

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

**IN THE MATTER OF APPLICATION FOR) PRELIMINARY ORDER
TRANSFER NO. 87938 IN THE NAME OF) AFFIRMING APPROVAL OF
THE CITY OF HEYBURN) AN APPLICATION FOR TRANSFER**
_____)

Procedural History

1. On June 14, 2023, the City of Heyburn (“Heyburn”) filed Application for Transfer No. 87938 (“*Transfer*”). The *Transfer* proposed changing the points of diversion for existing municipal water rights nos. 36-8550 and 36-8738 (“Municipal Rights”). The *Transfer* also proposed to change the points of diversion and the nature of use for water rights nos. 36-4233, 36-7970, 36-8332, 36-8744, and 36-17185 (“Wayside Rights”) from irrigation, commercial, and domestic uses to municipal use. The six proposed points of diversion include three existing wells authorized as points of diversion by the Wayside Rights and three existing wells that are part of Heyburn’s municipal system.
2. On January 16, 2024, the Department approved the *Transfer*. To prevent enlargement, the municipal rights resulting from the nature of use changes were approved with an annual diversion volume limitation based on the historic consumptive use. Ex. 6 at 3. Domestic in-home uses were considered nonconsumptive, commercial uses were considered fully consumptive, and irrigation uses were considered partially consumptive. Ex. 3, at 24.
3. On January 30, 2024, Heyburn filed a *Petition for Reconsideration* (“*Petition*”) asking the Department to reconsider the authorized diversion volume. Ex. 4, at 4-5. Heyburn states: “there is no rational basis to treat the Domestic Rights differently from commercial water right no. 36-8332. Accordingly, the *Transfer* should be amended to approve the entire volume associated with water right nos. 36-17185, 36-4233, 36-8744, and [36-7970].” Ex. 4, at 5.
4. On February 20, 2024, the Department issued a *Preliminary Order Granting Petition for Reconsideration and Amending Transfer Approval* (“*Preliminary Order*”). The *Preliminary Order* concluded, in relevant part:
 6. When approving the transfer, the Department did not properly consider the historic consumptive use in approving the nature of use change from commercial to municipal water use for water right 36-8332.
 7. The Applicant’s *Transfer* and *Petition* did not include evidence confirming the historic consumptive water use in the “Wayside Café”, “Stinker Station”, and “In House Use” The Department must limit the transferred volumes of these

rights to ensure the proposed change to municipal use does not result in an enlargement in use of the water rights.

Ex. 6, at 3. Accordingly, the municipal rights resulting from the nature of use changes approved in the *Preliminary Order* included reduced annual volume diversion limits, reflecting only the consumptive portion of the irrigation uses because the in-home domestic and commercial uses were considered non-consumptive.

5. On March 1, 2024, Heyburn filed a *Request for Hearing* (“*Request*”) regarding “the Department’s decision to treat domestic, commercial, and municipal water rights differently and the decision to reduce the volumes associated with the domestic and commercial water rights that were the subject of the *Transfer . . .*” *Request*, at 2.
6. On April 19, 2024, the Department issued an *Order Granting Request for Hearing; Order Appointing Hearing Officer; and Notice of Prehearing Conference* granting Heyburn’s *Request* and appointing Phill Hummer as Hearing Officer.
7. On July 9, 2024, the Department held an administrative hearing pursuant to the *Request*.
8. At the hearing, Chris Bromley of McHugh Bromley PLLC represented Heyburn, and Charles G. Brockway of Brockway Engineering PLLC (“Brockway”) testified as an expert witness on behalf of Heyburn. The *Transfer*, application approvals, *Petition*, and other records from the application process prior to the hearing were admitted into the record as Exhibits nos. 1 through 6. Exhibit no. 8 is a technical memorandum prepared by Brockway, Exhibit no. 9 is a waste water analysis also prepared by Brockway, and Exhibit no. 10 is a proposed condition by Brockway. Exhibit nos. 8, 9, and 10 were admitted into the record.

