

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 85639 IN THE NAME OF
IMH BOISE CIMARRON LLC

**PRELIMINARY ORDER APPROVING
TRANSFER APPLICATION**

BACKGROUND

On December 20, 2021, IMH Boise Cimarron, LLC (“IMH”) filed Application for Transfer No. 85639 (“Transfer”) with the Idaho Department of Water Resources (“Department” or “IDWR”). Beranna Dairy (“Beranna”) and Western Farms, Inc. (“Western Farms”) protested the Transfer. In this order, Beranna and Western Farms are collectively the “Protestants.” IMH and the Protestants did not settle this matter informally, and the Department referred the matter to an agency hearing officer (“Hearing Officer”) to initiate formal proceedings. The Hearing Officer conducted a prehearing conference on August 23, 2023, and a hearing on February 7 and 8, 2024.

Based on the following findings of fact and conclusions of law, the Hearing Officer approves the Transfer with conditions.

STATEMENT OF THE ISSUES

Idaho Code § 42-222(1) states that a person “entitled to the use of water” may apply to the Department to change “the point of diversion, place of use, period of use or nature of use” of the water right. Decreed Water Right 63-3298 authorizes the diversion and use of ground water to irrigate 164 acres. The Transfer proposes to discontinue 26 acres (0.52 cfs and 82.2 AF) of irrigation from ground water under decreed Water Right 63-3298 and convert it to domestic use in a 240-home subdivision within the existing place of use for Water Right 63-3298. Two new points of diversion (new wells) will be added for the proposed domestic use. The season of use for the proposed domestic component of Water Right 63-3298 will be changed from the irrigation season to year-round. Irrigation within the subdivision will be accomplished with the remaining portion of Water Right 63-3298 and by developing the water use authorized by Permit 63-34320.

Idaho Code § 42-222(1) also sets forth the criteria for evaluating an application for transfer of water rights:

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 place of use 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 Transfer does not propose to move water from one watershed to another, nor does it propose a municipal water use for reasonably anticipated future needs. At the commencement of the hearing, IMH and the Protestants stipulated that it is not necessary to evaluate whether the Transfer will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates and whether the water right is necessary to serve reasonably anticipated future needs. Thus, applying the remaining criteria stated in Idaho Code § 42-222(1), to approve the Transfer the Hearing Officer must find all the following to be true:

- I. IMH is entitled to the use of water.¹
- II. No water rights are injured by the Transfer.
- III. The Transfer does not constitute an enlargement in use of the original right.
- IV. The Transfer is consistent with the conservation of water resources with the state of Idaho.
- V. The Transfer is in the local public interest as defined by Idaho Code § 42-202B.
- VI. The change in nature of use from agricultural use would not significantly affect the agricultural base of the local area.
- VII. The new use is a beneficial use.

FINDINGS OF FACT

1. On January 29, 2009, the Snake River Basin Adjudication (“SRBA”) Court issued an Order of Partial Decree confirming the following elements for Water Right No. 63-3298:

Owners:	Judith I. Rawlings and Richart T. Rawlings
Source:	Ground Water
Priority Date:	6/12/1962
Purpose of Use:	Irrigation
Season of Use:	3/15 to 11/15
Quantity (Rate):	3.28 cubic feet per second (“cfs”)

¹ The use of Roman numerals here is consistent with the numbering of the corresponding sub-sections in the Conclusions of Law section below.

Quantity (Volume): 738 acre feet per year ("AF")

Point(s) of Diversion: Two points of diversion in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 8, Township 2 North, Range 3 West. The points of diversion are within Canyon County.

Place of Use: 164 acres within a 240-acre permissible place of use comprised of six 40-acre tracts located in portions of Sections 7, 8, and 17, Township 2 North, Range 3 West, B.M.

Exhibit 200.

2. The Transfer contains a Special Warranty Deed conveying three parcels of land from Epic Holdings, LLC, to IMH in 2021. The Special Warranty Deed states that the conveyance includes:

[A]ll and singular the tenements, hereditaments, and appurtenances thereunto belonging in or anywise appertaining, the rents, issues and profits thereof; and all estate, right, title and interest in and to the property, as well in law as in equity, except as expressly provided otherwise herein.

Together the three parcels of land match the 240-acre decreed permissible place of use for Water Right No. 63-3298, with the exception of a portion of the S $\frac{1}{2}$, SW $\frac{1}{4}$, Section 8, Township 2 North, Range 3 West, previously conveyed to Nampa Highway District No. 1. The record does not state the size of the excepted parcel or whether the conveyance included appurtenant water rights, including any portion of Water Right No. 63-3298. However, because the excepted parcel lies within only two 40-acre tracts, it and any appurtenant portion of Water Right No. 63-3298 are not more than 80 acres in total. Therefore, the conveyance of land from Epic Holdings, LLC, to IMH must be at least 160 acres (240 acres minus 80 acres), and the conveyance of all or a portion of Water Right No. 63-2398 must be at least 84 acres (164 acres minus 80 acres).

