* Farrell stated the amount of water used for irrigation of residential lawns can be monitored by calculating evapotranspiration rate and identification of acres to be irrigated. *Id.* Farrell did not state additional details about the process for evaluation of consumptive use relative to the amount of water diverted through the municipal system under the Permit Amendment. *Id.*

25. Farrell testified "molecule for molecule" of diverted water cannot be tracked, but the total diversion rate and the volume used can be measured. *Id.* He noted a number of other municipalities monitor comingled water but did not provide factual information about the monitoring methods at the hearing to support his testimony. *Id.*

26. Farrell stated the developer may not use the entire irrigation Water Right within Mayfield Springs, but seeks flexibility to irrigate residential yards as the development is built out and within the existing Water Right diversion limits. *Id.*

III. Mountain Home GWMA and Cinder Cone Butte CGWA

27. The Department established the Cinder Cone Butte Critical Groundwater Management Area (CGWA) in 1981 as a result of declining ground water levels. *See In the Matter of the Cinder Cone Butte Critical Groundwater Area, Order Establishing Critical Groundwater Area dated May 7, 1981.* A subsequent study of the entire Mountain Home area was conducted, including the Cinder Cone Butte area,

and, as a result, the Mountain Home Groundwater Management Area (GWMA) was designated in 1982 (*In the Matter of the Mountain Home Ground Water Management Area, Order Establishing Ground Water Management Area dated November 9, 1992*). The Mountain Home GWMA includes Elmore and Ada counties and was also established due to declining ground water levels. While new ground water appropriations are not allowed in the Cinder Cone Butte CGWA, the Mountain Home GWMA order states "there appear to be sub-areas where new appropriations could be authorized without injuring existing water rights." *Id.*

28. The five (5) existing PODs authorized under the Permit and the existing POD associated with Water Right are located outside the GWMA. Exs. IDWR1 & 2. New wells 1 and 2 proposed in both the Permit Amendment and Transfer Application are located within the GWMA. All of the wells used, or proposed to be used, by the Applicants are located outside the Cinder Cone Butte CGWA. Id.

29. A significant portion of the Permit POU, including the Mayfield Springs project site, is located within the GWMA. The existing Water Right POU is located outside the GWMA. The Transfer Application proposes to add the Mayfield Springs project site to the Water Right POU. This is an area that is more likely to be subject to administration because it is within the GWMA, Idaho Code § 42-233b ("The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis . . . .").

IV. Final Order Regarding Water Sufficiency and IDWR Water Sufficiency Memo.

30. The IDWR I-84 Memo, published May 31, 2012, evaluated the sufficiency of water supply along the I-84 corridor prior to the hearing. The memo established an 11-mile wide study boundary ("Study Boundary"), which includes areas within and outside the Mountain Home GWMA. The Department developed a water budget and estimated the sufficiency of supply within the boundary for existing and new uses. The IDWR I-84 Memo's sufficiency study considered consumptive use for existing water rights, including water rights that were not fully developed. It included the consumptive use associated with the Water Right, the Permit, and the POUs. Ex. 105. The POUs for both the Water Right and Permit are also located within the Study Boundary. The IDWR I-84 Memo concluded the estimated net recharge rate for the Study Boundary is positive, "indicating that existing consumptive uses, including those for the water rights not fully developed, are less than the rate of recharge."

31. On November 13, 2013, the Department issued the I-84 Corridor Order in the matter of several pending water right and transfer applications for planned communities and irrigation projects along the I-84 corridor between Boise and Mountain Home. "The applications were consolidated for the purpose of evaluating the sufficiency of water supply in the same geographic area of the Western Snake River Plain aquifer along the I-84 corridor."

32. The I-84 Corridor Order concluded an estimated net annual recharge volume for the Study Boundary of 7,440 acre-feet per year, or 10.3 cubic feet per second on a continuous basis, to be the maximum additional consumptive use that can be authorized in the Study Boundary. The I-84 Corridor Order does not preclude consideration of new water withdrawals within the GWMA, in fact, the Department has approved water right applications in the GWMA subsequent to the I-84 Corridor Order.