Based on consideration of evidence, the Hearing Officer finds, concludes, and orders as follows:

Findings of Fact

1. The *Transfer* proposes three changes to the elements of existing water rights: (1) a change in nature of use for the Wayside Rights to municipal purposes; (2) a change to the points of diversion and places of use of the Wayside Rights to incorporate the Wayside Rights into Heyburn’s municipal system and service area; and (3) a change to the points of diversion of the Municipal Rights to include the wells that have historically served the Wayside Rights.
2. Before the *Transfer*, the Wayside Rights authorized the diversion of ground water for the following:

Water Right	Diversion Rate (CFS)	Diversion Volume (AF)	Acres	Beneficial Use
36-4233	0.12	20.0	5.0	Irrigation
36-4233	0.20	7.0	N/A	Domestic
total	0.20	27.0	5	
36-7970	0.20	27.6	N/A	Domestic
36-8332	0.04	0.9	N/A	Commercial
36-8744	0.02	0.8	0.2	Irrigation
36-8744	0.05	2.4	N/A	Domestic
total	0.07	3.2	0.2	
36-17185	0.05	2.4	N/A	Domestic

3. Water diverted pursuant to the Wayside Rights historically supplied water to a café, gas station, 75 domestic homes, and the irrigation of 5.2 acres. Ex. 1, at 37; Ex. 8, at 1.
4. The unconsumed portion of water diverted and beneficially used pursuant to the domestic and commercial portion of the Wayside Rights entered Heyburn's wastewater treatment plant and discharged into the Snake River after treatment. Ex. 5, at 1; Ex. 8, at 2.
5. The Municipal Rights authorized the following:

Water Right	Diversion Rate (CFS)	Diversion Volume (AF)	Acres	Beneficial Use
36-8550	6.67	N/A	N/A	Municipal
36-8738	3.30	N/A	N/A	Municipal

Applicable Law

Idaho Code § 42-222(1) sets forth the criteria used to evaluate applications for transfer and states in relevant part:

The director of the [Department] 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 [Idaho Code § 42-202B] The director may consider consumptive use, as defined in [Idaho Code § 42-202B], as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.

Idaho Code § 42-222(2) sets forth the forfeiture provision criteria and states, in pertinent part: “All rights to the use of water . . . shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated.”

Analysis

I. Water Right Validity

Idaho Code § 42-222(1) states that a person “entitled to the use of water” may apply to the Department to change elements of the authorized water use. The water rights proposed to be changed must be valid as evidenced by an existing claim, license, or decree and not lost in accordance with the forfeiture provisions of Idaho Code § 42-222(2). If the water rights proposed to be changed are valid, the proposed transfer can be approved if the changes meet the criteria in Idaho Code § 42-222(1).

The Snake River Basin Adjudication (“SRBA”) Court issued a partial decree for water right no. 36-4233 on December 4, 1997, and for water right no. 36-7970 on March 20, 1998. The Department issued licenses for water right no. 36-8332 on July 6, 1992; water right no. 36-8550 on April 10, 1998; water right no. 36-8738 on July 10, 2006; and water right no. 36-8744 on May 3, 2019. Water right no. 36-17185 was created as the result of a *Notice in Change in Water Right Ownership* split filed on January 21, 2021 by Heyburn Estates LLC for a portion of water right no. 36-8744.

Heyburn submitted evidence identifying the location of irrigation occurring pursuant to the Wayside Rights. Ex. 1, at 38. Evaluation of aerial imagery available to the Department supports a conclusion that the full 5.2 acres have been irrigated within the most recent five year period. Ex. 3, at 23. Heyburn identified the homes served by the Wayside Rights. Ex. 1, at 38. Testimony and discussion in the record demonstrate water use within the homes and commercial buildings occurred within the five year period before the *Transfer* was filed. Ex. 8, at 4; Ex. 9, at 1; Brockway Test. Therefore, the Wayside Rights have not been forfeited. Similarly, testimony and discussion in the record demonstrate the Municipal Rights are utilized to deliver water to users within the service area and are not lost to forfeiture.

