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Fourth Judicial District, Ada County
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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

CITY OF HEYBURN'S OPENING BRIEF

Judicial Review from the Idaho Department of Water Resources
Mathew Weaver, Director

Honorable Eric J. Wildman, Presiding

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I. STATEMENT OF THE CASE

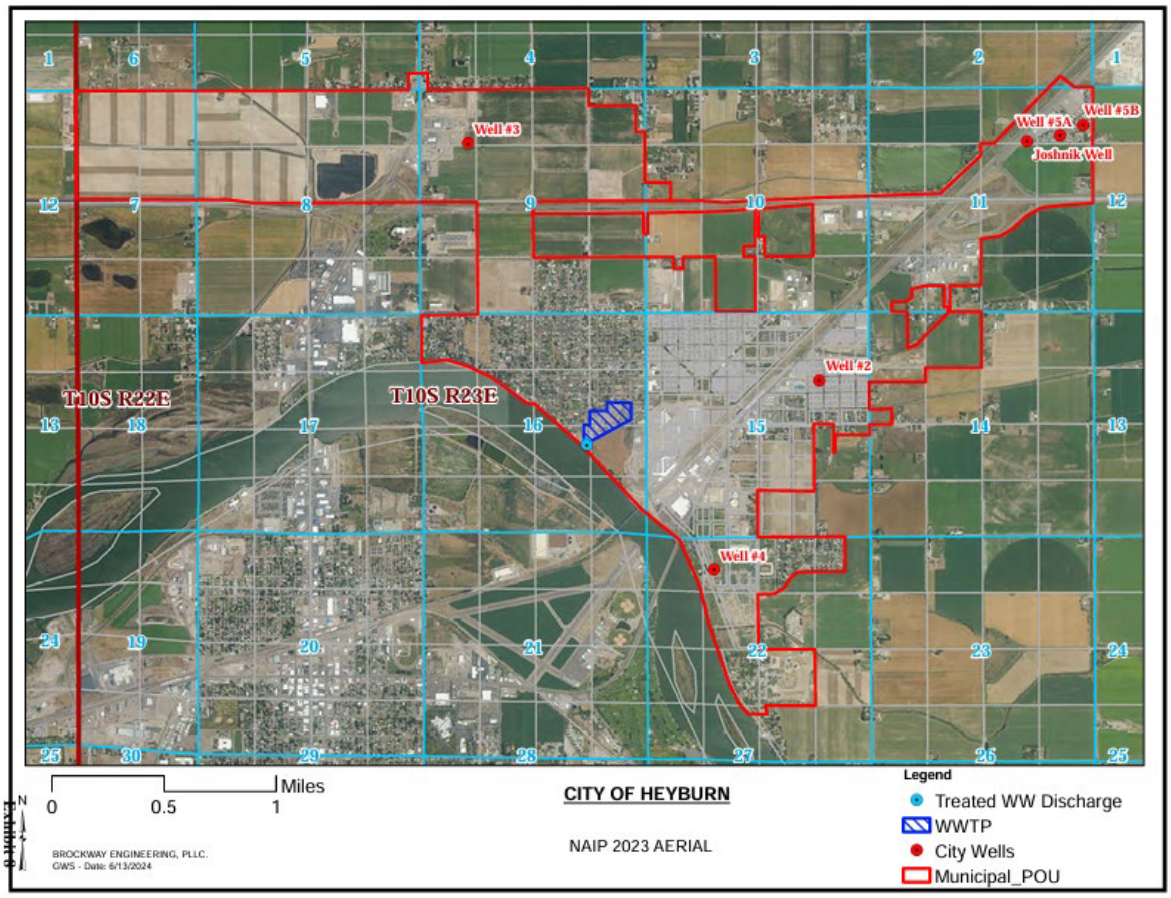
A. Nature of the Case

This case involves *Application for Transfer No. 87939* ("Transfer") filed by the City of Heyburn ("City") with the Idaho Department of Water Resources ("IDWR" or "Department"), wherein the City sought to change the purpose of use associated with a series of ground water rights from commercial, domestic, and irrigation to municipal. In considering the Transfer – which was not protested by third parties – the Department granted the change in purpose of use to municipal, authorized the transfer of volume associated with the irrigation purposes of use, yet denied the transfer of volume associated with the commercial and domestic rights. The denial was not based on substantial competent evidence presented at the hearing. Rather, IDWR denied the transfer of volume associated with the commercial and domestic rights due to IDWR's policy-based "belief" that enlargement and injury will always occur if volume is allowed to transfer from commercial and domestic uses to municipal. IDWR failed to consider the City's evidence that rebutted the Department's consumptive use policy, contrary to the Department's own mandate that municipal providers shall be afforded the opportunity to present evidence, on a case-by-case basis, to demonstrate consumptive and non-consumptive use. Consequently, the Final Order ignored the unrefuted evidence presented by the City establishing both its consumptive and non-consumptive use, defaulting instead to the debunked presumption that municipal use is wholly consumptive.

B. Course of the Proceedings and Statement of Facts

1. The City's municipal service area is shown below in a red outline. The specific area at issue is in the northeastern corner of the service area and was originally supplied with water from a series of commercial, domestic, and irrigation water rights near the "Wayside Café"

and “Stinker Station” (collectively referred to as “Wayside”), with the wells serving those locations labeled “Well #5,” “Well #5B,” and “Joshnik Well”:



R. 000208.