Exhibit 1, pages 12-14.

3. At the time of the hearing in this matter, IDWR had already acknowledged that IMH is the current owner of Water Right No. 63-3298 and updated the water rights database to show IMH as the current water right owner.

Exhibit 9, page 1.

4. Water Right No. 63-3298 authorizes the diversion of ground water at a rate of 3.28 cfs to irrigate 164 acres, 0.02 cfs per acre. The Transfer proposes converting 26 acres of irrigation and the associated 0.02 cfs per acre, totaling 0.52 cfs, to domestic use for 240 homes.

Exhibit 200; Exhibit 1; Testimony of Scott King.

5. Water Right No. 63-3298 authorizes the diversion of 738 AF of ground water to irrigate 164 acres, or up to 4.5 AF per acre. Rather than proposing the diversion of 117 AF, or 4.5 AF per acre for the 26 acres of irrigation to be converted to domestic use, the Transfer proposes a reduction in the annual diversion volume limit to 82.2 AF for the proposed domestic use. The reason for proposing 82.2 AF instead of 117AF is that the historic maximum consumptive use for irrigation of the current place of use for Water Right No. 63-3298 is 3.16 AF per acre, or 82.2 AF for 26 acres. The historic maximum consumptive use is based on growing alfalfa, the most water consumptive crop in the area, on the entire place of use for Water Right No. 63-3298 in the years 2008, 2009, 2010, and 2014. While these years are not within the five years prior to filing of the Transfer, the lack of crop mix data for 2020 and 2021 necessitates looking farther back in time to get a clear picture of historic cropping patterns on the place of use for Water Right No. 63-3298. Alfalfa is all or a significant segment of the crop mix irrigated with Water Right No. 63-3298 in most years since 2008. Furthermore, the fact that the entire place of use for Water Right No. 63-3298 was planted in alfalfa four times in sixteen years suggests it is not unusual to irrigate only alfalfa in a given year with Water Right No. 63-3298.

Exhibit 200; Exhibit 1; Exhibit 2, page 8; Exhibits 11-22; Testimony of Scott King.

6. Idaho Department of Environmental Quality ("IDEQ") requires a peak day demand of approximately 200 gpm (0.45 cfs) and peak-hour demand of 440 gpm (0.99 cfs) for a water system serving 240 homes.

Testimony of Scott King; Exhibit 2, page 3.

7. In-house use of water for domestic purposes in modern homes is typically less than 300 gallons per day per home. For 240 homes, 300 gallons per day is 26,280,000 gallons, or 80.7 AF, per year.

Testimony of Scott King; Exhibit 2, page 3.

8. IMH proposes to divert and deliver water year-round for in-house domestic use by means of two wells, each located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 17, Township 2 North, Range 3 West. Each well will be designed to meet the peak day demand requirement of 200 gpm. IMH proposes to install a storage tank to enable the subdivision water system to meet IDEQ's peak-hour requirement of 440 gpm.

Testimony of Scott King; Exhibit 2, page 3.

9. The in-house domestic water system proposed in the Transfer will not be connected to the irrigation water system for the proposed 240-home development.

Testimony of Scott King; Exhibit 2, page 3.

10. The federal Farm Service Agency (“FSA”) tracks the crops grown on Farm Number 3698, which corresponds to the place of use for Water Right No. 63-3298. FSA reports show that crops were grown on Farm Number 3698 in most years from 2008 through 2022.

Exhibits 11-22; Testimony of Scott King.

11. An FSA report shows that in 2019 Farm Number 3698 grew 45.19 acres of alfalfa and 126.33 acres of turnips.

Testimony of Scott King and Exhibit 21.

12. An FSA report shows that in 2022 Farm Number 3698 grew grass, millet, and another crop labeled “GREEN” on 171.52 acres of cropland.

Testimony of Scott King and Exhibit 22.

13. The Transfer proposes to dispose of wastewater from the proposed subdivision by either treating it and returning it to the local ground water through a community drain field or by treating it and reusing it for irrigation.

Testimony of Scott King; Exhibit 2, page 3.

14. Beranna owns 15 water rights authorizing diversion of ground water from 14 wells located within 1.6 miles of the place of use for Water Right No. 63-3298. Many of the Beranna water rights are for irrigation purposes.

Exhibit 2, pages 3-4.

15. Western Farms owns 13 water rights authorizing diversion of ground water from 14 wells located within 6.5 miles of the place of use for Water Right No. 63-3298. Some of the Western Farms water rights are for irrigation purposes.