II. Injury and Enlargement

Pursuant to Idaho Code § 42-222(1), the Department must evaluate whether the proposed transfer will cause an injury or enlargement. The proposed transfer cannot be approved if the proposed change constitutes an enlargement or injures other water rights. I.C. § 42-222(1). 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.”). In addition, “there is a per se injury to junior water right holders anytime an enlargement receives priority.” *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753 (2005).

Enlargement occurs 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. Idaho Dep't of Water Res.* 170 Idaho 251, 259 (2022).

The Department may consider consumptive use when evaluating whether a proposed change would result in enlargement. I.C. § 42-222(1). Idaho Code § 42-202B(1) defines consumptive use as “that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state.” In other words, consumptive use is the portion of water diverted and beneficially used under a water right that is not returned to the waters of the state. The statute makes no distinction between ground water and surface water.

The Department considers any future consumptive use that is in excess of the historic consumptive use to be an enlargement. *In re 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*, at 6 (Sept. 22, 2021) [hereinafter *Johnson Exceptions*]. “To prevent enlargement of the historic consumptive use, [a water right] could be changed to municipal purposes [when] its annual diversion volume [is] reduced to its historic consumptive use.” *Johnson Exceptions*, at 6 n.7.

1. *Municipal purposes are fully consumptive.*

Heyburn asserts that the Department treats domestic and commercial uses different than municipal use as a matter of policy without basis and argues the use of water pursuant to the Wayside Rights prior to the proposed change will not be different after the proposed change. Ex. 8, at 5; Brockway Test. Specifically, Heyburn argues that no enlargement will occur by incorporating the full volume of the domestic and commercial use components of the Wayside Rights into the municipal system because the historic diversion and disposal system is fully consumptive with regard to the aquifer. Ex. 4, at 5; Ex. 8, at 4; Brockway Test. Heyburn claims there will be no net change to the water balance under the proposed transfer because the unused water will continue to be conveyed to Heyburn’s wastewater treatment facility and discharged to the Snake River. Ex. 8, at 4. As a result, ground water diverted pursuant to the Wayside Rights would not return to the aquifer. Ex. 8, at 4–5; Ex. 9, at 1; Brockway Test.

Municipal purpose water rights are treated differently than other beneficial uses because they are fully consumptive in nature due to their role in facilitating a broader range of end uses that inherently involve higher levels of consumption. A water right for municipal purposes may be fully consumptive without (a) engaging in waste, (b) violating the duty of beneficial use, or (c) exceeding the scope of the right. *Mem. Decision & Order*, at 10, *Riverside Irr. Dist. v. Idaho Dep't of Water Res.*, No. CV 14-21-05008 (Canyon Cnty. Dist. Ct. Idaho Dec. 28, 2021) [hereinafter *Riverside*]. This occurs because “other components of the municipal water use may consume, either now or in the future, more water” than what was historically used prior to the transfer. *Johnson Exceptions*, at 6. For example, a municipal

right diverted today for non-consumptive in-home uses could later be used for a manufacturing facility that is fully consumptive.

In addition, municipal purpose water rights are treated differently because effluent production is inherent in municipal use. *See Riverside*, at 10. Treated effluent¹ is the unused portion of water collected at the municipality's effluent treatment plant, processed for treatment, and disposed of in some manner by the municipality. For instance, treated effluent may be discharged either (a) directly into a surface water source, or (b) through land application methods.² Discharging the treated effluent directly to the original source or another source is non-consumptive because it enters the "waters of the state" and is available for use by others. However, discharging treated effluent through land application methods may be partially consumptive because water is lost through evaporation or transpiration.

A municipality cannot always guarantee it will discharge treated effluent into the "waters of the state" because methods of discharging treated effluent may change in the future. Changing the discharge method to the partially consumptive land application method would constitute an enlargement of use and would cause injury by reducing the water available for use by other water right holders. Therefore, the Department considers water used for municipal purposes as fully consumptive. *See In re Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Snake River Basin, Amended Snake River Basin Moratorium Order*, at 29 (July 16, 2024).