2. “[S]ince approximately July 6, 1982,” wastewater from Wayside has been conveyed by pipe to the City’s wastewater treatment plant (“WWTP”). R. 000176. The WWTP is shown on the above map with blue hashmarks. Treated effluent is then discharged to the Snake River at the location depicted with the blue dot.

3. The water rights that supplied Wayside were partially decreed in the Snake River Basin Adjudication (“SRBA”) or licensed by the Department and were later conveyed to the City in return for municipal service. These water rights are summarized in Table 1 below, totaling 61.10 acre-feet:

Table 1: Water right descriptions before the Transfer #87938 application.

RIGHT #	36-4233		36-8744		36-17185	36-8332	36-7970
PRIORITY DATE	3/1/1963		12/22/1995		12/22/1995	10/12/1987	3/10/1981
BASIS	Decreed		License		License	License	Decreed
SOURCE	Ground Water		Ground Water		Ground Water	Ground Water	Ground Water
USE	Irrigation	Domestic	Irrigation	Domestic	Domestic	Commercial	Domestic
Period of Use	4/01-10/31	1/01-12/31	3/15-11/15	1/01-12/31	1/01-12/31	1/01-12/31	1/01-12/31
Diversion	0.12 CFS	0.20 CFS	0.02 CFS	0.05 CFS	0.05 CFS	0.04 CFS	0.20 CFS
Combined Diversion	0.20 CFS		0.07 CFS				
VOLUME	20.0 AFA	7.0 AFA	0.8 AFA	2.4 AFA	2.4 AFA	0.9 AFA	27.6 AFA
COMBINED VOLUMES	27.0 AFA		3.2 AFA				
TOTAL VOLUME	61.1 AFA						

R. 000203 (collectively referred to hereafter as the "Wayside Rights").

4. The Wayside Rights "historically supplied water to a café and, gas station, 75 domestic homes, and the irrigation of 5.2 acres." *Id*. Wayside is shown in more detail below:

R. 000173.

5. On June 14, 2023, Brockway Engineering, PLLC, on behalf of the City, filed the Transfer to change the purpose of use of the Wayside Rights from commercial, domestic, and irrigation to municipal:

> The City of Heyburn desires to update the water rights utilized to provide water to its citizens. Municipal water rights 36-8550 and 36-8738 will be updating their place of use and points of diversion. Beneficial uses of water rights 36-4233, 36-7970, 36-8332, 36-8744 and 36-17185 will be changing to municipal with this transfer and their place of use and points of diversion will match 36-8550 and 36-8738.
>
> No ESPA Model analysis is required with this transfer application. Historical water use for water rights 36-4233, 36-7970, 36-8332, 36-8744 and 36-17185 were determined by calculating the water demand for the Wayside Café, Stinker Station, in house use and consumptive irrigation on 5.2 acres of irrigation. These calculations are included in the transfer application.