Exhibit 2, pages 4-5.

16. Compared to the locations of the current points of diversion for Water Right No. 63-3298, the two new points of diversion proposed in the Transfer would be located about half a mile further away from Beranna’s nearest points of diversion.

Exhibit 2, Figure 1, page 7.

17. Compared to the locations of the current points of diversion for Water Right No. 63-3298, the two new points of diversion proposed in the Transfer would be located about one quarter mile further away from Western Farms’ nearest points of diversion.

Exhibit 2, Figure 1, page 7.

18. The geology underlying the area in Canyon County where IMH, Beranna, and Western Farms divert ground water is characterized by about 600 feet of sediments. The upper 300 feet of sediments is called the Snake River Group. Water in the Snake River Group is a water table aquifer; it is not under much pressure. Below the Snake River Group is 300 feet of sediments called the Idaho Group. Water in the Idaho Group is under pressure, so that water rises in a borehole. The Snake River Group and the Idaho Group are separated by layers of blue clay, and water in the two groups is geochemically distinct.

Exhibit 108, page 1; Testimony of Ken Neeley.

19. Ground water levels in the Snake River Group aquifer zone may be declining, as indicated by declining drain flows in the western Treasure Valley.

Testimony of Hal Anderson.

20. Ground water levels in the Idaho Group aquifer zone appear to be stable or increasing in the vicinity of IMH's proposed new wells.

Exhibit 3, page 4; Exhibit 34; Exhibit 35; Testimony of Scott King.

21. The ground water to supply Water Right No. 63-3298 is currently diverted from the Snake River Group aquifer zone and the Idaho Group aquifer zone. The record contains a 1992 well driller's report for a replacement well for Water Right No. 63-3298. A July 14, 2008, memorandum from Vicky Music explains Transfer No. 74046, which added the replacement well as a second point of diversion for Water Right No. 63-3298. The memorandum states:

A replacement well was drilled in 1992; however, it appears that the original well was not abandoned. The applicants wish to use both wells. The well drilled in 1992 will be added as the second point of diversion.

The 1992 well driller's report states that the replacement well was screened at three intervals below ground surface: 240 to 270 feet, 320 to 380 feet, and 390 to 410 feet. The replacement well borehole pierced a layer of blue clay from 287 to 320 feet below ground surface. Because the Snake River Group and the Idaho Group are separated by layers of blue clay located about 300 feet below ground surface (see Finding of Fact No. 18), it is likely the replacement well produces water from the Snake River Group (240 to 270 feet) and the Idaho Group (320 to 380 feet and 390 to 410 feet).

Exhibit 200; Exhibit 108; Testimony of Ken Neeley.

22. As for the original well for Water Right No. 63-3298, it too produces water from the Snake River Group and the Idaho Group. In 1966 Frank N. Rawlings, owner of the permit that became Water Right No. 63-3298, submitted a *Deposition of Holder* ("Deposition") in connection with proof of beneficial use for the permit. In the Deposition, Rawlings lists the depth of the well as 465 feet and depth of water in the well as 320 feet. Witness Ken Neeley reports that the original well is 490 feet deep, with openings at the following intervals: 195 to

220 feet, 260 to 275 feet, and 279 to 463 feet. Give the proximity of the two points of diversion for Water Right No. 63-3298, it is likely the lithology of the borehole for the original well is similar to the lithology of the borehole for the replacement well. That likelihood places the open intervals in the original well above and below the blue clay layer extending from 287 to 320 feet below ground surface.

Exhibit 200; Exhibit 108; Testimony of Ken Neeley.

23. IMH has not definitively indicated whether it intends to construct the proposed new points of diversion so that water is drawn from the Snake River Group or the Idaho Group, although it has “preliminary” plans for its new wells to be completed in sediments “below 300 feet”, suggesting the wells will be completed in the Idaho Group. IMH proposes to construct a test well to determine the aquifer zone to target for its proposed new production wells.

Exhibit 3, page 6; Testimony of Scott King.

24. The record in this matter does not show whether Beranna’s wells and Western Farms’ wells draw water from the Snake River Group sediments or the Idaho Group sediments, except for two Beranna wells that appear in Table 1 in Exhibit 108. One of the two Beranna wells diverts water from the Idaho Group. The other well appears to draw from both the Snake River Group and the Idaho Group.

Exhibit 108; Testimony of Ken Neeley.

25. Agriculture produced almost \$1 billion of goods and services in Canyon County in 2022.

Exhibit 4, pages 5 and 11; Exhibit 105, page 1; testimony of Jeffrey L. Moffet.

26. Discontinuing farming on the place of use for Water Right No. 63-3298 would have direct impacts consisting of a loss of up to \$405,000 of economic output.