2. *Domestic and commercial uses in this matter are nonconsumptive.*

At the time the *Transfer* was filed, four Wayside Rights (water rights nos. 36-4233, 36-7970, 36-8744, and 36-17185) authorized domestic use and one Wayside Right (water right no. 36-8332) authorized commercial use for a gas station and convenience store. Ex. 8, at 1. These rights were used within defined places of use, and the in-home and commercial uses were historically non-consumptive. The appropriated water returned to waters of the State through Heyburn's effluent treatment system and discharged into the Snake River as treated effluent without a reduction in volume. Ex. 5, at 1; Ex. 8, at 1–2; Brockway Test.

While domestic and commercial uses may involve return flows to city effluent treatment systems, municipal distribution systems often result in the full consumption of water by end users. Because Heyburn proposes to connect the wells associated with the Wayside Rights to its municipal distribution system, the pre-transfer water from the Wayside Rights would be delivered to end users throughout its service area. Ex. 1, at 3, 5; Brockway Test. This change could facilitate the use of water for purposes that are more consumptive—such as industrial cooling, car washes, or park irrigation—and may result in evaporative or transpiration losses. Additionally, commingling the previously used domestic and commercial water into the municipal system would transfer control to the end user and makes it difficult to ensure the water will not be fully consumed. *Johnson Exceptions*, at 5. Without suitable

¹ Because the term "wastewater" frequently refers to agricultural runoff, this order will refer to the water entering, and discharged from, a municipality's wastewater treatment plant as "treated effluent."

² Either method is subject to Idaho Department of Environmental Quality's standards and permitting requirements that are not at issue in this matter.

control over the end use, Heyburn cannot ensure enlargement would not occur. Accordingly, changing from a non-consumptive use to a potentially fully consumptive use constitutes an enlargement of the historic use.

Moreover, domestic and commercial rights are often subject to both volume and diversion rate limitations. Municipal rights, by contrast, often do not include a volume limitation. Approving the *Transfer* with an annual diversion volume limitation when changing the nature of use to municipal use is necessary to prevent increased consumptive use caused by end users that are more consumptive than those historically authorized.

To prevent enlargement, the Department must limit the annual diversion volume to the historic consumptive use portion. Given the historic use of the Wayside Rights that authorized in-home domestic use and commercial use was non-consumptive, the historic consumptive use portion of water rights nos. 36-4233, 36-8744, 36-8332, and 36-17185 is 0.0 acre-feet (af). Accordingly, the Department should place an annual diversion volume limit on those rights of 0.0 af.

The historic use of water right no. 36-7970 is partially consumptive because the domestic use includes both in-home use and external use such as irrigation of lawns and landscaping. Water right no. 36-7970 authorizes 27.6 af for 23 homes, which is equivalent to the Department's standard of 0.6 af allocated for in-home use and 0.6 af allocated for domestic type irrigation. As discussed in greater detail below, the consumptive portion of irrigation pursuant to the Wayside Rights is 3.21 af per acre. The Department's standard field headgate allowance for irrigation at the place of use of the Wayside Rights in the Department's Administrative Basin No. 36 is 4.0 af. *Standards for Irrigation Consumptive Use Requirements, Irrigation Field Headgate Requirements, and Irrigation Season of Use*, Administrator's Licensing Memorandum No. 9, at 4 (Oct. 12, 1999). The following calculation determines the consumptive portion of the annual diversion volume associated with the external portion of the domestic use pursuant to water right no. 36-7970:

$$23 \text{ homes} * 0.6 \text{ af per home} * (3.21 \text{ af}/4.00\text{af}) = 11.07 \text{ af}$$

Accordingly, the Department must limit the annual diversion volume for water right no. 36-7970 to 11.1 af. Therefore, the prior approval excluding the annual volume for in-home domestic and commercial use of the Wayside Rights and including the portion used for domestic lawn and landscape irrigation was correct and warranted.