R. 000101.

6. During October 2023, the Transfer was advertised. R. 000167, 000169.

7. The Department solicited watermaster comments, with the Watermaster for Water District No. 130, Corey King, stating he did "not oppose approval of this application." R. 000168.

8. The Transfer was not protested. R. 000164.

9. On January 16, 2024, the Department approved the Transfer, in part. R. 000142-63. The approval authorized the change in purpose of use of the Wayside Rights to municipal, including the full diversion rate, but limited the allowance of volume to the irrigation water rights (36-4233 and 36-8744), the irrigation component associated with the domestic water rights (36-7970), and the commercial water right (36-8332). *Id*. Thus, IDWR authorized the transfer of 28.7 acre-feet, yet denied the transfer of any volume associated with the in-home components of the domestic water rights (36-7970 and 36-17185), summarized below:

Table 3: Water right descriptions under Transfer #87938 as originally approved by IDWR.

RIGHT #	36-4233		36-8744		36-17185	36-8332	36-7970
PRIORITY DATE	3/1/1963		12/22/1995		12/22/1995	10/12/1987	3/10/1981
BASIS	Decreed		License		License	License	Decreed
SOURCE	Ground Water		Ground Water		Ground Water	Ground Water	Ground Water
USE	Municipal	Municipal	Municipal	Municipal	Municipal	Municipal	Municipal
Period of Use	4/01-10/31	1/01-12/31	3/15-11/15	1/01-12/31	1/01-12/31	1/01-12/31	1/01-12/31
Diversion	0.12 CFS	0.20 CFS	0.02 CFS	0.05 CFS	0.05 CFS	0.04 CFS	0.20 CFS
Combined Diversion	0.20 CFS		0.07 CFS				
VOLUME	16.1 AFA	0.0 AFA	0.6 AFA	0.0 AFA	0.0 AFA	0.9 AFA	11.1 AFA
COMBINED VOLUMES	16.1 AFA		0.6 AFA				
COMBINED VOLUMES	16.7 AFA						
TOTAL VOLUME	**28.7 AFA**						

R. 000205; *see also* R. 000142.[1]

10. The decision to deny the transfer of volume for in-home domestic use ("Domestic Rights") to municipal was made pursuant to a January 15, 2024, *Memorandum* ("Municipal Memo"), prepared by IDWR's Southern Regional Manager, in which the Transfer was evaluated. In the Municipal Memo, it was explained that if the Transfer were approved in full, enlargement would result: "A meeting was held between me, IDWR administration, and IDWR Eastern & Western Regional Managers. During this meeting, it was decided that IDWR cannot allow volume credit in a conversion from in house domestic use to municipal use . . . ." R. 000165. (emphasis added).

11. On January 30, 2024, the City filed a *Petition for Reconsideration*, in which the City took no issue with the volumetric calculations for the irrigation and commercial components of the Wayside Rights, yet challenged the Department's decision to deny the transfer of volume associated with the Domestic Rights: "The basis for this Petition is to ask IDWR to reconsider its decision to reduce the volumes associated with water right nos. 36-17185, 36-4233, 36-8744, and 36-7970 ('Domestic Rights')." R. 000170.

[1] As will be explained, on reconsideration, the Department reduced the commercial volume to zero. *See* Table 4, below, R. 000206.