ANALYSIS

Permit Amendment

Sufficiency of Water Supply, Injury to Other Water Rights, and Enlargement

The Permit authorizes a diversion rate of 10 cfs for municipal use from January 1 to December 31, and an annual diversion volume limit of 1,815 af. The Permit Amendment does not propose an increase in diversion rate or volume, or change in the POU. The Permit Amendment proposes to add two new PODs within the Mayfield Springs project area. The existing authorized PODs are located outside the GWMA while the new proposed PODs are located within the GWMA. Idaho Code § 42-211 sets forth the standards for evaluating an application for amendment of a permit which requires the Department to examine whether an approval will result in the diversion and use of more water than originally permitted and if the rights of others will be adversely affected. In addition, Idaho Code § 42-233b defines a Ground Water Management Area and authorizes the director to evaluate on an individual basis whether sufficient water is available and that other prior rights will not be injured.

Locating the proposed new PODs within the project area will improve efficiency of pumping water to planned community given the proximity of the wells to other water delivery infrastructure. Locating the PODs further south and downgradient of the homeowners north of Mayfield Springs may reduce the likelihood of impacts on existing homeowners' wells and Indian Creek from the currently authorized *Permit* PODs.

The IDWR I-84 Memo found there is a net positive recharge rate for a project area that includes the POU for the Permit Amendment, Transfer Application, and surrounding properties within and outside the GWMA. The I-84 Corridor Order found the positive estimated net annual recharge volume would allow for additional consumptive use development in the Study Boundary. The consumptive uses for the existing Water Right and undeveloped Permit were included as existing uses in the study. The Permit Amendment does not propose to increase consumptive use, volume, or diversion rate, and the new PODs are proposed in an area determined to have sufficient water supply.

The two additional proposed PODs through the Permit Amendment will not result in an increase in the amount of water originally permitted and the existing monitoring conditions will prevent possible injury to the existing water rights.

Public Interest

"Local public interest" is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3). The requested Permit Amendment does not change uses under the approved Permit. The Permit Amendment will reduce pumping and piping costs and provide water to a planned residential community. The Permit Amendment is in the local public interest.

Transfer Application

Validity of the *Water Right*

The Department must confirm that each water right, or portion thereof, included in a Transfer Application is valid as part of its review under Idaho Code § 42-222. The Water Right authorizes irrigation from ground water of up to 145 acres, of which 104 acres are currently being irrigated under the Water Right and 41 acres are leased to the Idaho Water Supply Bank. The Water Right is a valid water right and the Transfer Application should be evaluated under the criteria set forth in Idaho Code § 42-222.

Enlargement

Pursuant to Idaho Code § 42-222(1), for any application for transfer the Department must determine whether the proposed change would enlarge the use of water under the water right or injure other water rights. Enlargement occurs when the total diversion rate, annual diversion volume, or extent of beneficial use, exceeds the amounts or beneficial use authorized under the water right prior to proposed transfer.

The Transfer Application proposes to change the existing Water Right POU to include the Mayfield Springs project site and to add three PODs that are also authorized under the Permit as municipal use wells. The Permit requires common areas, parks, school grounds, golf courses, and any other large parcels only be irrigated under this water right with wastewater that has been previously beneficially used for potable or culinary purposes, has been treated in a wastewater treatment plant, and is delivered from the wastewater treatment plant to the parcel to be irrigated.

Water diverted under the transferred Water Right would be used for irrigation purposes within Mayfield Springs, in areas not irrigated with wastewater as required under the Permit. Farrell testified use of the irrigation Water Right for residential lawns will reduce the amount of municipal water used for lawn irrigation, and common areas will be irrigated with treated wastewater. As stated in the Transfer Application: "The water right is planned to be used to supplement/supply irrigation needs within the new planned community. Wastewater reuse is to be utilized to irrigate common areas as the community grows…The transfer would allow irrigation water to be supplied from the Mayfield Springs existing and planned municipal wells and used on project site."