Exhibit 5, page 10.

27. In addition to direct impacts, discontinuing farming on the place of use for Water Right No. 63-3298 would have indirect and induced impacts throughout the Canyon County economy. Indirect and induced impacts would be the loss of about \$200,000 of goods and services and approximately 5.1 to 5.9 jobs.

Exhibit 5, page 10; Exhibit 105, page 2.

28. Overall, farming of the place of use for Water Right No. 63-3298 generates less than 0.1% of the overall plant-based agricultural economic output of Canyon County.

Exhibit 4, page 11.

29. Whether to place housing and farms in proximity has traditionally and legally been the purview of local government under Idaho's Local Land Use Planning Act.

Testimony of Keri Smith.

30. Canyon County approved the zoning change needed to change the place of use for Water Right No 63-3298 from agricultural use to residential use. Canyon County has not yet approved IMH's subdivision application.

Testimony of Keri Smith; Testimony of George Crookham; Testimony of Bernie Teunissen.

31. The Department issued Water Right Permit No. 63-34320 ("Permit") in 2020. The Permit authorizes IMH to divert 1.0 cfs of ground water to irrigate 50 acres within a 214-acre permissible place of use. The Permit's permissible place of use is within the same 40-acre tracts that the permissible place of use for Water Right No. 63-3298 occurs.

Exhibit 300.

CONCLUSIONS OF LAW

I. IMH is entitled to the use of water.

When evaluating a transfer application, the Department first determines whether the applicant is "entitled to the use of water" as required by Idaho Code § 42-222(1). The Department interprets this requirement to mean that the water right(s) proposed to be changed must be valid. To determine water right validity, the Department requires evidence of a license, claim, or decree. Idaho Code § 42-222(1). The Department then evaluates the licensed, claimed, or decreed water right relative to the forfeiture provisions of Idaho Code § 42-222(2). If the water right proposed to be changed is not valid, the proposed change cannot be approved, and any further analysis is moot. If the water right proposed to be changed is valid, the Department applies the transfer evaluation criteria in Idaho Code § 42-222(1).

As stated in Finding of Fact No. ("FOF") 1, on January 29, 2009, the SRBA Court issued a partial decree confirming the elements of Water Right No. 63-3298. As stated in FOF 2, IMH acquired most of the land recognized in the partial decree as the place of use for Water Right No. 63-3298, and IMH's land acquisition included "appurtenances." Idaho Code § 42-101 states that a water right is "one of the appurtenances of" the land where the water right is used. As stated in FOF 3, IDWR acknowledges that IMH is the current owner of Water Right No. 63-3298. As stated in FOF 10-12, FSA reports show that crops have been grown on the place of use for Water Right No. 63-3298 in most years since the right was decreed in the SRBA. The FSA reports also show that the number of acres with crops within the place of use for Water Right No. 63-3298 in 2019 and 2022 exceeded the number of acres authorized to be irrigated by the water right.²

² Whether IMH or its predecessor in ownership of Water Right No. 63-3298 violated the water right by irrigating more land than authorized by the water right is a separate matter. The key fact in this case is that IMH or its predecessor did not partially forfeit Water Right No. 63-3298 by continuously irrigating fewer acres than authorized by the water right.

Water Right No. 63-3298 is valid through means of a court decree, and evidence shows it has been used in the last five years. IMH has shown a possessory interest in Water Right No. 63-3298 that has not been challenged in this matter. IMH has shown that it is entitled to the use of water pursuant to Water Right No. 63-3298.

IMH has met its burden of persuasion for this review element.

II. No water rights are injured by the Transfer.

Idaho Code § 42-222(1) establishes that an application for transfer cannot be approved if “other water rights are injured thereby.” Injury results from reduced availability of water to satisfy a water right. *See Barron v. IDWR*, 135 Idaho 414, 418 (2001) (“IDWR’s concern over the potential for reduced availability, *i.e.*, injury, to those rights appears valid.”).

Rule 45.01.a of the Water Appropriation Rules (IDAPA 37.03.08.045.01.a), although not directly applicable to the Transfer, is helpful for explaining the ways reduced availability can result in injury:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree, claim, or the historical amount beneficially used by the water right holder of such permit, license, decree, or claim, whichever is less;
- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert water for an existing water right. . . . ; or
- iii. The proposed use would make the quality of the water available unusable by an existing water right and could not be restored to usable quality without unreasonable effort or expense.

A. The Transfer will not reduce the amount of water available to satisfy existing water rights.

The Transfer proposes to reduce the amount of water that can be diverted pursuant to Water Right No. 63-3298, so the Protestants’ water rights will not be injured by a straightforward additional depletion of the water available to them. However, the Protestants suggest that the Transfer may nevertheless reduce the availability of water to their existing ground water rights in two ways:

1. Changing from one aquifer production zone to another will result in more water being drawn from the same aquifer zones used by the Protestants.