12. On February 20, 2024, the Department issued its *Preliminary Order Granting Petition for Reconsideration and Amending Transfer Approval* ("2024 Preliminary Order"). R. 000179. As to the Domestic Rights, the Department explained that because the City did not provide "evidence" establishing historic use, it was proper to deny the transfer of volume. R. 000181. As to the commercial water right, and for the same reason that the City did not provide evidence of use, the Department concluded it improperly allowed the transfer of 0.90 acre-feet associated with water right no. 36-8332 ("Commercial Right"). *Id*. and R. 000190. As a result, the Transfer was amended to reduce the volume associated with the Commercial Right to zero, thereby decreasing the transferred volume from 28.70 acre-feet to 27.80 acre-feet, as summarized below:

Table 4: Water right descriptions under Transfer #87938 as amended by IDWR.

RIGHT #	36-4233		36-8744		36-17185	36-8332	36-7970
PRIORITY DATE	3/1/1963		12/22/1995		12/22/1995	10/12/1987	3/10/1981
BASIS	Decreed		License		License	License	Decreed
SOURCE	Ground Water		Ground Water		Ground Water	Ground Water	Ground Water
USE	Municipal	Municipal	Municipal	Municipal	Municipal	Municipal	Municipal
Period of Use	4/01-10/31	1/01-12/31	3/15-11/15	1/01-12/31	1/01-12/31	1/01-12/31	1/01-12/31
Diversion	0.12 CFS	0.20 CFS	0.02 CFS	0.05 CFS	0.05 CFS	0.04 CFS	0.20 CFS
Combined Diversion	0.20 CFS		0.07 CFS				
VOLUME	16.1 AFA	0.0 AFA	0.6 AFA	0.0 AFA	0.0 AFA	0.0 AFA	11.1 AFA
COMBINED VOLUMES	16.1 AFA		0.6 AFA				
COMBINED VOLUMES	16.7 AFA						
TOTAL VOLUME	**27.8 AFA**						

R. 000206.

13. On March 1, 2024, and pursuant to I.C. § 42-1701A(3), the City timely filed a *Request for Hearing*: "[T]he City hereby requests a hearing in the above-captioned matter, including but not limited to the Department's decision to treat domestic, commercial, and municipal water rights differently and the decision to reduce volumes associated with the domestic and commercial water rights that were the subject of the *Transfer* . . . ." R. 000054.

14. On April 19, 2024, the Director issued an *Order Granting Request for Hearing; Order Appointing Hearing Officer; Notice of Prehearing Conference*. R. 000057.

15. On May 13, 2024, a prehearing conference was held, in which a hearing was scheduled with associated deadlines. R. 000061.

16. On July 9, 2024, a hearing was held in Twin Falls and presided over by an IDWR employee. R. 000067.

17. At the hearing, the City provided expert testimony through Charles G. Brockway, Ph.D., P.E., establishing the consumptive use associated with the Commercial Right and Domestic Rights (collectively referred to as the "Commercial and Domestic Rights") was 40.30 acre-feet. R. 000204-05, 000207.

18. With the consumptive use for the Commercial and Domestic Rights established, this resulted in water that could be transferred by the City to municipal use. Recognizing that the Department had concerns with municipal water rights and the possibility that those rights could become more consumptive in the future, Dr. Brockway offered a written condition, as fully documented in Exhibit 10 ("Enlargement Condition"), to be placed on the City's municipal water rights, which would guarantee the continued discharge of 40.30 acre-feet by the City from its WWTP into the Snake River:

> 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.

R. 000213; Tr. p. 37, lns. 17-19 ("the city would still be obligated to return 40.3 acre feet to the river so that nothing would change").

