

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF HEYBURN,	)	Case No. CV01-25-19943
	)	
Petitioner,	)	ORDER DENYING PETITION
	)	FOR REHEARING
vs.	)	
	)	
	)	
THE IDAHO DEPARTMENT OF WATER RESOURCES,	)	
	)	
Respondent.	)	
	)	
	)	
IN THE MATTER OF APPLICATION FOR TRANSFER NO. 87938 IN THE NAME OF THE CITY OF HEYBURN	)	
	)	

I.

BACKGROUND

This matter concerns a petition seeking judicial of a final order of the Director of the Idaho Department of Water Resources. The final order approves in part, and denies in part, an application for transfer filed by the City of Heyburn. On May 1, 2026, the Court entered a Memorandum Decision and Order, along with a Final Judgment, affirming the final order. The background set forth in the Memorandum Decision is incorporated herein. On May 15, 2026, the City filed a petition for rehearing. In response to the petition, the Court ordered oral argument be held and set forth a briefing schedule for the parties. The parties briefed the issues and a hearing on the petition for rehearing was held on July 23, 2026.

II. ANALYSIS

This case involves an application for transfer of the subject rights filed by the City.¹ The subject rights authorize the diversion of ground water for irrigation, domestic, and commercial uses. The transfer application seeks to change the purpose of use each subject right to “municipal.”

In the final order, the Director determined that the nature of municipal use is such that water diverted can be fully consumed. The Court agreed and affirmed the Director’s determination. The City does not seek rehearing on the Court’s ruling in this respect.

The Director next determined that unconditionally transferring the entire cumulative diversion volume of the subject rights to a municipal use would result in an enlargement in consumptive use under Idaho Code § 42-222(1). The subject rights cumulatively authorize a diversion volume of 61.1 acre-feet annually. Of that, the Director found 33.3 acre-feet to be historically non-consumptive and 27.8 acre-feet to be historically consumptive. The Director limited the volume of water that may be diverted annually under the transfer to 27.8 acre-feet, finding that “to prevent enlargement of the historical water use and the resultant injury, the Department must limit the amount of water changed to municipal purposes to the historical consumptive volume.” R., 86. The Court agreed. It affirmed the Director’s determination that unconditionally transferring the entire cumulative diversion volume of the subject rights to a municipal use would result in an enlargement of consumptive use. The City does not seek rehearing on the Court’s ruling in this respect.

The Court next addressed the Director’s determination to decline the conditional transfer of the entire cumulative diversion volume of the subject rights to a municipal use. On July 9, 2024, the City proposed the following condition in conjunction with its transfer request:

The commercial and domestic volumes under water right nos. 36-4233, 36-8744, 36-17185, 36-7970, and 36-8332, in the amount of 40.3 acre-feet per annum, shall continue to be discharged by the City of Heyburn to the Snake River at the City’s wastewater treatment plant [insert DEQ number] and an annual report shall be filed with the Idaho Department of Water Resources by [insert date] to demonstrate that this requirement is met.

¹ A list of the “subject rights” and their elements are set forth on pages 1 and 2 of the Court’s Memorandum Decision dated May 1, 2026.

R., 213, Tr., p.37. This condition was admitted into the record as Exhibit 10. R., 79.

The proposed condition is essentially a replacement water condition. Its intent is not to limit the diversion and consumptive use of the subject rights post-transfer to that which was consumed historically. Rather, it proposes to address the diminution of return flow resulting from the transfer by using replacement water from one or more of the City's other municipal water rights to maintain return flows at their historic levels. The Court held the Director did not abuse his discretion in rejecting the proposed condition as it would still allow a greater consumptive use of water under the subject rights than has occurred historically. It is this ruling the City challenges on rehearing.

In large part, the City reasserts its argument that the proposed condition cures or precludes any enlargement of consumptive use. The Court disagrees. The Director determined 27.8 acre-feet of the subject rights to be historically consumptive. This determination is supported by substantial and competent evidence for the reasons set forth in Memorandum Decision.

The proposed enlargement condition does not limit the consumptive use of water under the transfer to that which was consumed historically (i.e., 27.8 acre-feet annually). As a result, if the entire cumulative diversion volume of the subject rights is transferred to a municipal use with the transfer condition, it would still allow the City to consumptively use more water under the subject rights than has occurred historically. That is, it would allow the potential consumptive use of 61.1 acre-feet annually as opposed to the 27.8 acre-feet annually that has occurred historically. This is because the nature of municipal use is such that water diverted can be fully consumed. Maintaining a status quo return flow into the Snake River via replacement water, while arguably addressing the issue of injury to other water rights reliant on return flow, does not resolve the issue of the enlargement of consumptive use under the subject rights should the entire cumulative diversion volume of subject rights be transferred.²

This case presents an anomaly in that the non-consumptive portions of the subject rights does not return to its original source (i.e. groundwater). If it did return to the aquifer there would

² The City's wastewater facility currently treats and discharges into the Snake River significantly more water than the non-consumption portion of the subject rights. In the event the City increases the consumptive use of the subject rights, the use of return flows from the City's other municipal rights to offset the increase utilizes water originating from the City's other water rights that already returns to the waters of the state. In this regard, the proposed condition would not mitigate any enlargement created by an increase in consumptive use.

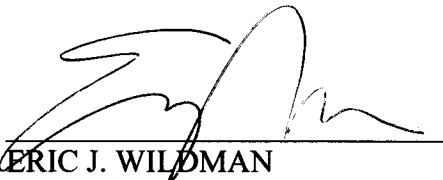
be no argument that the Director could limit the transferred quantity to historic consumptive use. The result would be less water withdrawn from the aquifer under the new right. The application of the law is no different in this case. The Director can still limit the withdrawal from the aquifer to the historic consumptive use in approving a transfer. This not only complies with the statute but as a practical matter avoids future administrative problems created by transferring the full authorized quantity of a right (both consumptive and non-consumptive) and then placing volume restrictions on how much of that quantity can be consumed to avoid enlargement. For these reasons, the Court will deny the City's petition for rehearing.

III.

ORDER

Therefore, based on the foregoing, IT IS ORDERED the City's petition for rehearing is hereby denied.

Dated 8/4/20


ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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By Caterina Montez-Hutings
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