2. The irrigation development authorized pursuant to Permit No. 63-34320 will occur only if the Transfer is approved, and development pursuant to the permit will reduce the amount of ground water available to the Protestants.

Lack of information in the record makes it difficult to evaluate whether ground water withdrawals will change from one aquifer zone to another. As stated in FOFs 21 and 22, IMH most likely currently draws at least some of its water from the Idaho Group sediments. As stated in FOF 24, the record does not make clear which aquifer zones the Protestants draw from currently, with the exception of one well that draws from the Idaho Group aquifer and another well that appears to draw water from both the Snake River Group and the Idaho Group aquifers. As stated in FOF 23, IMH is not sure whether it intends to draw water from the Snake River Group aquifer or the Idaho Group aquifer.

Hypothetically, if the proposed diversion occurs in a different aquifer zone than current diversions under Water Right No. 63-3298, the change to year-round use could result in water level declines in any Protestants' wells diverting water from the same aquifer zone. FOF 19 states that ground water levels in the shallower Snake River Group aquifer zone may be declining. If the Transfer results in increased pumping from ground water in the Snake River Group, it could increase the rate of decline in that aquifer zone and impact any of the Protestants' water rights pumping from the Snake River Group. If the Transfer results in increased pumping from the deeper Idaho Group, which is stable or increasing as stated in FOF 20, any impact on water levels in the Protestants' wells is likely to be negligible or even offset by trends toward increasing water levels.

IMH proposes two measures likely to reduce the effects of the proposed transfer on the Protestants' water supply compared to IMH's pre-transfer effects on the Protestant's water supply. First, as described in FOF 5, IMH proposes to reduce its authorized diversion volume, likely resulting in it withdrawing less ground water each year. Second, as described in FOFs 16-17, IMH proposes to move its new points of diversion farther away from the Protestants' wells, reducing the likelihood that its pumping cones of depression will cause water levels in the Protestant's wells to decline appreciably. These two proposed measures may not completely prevent changes to water levels in the Protestants' wells, but they significantly reduce the likelihood of significant changes that would reduce the amount of water available to satisfy the Protestants' water rights. To further reduce the possibility that changes to water levels in the Protestants' wells would reduce the availability of water to satisfy the Protestants' water rights, IMH could be required to employ the additional measure of completing its proposed new points of diversion in the Idaho Group aquifer, which it already is taking some water from, and which appears to be stable or increasing, as stated in FOF 20.

As for the Protestants assertion that the irrigation development authorized pursuant to the Permit will occur only if the Transfer is approved, and that diversions pursuant to the Permit will reduce the amount of ground water available to the Protestants, it is an impermissible collateral attack on the Permit, which IDWR approved in 2020. The Protestants' assertion regarding the Permit is not relevant to this analysis of the proposed changes to Water Right No. 63-3298.

B. The Transfer will not force the Protestants to unreasonable effort or expense to divert water for their existing water rights.

The Protestants also question whether year-round pumping could injure their water rights by lowering the water level in their wells. Testimony of Ken Neeley.

Any decline in water levels attributable to the Transfer is not necessarily injury. Injury would occur if the decline forced the Protestants to unreasonable expense or effort to divert water pursuant to their water rights. *See* IDAPA 37.03.08.045.01.a.ii. Beranna and Western Farms did not report that water levels at any time of year currently prevent them from diverting water in accordance with their water rights, with the exception of one Western Farms well. The lack of water in the well was not attributed to any particular cause, and Western Farms produced water from that well by lowering the pump deeper into the well. Testimony of Joe Weitz. If the proposed Transfer were to reduce water levels in any of the Protestants' wells, it would not be injury if the remedy were simply to lower the pump in the well, as Western Farms did.

Hypothetically, if the proposed diversion occurs in the same aquifer zone as current diversions under Water Right No. 63-3298, injury is unlikely. In fact, the change to year-round use is likely to result in a flatter, shallower cone of depression than the current irrigation season cone of depression, making it easier for Beranna and Western Farms to divert ground water during the irrigation season, when their water needs are greatest. Testimony of Scott King.

If the proposed diversion occurs in a different aquifer zone than IMH currently produces from, then the analysis is the same as in section II.A above. The lowering water levels in the Protestants' wells to the point of unreasonable effort or expense is rendered unlikely by IMH's plan to locate its new wells as far as possible from the Protestants' wells and by pumping from the Idaho Group aquifer zone.

C. The Transfer will not alter the water quality so that existing water rights become unusable.

The Protestants did not raise the issue of whether the Transfer will change water quality such that it is not usable for the beneficial uses authorized by the Protestants' water rights. As stated in FOF 13, IMH will either treat and dispose of wastewater from the proposed domestic use in a drain field or treat it and re-use it for irrigation.