Intermountain will divert and deliver ground water for both the irrigation Water Right and the municipal Permit from the same municipal wells. The Transfer Application does not propose a change in the 145-acre limit, diversion rate, volume, or period of use authorized under the Water Right. Farrell testified the acres to be irrigated with the Water Right will be reported to the Department and consumptive use and associated volumes could be verified by calculating evapotranspiration rates. However, Farrell's testimony established that Intermountain will not have control over how much water is used to irrigate the residential lands or whether or when the acres are irrigated, or even whether the intended acres would be identified. Insufficient evidence was submitted to establish how Intermountain will ensure that water diverted under the irrigation right will not, at times, be augmenting municipal demand. This additional use would be an enlargement of the Water Right.

Water is currently diverted pursuant to the Water Right for agricultural irrigation. Diversion would typically cease during harvest or high precipitation periods. Watering of residential land may also cease during high precipitation periods. However, if water withdrawals under the Water Right are commingled with water withdrawn for municipal purposes at times when residential land is not being irrigated, monitoring the Water Right based on the authorized annual volume limit will not ensure the irrigation Water Right will not be applied to municipal uses.

The irrigation Water Right has a 1974 priority date, while the municipal Permit has a 2005 priority date. In the event of priority administration, especially in the GWMA, the municipal Permit bearing a 2005 priority date could be curtailed, and water diverted pursuant to the irrigation Water Right may continue to be delivered in priority. However, water diverted pursuant to the irrigation Water Right would be commingled into the municipal system without control over whether it is delivered and applied to irrigate designated residential land or used for in-house municipal purposes. Johnson bears the burden of proof for all the pertinent criteria set forth in Idaho Code § 42-222. While monitoring and reporting conditions could be applied to the Transfer Application, and evidence was provided to demonstrate a willingness to comply with Department ground water monitoring, measurement, and reporting requirements, the transfer applicant did not demonstrate that delivery of irrigation water through a municipal system would not result in an enlargement of use of the original Water Right nor injure other water rights.

CONCLUSIONS OF LAW

1. In the matter of Application for Amendment of Permit No. 63-32225, the applicant has satisfied the burden of proof for the review criteria set forth in Idaho Code § 42-211 and the Application Amendment should be approved.

2. In the matter of Application for Transfer No. 83875, the applicant has not satisfied the burden of proof for the review criteria set forth in Idaho Code § 42-222. The Transfer Application's proposal to add three new PODs and the POU for Mayfield Springs Planned Community to divert and deliver water through the municipal delivery system will constitute an enlargement in use of the original Water Right and other rights may be injured. Therefore, the Transfer Application should be denied.

ORDER

IT IS HEREBY ORDERED that Application for Amendment of Permit No. 63-32225, in the name of Intermountain Sewer & Water, Corp. and Application is APPROVED as set forth in the approval documents issued in conjunction with this order.

IT IS FURTHER ORDERED that Transfer No. 83875 in the name of Gregory B. Johnson is DENIED.

IT IS FURTHER ORDERED *Gregory B. Johnson's Notice of Appeal, Exceptions and Petition for Review of Preliminary Order to the Director* is DENIED.

Dated this 2nd day of September 2021.

Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September 2021, I served a true and correct copy of the foregoing document on the following by the method(s) indicated below:

S. Bryce Farris SAWTOOTH LAW OFFICES, PLLC 1101 W. River St., Ste. 110 P.O. Box 7985 Boise, ID 83707 bryce@sawtoothlaw.com *For Applicants*	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Gregory B Johnson 2037 E. Terza Meridian, ID 83642 greg@westparkco.com *Applicant*	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Intermountain Sewer & Water, Corp. 1861 S. Wells Ave., Ste. 210 Meridian, ID 83642 tfarrell@mountainwtr.com shurley@mountainwtr.com *Applicant*	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
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Sarah Tschohl
Legal Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.