19. As testified to by Dr. Brockway, the City's effluent returns to the Snake River are regulated by the Idaho Department of Environmental Quality ("DEQ"), with requirements to measure and report through a "discharge monitoring report, or DMR." Tr. p. 38, lns. 11-17. Dr. Brockway opined that since the City is required to prepare a DMR and report it to DEQ, that it

would be reasonable for the City to report its discharge to IDWR to establish compliance with the Enlargement Condition. Tr. p. 39, lns. 4-9. Dr. Brockway explained that if the City does not meet the discharge requirements imposed by DEQ, "there's a wide range . . . [of consequences] up to and including fines or even criminal charges." Tr. p. 39, lns. 1-3.

20. To further establish that the City can commit to returning 40.30 acre-feet to the Snake River, Dr. Brockway testified to the consumptive use associated with the City's municipal water rights. In the 2023 calendar year, Dr. Brockway explained that the City pumped 530 acre-feet of water for municipal use, with the City returning 594 acre-feet of treated effluent from the WWTP to the Snake River. R. 000209-211; Tr. p. 32, lns. 17-25, p. 33, lns. 1-25, p. 34, lns. 1-21. The reason that the City returns more water to the Snake River than it pumps is because there is "a very shallow ground water" table in and around the City, which results in "considerable . . . infiltration" into the City's wastewater collection system. Tr. p. 32, lns. 23-25. Based on the City's 2018 Wastewater Collection System Master Plan, prepared by JUB Engineers, Inc., Dr. Brockway quantified the 2023 infiltration at 304 acre-feet. R. 000209. After accounting for infiltration, Dr. Brockway testified that the consumptive use associated with the City's municipal water rights is 45%. *Id.*; Tr. 32, lns. 17-25, p. 33, lns. 1-13. Thus, in 2023, of the 530 acre-feet that the City pumped, it discharged 240 acre-feet of treated effluent to the Snake River that was due to pumping for municipal use. Tr. p. 33, lns. 10-13.

21. A reason for Dr. Brockway's detailed testimony was to address an email from IDWR's Eastern Regional Manager, dated August 11, 2023, in which he explained his belief that the City's municipal use nearly 100% non-consumptive: "Most of the water pumped by the City is not consumed and is discharged into a drain channel connected to the Snake River. For example, in 2022, the City diverted 513.7 acre-feet and returned 510.5 acre-feet to the drain

channel through its wastewater treatment facility." R. 000141.[2] Dr. Brockway's analysis of the City's treated effluent returns to the Snake River is the only evidence in the record that establishes the City's consumptive use.

22. On October 2, 2025, the Department issued its *Preliminary Order Affirming Approval of Transfer Application*, R. 000068, wherein it granted the transfer of 27.8 acre-feet from irrigation to municipal, yet again denied the transfer of any volume associated with the Commercial and Domestic Rights ("Preliminary Order"). R. 000066. Ignoring both the Enlargement Condition that was testified to by Dr. Brockway and the facts in the record, the Preliminary Order substituted a policy-based conclusion that municipal water rights are always fully consumptive, contrary to actual evidence, resulting in the conclusion that volume can never transfer: "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." R. 000070.

23. On October 21, 2025, the Department issued an *Amended Final Order Approving Application for Transfer, in Part* ("Final Order"), with the Final Order affirming the conclusion reached in the Preliminary Order that no transfer of volume associated with the Commercial and Domestic Rights could occur. R. 000078. Like the Preliminary Order, the Final Order ignored the Enlargement Condition.

[2] The August 11, 2023 email regarding the City's consumptive use was largely contemporaneous with the meeting involving "IDWR administration, and IDWR Eastern[, Southern] & Western Regional Managers" that was discussed in the Municipal Memo, *supra*, in which "it was decided that IDWR cannot allow volume credit in a conversion from in house domestic use to municipal use . . . ." R. 000165; *see* Tr. p. 29, lns. 13-25.

24. On October 31, 2025, the City timely filed its *Petition for Judicial Review* with the Court, through which it challenged the Final Order.[3]

II. ISSUES PRESENTED ON REVIEW

The City presents the following issues for review:

1. Whether the Final Order's unrebuttable consumptive use presumption concerning transfers of water rights to a municipal purpose of use is lawful?