The Transfer will not reduce the amount of water available to satisfy existing water rights or force the Protestants to an unreasonable expense or effort to divert water pursuant to their water rights. Furthermore, the Transfer will not change ground water quality so that the ground water is not usable.

IMH's proposed change would not result in an injury to other water rights. IMH met its burden of persuasion for this review element.

III. The Transfer does not constitute an enlargement in use of the original right.

Idaho Code § 42-222(1) states that the change proposed in an application for transfer must “not constitute an enlargement in use of the original right.” Enlargement will occur if the total diversion rate, annual volume diverted, or the number of acres irrigated, increases beyond what is authorized by the water rights prior to the proposed transfer. *See 3G AG LLC v. IDWR*, 170 Idaho 251, 259 (2022). Pursuant to Idaho Code § 42-222(1), the Department “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.”

As stated in FOFs 4 and 5, the Transfer proposes changing a 26-acre portion of an irrigation water right and its associated 0.52 cfs diversion rate and 117 AF annual diversion volume to domestic use. In doing so, IMH will reduce the 117 AF annual diversion volume to 82.2 AF, which is the historic consumptive use, to ensure that no more water is diverted or consumed under the proposed domestic use than occurred under the irrigation use. Thus, the total diversion rate, annual volume diverted, and number of acres irrigated will not increase beyond what is authorized by the 26-acre portion of Water Right No. 63-3298 prior to the proposed transfer.

The Transfer proposes changing the season of use for Water Right No. 63-3298 from the irrigation season (260 days) to the entire year (365 days). Idaho Code § 42-222(1) allows for a change in period of use, and lengthening the season of use of a ground water right does not necessarily result in enlargement. When ground water is pumped, the result is a cone of depression in the aquifer from which the ground water is diverted. When ground water is pumped for part of the year, a cone of depression forms during the period of pumping and dissipates or recovers when pumping ceases. Beranna and Western Farms suggest that extending the season of use from the irrigation season to all year might injure their water rights by preventing the ground water level from recovering during the non-irrigation season, as they have been accustomed to, and interfering with their ability to divert water pursuant to their ground water rights. Testimony of Ken Neeley. As explained in section II.B above, the change in cone of depression caused by the extended season of use will not force the Protestants to unreasonable effort or expense to divert water from their wells.

IMH’s proposed change does not result in an enlargement of use. IMH has met its burden of persuasion for this review element.

IV. The Transfer is consistent with the conservation of water resources with the state of Idaho.

Idaho Code § 42-222(1) states that an application for transfer is not approvable unless “the change is consistent with the conservation of water resources within the State of Idaho.” This requirement has been interpreted by the Department to mean the proposed water use must be efficient in preserving as much water as possible in accomplishing its beneficial use.

IMH proposes to divert ground water at a maximum rate of 0.52 cfs and an annual maximum diversion volume of 82.2 AF. As stated in FOF 6, IMH’s proposed diversion rate of

0.52 cfs does not exceed what is needed, but rather is less than the IDEQ peak-hour minimum design requirement of 440 gpm (0.99 cfs) for a 240-home subdivision. IMH's proposed use of a storage tank to supply the difference between the diversion capacity of the wells and peak-hour demand requirement is an efficient practice.

IMH's proposed annual diversion volume of 82.2 AF for 240 homes equates to 306 gallons per home per day. As stated in FOF 7, 82.2 AF slightly exceeds IMH's estimated use of 300 gallons per day per home for a subdivision. The six gallons per day per home difference is not significant. The use of water in a home depends on many factors, including the number of people occupying the home, the types of appliances used in the home, and the cultural practices of the home's occupants. While 300 gallons or less per day per modern home is typical, a variance of six gallons per day, or 2%, could occur without waste.

IMH's proposed change is consistent with the conservation of water within the State of Idaho. IMH has met its burden of persuasion for this review element.

V. The Transfer is in the local public interest as defined by Idaho Code § 42-202B.

Idaho Code § 42-222(1) states that the change proposed in an application for transfer must be "in the local public interest as defined in section 42-202B, Idaho Code." Idaho Code Section 42-202B(3) states:

"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 supply.

The Protestants' testimony implies that the Transfer may not be in the local public interest because the area south of Lake Lowell in Canyon County, which is where Water Right No. 63-3298 is diverted and used, is a known "hot spot" of ground water level declines, even though IDWR has not designated the aquifer in the area to be a critical ground water area pursuant to Idaho Code § 42-233a or ground water management area pursuant to Idaho Code § 42-233b. Testimony of Hal Anderson; Exhibit 108 at 4. The Protestants imply that the Transfer could contribute to ground water level declines in the local area. Testimony of Hal Anderson; Exhibit 108 at 4 and 6.