3. *Irrigation uses are partially consumptive.*

At the time the *Transfer* was filed, two Wayside Rights (water right nos. 36-4233 and 36-8744) authorized irrigation use. Irrigation use is partially consumptive because a portion of the water applied to a crop returns to the waters of the state and is available for use. Heyburn agrees that the portion of the irrigation use component represented by precipitation deficit data is a consumptive water use under the Wayside Rights. Ex. 8, at 5. Precipitation deficit data shows the consumptive volume for irrigation pursuant to the Wayside Rights is 3.21

acre-feet per acre (af/ac). Ex. 3, at 1; Ex. 8, at 2. The following calculations determine the historic consumptive use volume associated with irrigation under each right:

Water Right No. 36-4233:	5.0 acres * 3.21 af/ac = 16.1 af
Water Right No. 36-8744:	0.2 acres * 3.21 af/ac = 0.6 af

Therefore, 16.1 af for right no. 36-4233 and 0.6 af for right no. 36-8744 can be transferred to municipal purposes without enlarging the historic consumptive use.

III. Conservation of Water Resources Within the State of Idaho

Heyburn proposes to connect the wells that currently serve as the points of diversion for the Wayside Rights to Heyburn's municipal conveyance works and continue to treat effluent through the treatment system. Ex. 8, at 2, Brockway Test. Reports and testimony in the record demonstrate that Heyburn monitors their conveyance and treatment system to ensure their system is functioning efficiently. Efficient diversion and conveyance systems preserve as much water as possible for beneficial use by other users. Therefore, the proposed change is consistent with the conservation of water resources.

IV. Local Public Interest

Idaho Code § 42-202B(3) defines local public interest "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." Changes to a water right as authorized by Idaho Code § 42-222 can be utilized to meet the changing needs of water users. *See* Idaho Water Resource Board, *Idaho State Water Plan*, at 17 (Nov. 2012). The changes proposed by Heyburn are intended to improve Heyburn's ability to serve users within the service area. Therefore, the proposed change is in the local public interest.

CONCLUSIONS OF LAW

1. Pursuant to Idaho Code § 42-222(1), the Department cannot approve a transfer application if the proposed change would enable an enlargement of use of the right or cause an injury to existing water rights.
2. The in-home domestic and commercial portions of the Wayside Rights have historically been non-consumptive and a change of the nature of use to municipal purposes within Heyburn's service area would facilitate an increase in the consumptive use volume.
3. The historic use of water and Idaho Code § 42-222(1) govern how the Department evaluates changes to water rights. The Department's decision to reduce the volume of the Wayside Rights is warranted.

4. To prevent enlargement of the historic water use and the resultant injury, the Department must limit the amount of water changed to municipal purposes to the historic consumptive volume.
5. The Department will place an annual diversion volume limit on water right nos. 36-8332 and 36-17185 of 0.0 af, water right no. 36-7970 of 11.1 af, water right no. 36-4233 of 16.1 af, and water right no. 36-8744 of 0.6 af.

ORDER

IT IS HEREBY ORDERED that the *Preliminary Order Granting Petition for Reconsideration and Amending Transfer Approval* is **AFFIRMED**.

Dated this 2nd day of October 2025.



Phill Hummer
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of October, 2025, I served a true and correct copy of the foregoing document on the following by the method(s) indicated below:

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Jean Hersley
Technical Records Specialist II

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.



IDAHO DEPARTMENT OF
WATER RESOURCES

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Governor Brad Little

Director Mathew Weaver

October 2, 2025

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CITY OF HEYBURN
PO BOX 147
HEYBURN ID 83336-0147

RE: Preliminary Order Affirming Approval of An Application for Transfer No.
87938

Dear Permit Holder(s):

The accompanying order is a **"preliminary order"** issued by the Department pursuant to section 67-5243(3), Idaho Code. It can and will become a final order without further action of the department unless a party petitions for reconsideration within fourteen (14) days after issuance as described in the enclosed yellow information sheet.

If you have any questions regarding this matter, please call me at 208-287-4942.

Sincerely,

Jean Hersley
Technical Records Specialist II

Enclosure

c: Brockway Engineering PLLC