The Protestants' questions about the sufficiency of the water supply to support the Transfer is irrelevant. Unlike with applications for new water rights, "sufficiency of supply" is not a statutory review criterion for water right transfers. The statutory requirement that transfers do not result in enlargement ensures no increase in overall depletions from the water source. The Transfer will not result in enlargement in use of Water Right No. 63-3298. (See section III above.)

Water quality changes are often a significant local public interest concern, but not in this matter. As stated in FOF 13, IMH will prevent significant changes to the ground water quality by either treating it and returning it to the local ground water through a community drain field or by treating it and reusing it for irrigation.

The Transfer will not alter the ground water supply or quality in the local area. Therefore, it is not in conflict with the local public interest. IMH has met its burden of persuasion for this review element.

VI. The change in nature of use from agricultural use to domestic use would not significantly affect the agricultural base of the local area.

Idaho Code § 42-222(1) states, “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.”

A. Canyon County is the selected local area.

Evaluation of this criterion first requires selection of a “local area.” Experts for IMH and the Protestants used Canyon County as the “local area” to analyze whether the Transfer “would significantly affect the agricultural base of the local area.” Testimony of Jeff Moffatt; Testimony of Phillip Watson. The reason for using Canyon County is that IMPLAN, the economic modeling software used by both economic modelers who testified at the hearing, maintains a set of economic data for Canyon County. Testimony of Jeff Moffatt; Testimony of Phillip Watson. The choice to use Canyon County to define the local area is significant. Using a larger area, such as multiple counties within the Treasure Valley, would dilute the impact of the transfer within the area while possibly raising the question of whether more remote sectors of the area – such as the eastern end of the Treasure Valley – are “local.” Choosing a smaller area – such as a postal code zone or a census block – would increase the impact of the transfer within the area while possibly raising the question of whether the selected area functions as an economic unit with its own “agricultural base.” The choice of Canyon County, which was employed by both sides in this matter, is a reasonable compromise for defining a local area with its own agricultural base.

B. Agricultural base includes economic factors and non-economic behaviors and practices.

The meaning of the term “base” in Idaho Code § 42-222(1) is also key to this evaluation. The record in this matter contains testimony that “base” should include economic factors, such as effects of the Transfer on the Canyon County agricultural economy, and non-economic factors, such as the behaviors and practices by which Canyon County farmers apply chemicals, move farm equipment, and otherwise operate their businesses. Testimony of Jeff Moffett; Testimony of Phillip Watson; Testimony of Keri Smith; Testimony of Bernie Teunissen; Testimony of George Crookham; Testimony of Joe Weitz. Because “base” is not defined in statute, the Hearing Officer agrees that this analysis should consider economic and non-economic factors.

Testimony at the hearing also addressed the notion that the Transfer will initiate a chain of events leading to additional land use and water use changes – a so-called domino effect – raising the likelihood that over time more agricultural land will go out of production and resulting in broader changes to the agricultural base of the local area. Testimony of Phillip

Watson; Testimony of Keri Smith; Testimony of Bernie Teunissen. In addition to addressing the economic and non-economic factors in the agricultural base, an analysis of the domino effect concept is included below.

1. Economic factors.

In this matter, IHM and the Protestants put significant effort into generating and presenting economic analyses. This signifies that the parties expect economic factors to be heavily weighted within the scope of the agricultural base. FOF 28 shows that the effects of removing the place of use for Water Right No. 63-3298 from agricultural production will be very small – amounting to insignificant – compared to the overall size of Canyon County plant-based agricultural economy, which is only a segment of the entire agricultural economy of Canyon County. Thus, the Protestants’ assertions regarding the economic impact of the Transfer on the agricultural base of the local area are not persuasive.

2. Non-economic behaviors and practices.

The testimony that the agricultural-based behaviors and practices of the local area will be significantly affected by the Transfer is also not persuasive in this case. Protestants assert that allowing housing developments in the midst of farms has negative impacts on farmers and farming operations, including forced changes in cropping choices, forced changes in chemical application practices, more frequent trespassing, increased traffic hazards, etc. Exhibit 107 at 9. Witnesses for the Protestants testified that such impacts are likely if the place of use for the Water Right No. 63-3298 changes from agricultural to residential use. Testimony of Phillip Watson; Testimony of Keri Smith; Testimony of Bernie Teunissen. However, the Hearing Officer is not convinced that the water and associated land use changes proposed in the Transfer would significantly affect the agricultural-based behaviors and practices of the local area. Testimony in this matter suggests that farming among residential developments requires adaptations, but those adaptations do not prevent the farming from occurring at a financially viable level. For example, Joe Weitz testified that on land he farms close to the City of Caldwell, where residential developments are more commonplace, he has had to alter his chemical application and other farming practices to methods that are marginally more expensive or less convenient, but he still farms. Similarly, Bernie Teunissen characterized the effects of increased traffic on rural roadways as “the accumulative annoyance.” An annoyance is less than a significant impact. Bernie Teunissen also testified that if he has to adjust his chemical application practices, the adjustments will not shut down his operations at Beranna Dairy.

In addition, as stated in FOF 29, whether to place housing and farms in proximity has for many years been the regulatory purview of local government under Idaho’s Local Land Use Planning Act.³ Under the Local Land Use Planning Act, local governments have a major role in deciding where and how agricultural land uses and other land uses mix. Idaho Code §§ 67-6503, 67-6508. As stated in FOF 30, Canyon County has already approved the zoning change that would allow residential use at the place of use for Water Right No. 63-3298. The Hearing Officer thinks the perspective of local government should be heavily weighted in land use

³ See Chapter 65, Title 67, Idaho Code.

matters, and he declines to second-guess Canyon County's zoning decision allowing residential development at the place of use for Water Right No. 63-3298.

3. Domino effect.

For two reasons, the argument that the reduction in agricultural land will have a domino effect on the rest of the Canyon County agricultural economy is also not persuasive. First, the Protestants did not provide quantitative evidence for the likelihood of a chain of events resulting in significant reduction in agricultural land beyond just IMH's farm. Phillip Watson testified that studies from other states showed that a decline in the agricultural land base in those states resulted in more agricultural land being taken from production. However, the likelihood of such a change was not quantified. Testimony of Phillip Watson. Furthermore, because the cited studies were done in other states, their conclusions may not apply at all in Canyon County in Idaho. Evaluating the Transfer to prevent any hypothetical ensuing changes would unfairly make IMH responsible for land use and water use decisions that may not even happen.

Second, the Protestants' domino effects argument is inconsistent with Idaho Code § 42-222(1). Statutorily, IDWR must evaluate the effects of "a change", i.e. the proposed Transfer. Idaho Code § 42-222(1) does not direct IDWR to evaluate the change proposed in the Transfer and all potential ensuing changes. IDWR must apply the plain language of the statute, which describes the change in the singular. If the Idaho Legislature expected IDWR to evaluate more changes than just the single Transfer, Idaho Code § 42-222(1) likely would say so. Furthermore, the implication of the domino effects argument is that no water right used in the agricultural economy could ever change to a non-agricultural use because any change would inevitably initiate a chain of events leading to significant alterations in the local agricultural base. The Idaho Legislature did not say in Idaho Code § 42-222(1) that no water right used for agricultural purposes could ever be changed to a non-agricultural purpose. Idaho Code § 42-222(1) clearly allows for such a change when its impacts are not significant.

IMH's proposed change does not significantly affect the agricultural base of the local area. IMH has met its burden of persuasion for this review element.

VII. The new use is a beneficial use.

The Transfer proposes the diversion and use of water for domestic purposes in 240 homes. Domestic use is recognized in Section 3, Article XV, of the Idaho Constitution as a beneficial use of water.

IMH has met its burden of persuasion for this review element.

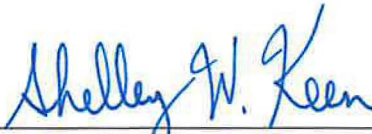
ORDER

IT IS HEREBY ORDERED that the Transfer Application is **APPROVED** subject to the conditions set forth in *Transfer of Water Right: Transfer No. 85639* issued in conjunction with this order. Among the approval conditions are measures to ensure that the new points of

diversion are constructed to draw water from more than 300 feet below ground surface so it comes from the Idaho Group aquifer.

IT IS FURTHER HEREBY ORDERED that to reflect the division of Water Right No. 63-3298 into separate domestic and irrigation systems, Water Right No. 63-3298 is split into two water rights. The transferred portion for domestic use is now Water Right No. 63-35189. The remaining irrigation portion will continue to be Water Right No. 63-3298, albeit with the elements revised to reflect the Transfer. The elements of Water Right Nos. 63-35189 and the revised elements of Water Right No. 63-3298 are described in *Transfer of Water Right: Transfer No. 85639* issued in conjunction with this order.

DATED this 15th day of July 2024.



Shelley W. Keen
Hearing Officer

CERTIFICATE OF SERVICE

I certify that on the 15th day of July, 2024, I served or caused to be served the *Preliminary Order Approving Transfer Application* to the Parties by the following method(s):

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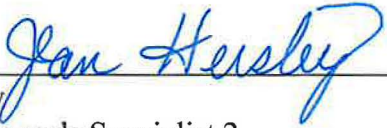
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