2. Whether the Final Order erred in concluding that enlargement will result?

3. Whether the Final Order violated the City's substantial rights?

4. Whether the Final Order violated the City's individual liberty rights?

III. STANDARD OF REVIEW

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the petitioner has

[3] The City's *Petition for Judicial Review* is located on the Court's website: http://srba.state.id.us/Images/AdminApp/CV01-25-19943/10-31-2025%20Petition%20for%20Judicial%20Review.pdf (visited Jan. 22, 2026).

been prejudiced. I.C. § 67-5279(4); *Barron* at 417, 18 P.3d at 222. The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). "The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Urrutia v. Blaine County, ex rel. Bd. of Comm's,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000). Lastly, "When interpreting the provisions of any state law, this chapter, or any rule, as defined in section 67-5201, Idaho Code, the court shall not defer to an agency's interpretation of the law or rule and shall interpret its meaning and effect de novo. In an action brought by or against an agency, after applying all customary tools of interpretation, the court shall exercise any remaining doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty." I.C. § 67-5279(5).

IV. ARGUMENT

The Final Order's decision to deny the transfer of volume from the Commercial and Domestic Rights to municipal is not based on substantial competent evidence in the record; rather, it is based on a "policy" that was rebutted by the City at the hearing. Through further application of the policy, and contrary to the unrebutted evidence to the contrary, the Department arbitrarily concluded that enlargement would result if the Transfer was approved in full. The Department's decision to deny the transfer of volume from the Commercial and Domestic Rights to municipal violated the City's substantial rights and liberty rights. The remedy in this case is to reverse the Final Order, in part, with instructions to the Department to approve the transfer of 40.30 acre-feet from the Commercial and Domestic Rights to municipal, with inclusion of the Enlargement Condition.

A. Contrary to Law, The Final Order Established an Unrebuttable Presumption that Municipal Use is Fully Consumptive

In the 2024 Preliminary Order, it was stated that because the City did not establish the consumptive use associated with the Commercial and Domestic Rights, the Department must deny a transfer of volume to municipal: "The Applicant's Transfer and Petition did not include evidence confirming the historic consumptive water use in the 'Wayside Café', the 'Stinker Station', and 'In House Use' (the domestic and commercial uses for rights 36-4233, 36-7970, 36-8332, 36-8744, and 36-17185 prior to the Transfer)." R. 000181. In the Final Order, the Director ignored the substantial, competent, and unrebutted evidence presented by the City, resulting in denial of the transfer of volume from the Commercial and Domestic Rights to municipal, based purely on a policy that the Department "considers" to be correct:

> 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. If municipal water rights were considered partially consumptive or non-consumptive, 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 rights used for municipal purposes as fully consumptive.

R. 000083 (emphasis added) (internal citations omitted).

The Final Order's policy-based presumption was foreshadowed and prejudged by the Municipal Memo, in which it was stated: "A meeting was held between me, IDWR administration, and IDWR Eastern & Western Regional Managers. During this meeting, it was decided that IDWR cannot allow volume credit in a conversion from in house domestic use to municipal use . . . ." R. 000165. (emphasis added).

While there may be reasons for a presumption to exist, when a presumption is "rebuttable in name only" it is contrary to Idaho law. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 722, 791

P.2d 1285, 1301 (1990) (J. Bistline dissenting). According to the Court, when a party presents evidence to rebut a presumption, the presumption is eliminated in its entirety. *McCray v. Rosenkrance*, 135 Idaho 509, 514, 20 P.3d 693, 698 (2001) ("When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue."); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 746, 947 P.2d 409, 419 (1996) ("the Director's Report is prima facie evidence and the facts contained therein are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption."); *Idaho County Nursing Home v. Idaho Dept. of Health & Welfare*, 120 Idaho 933, 939-40, 821 P.2d 988, 994-95 (1991) ("The Department may not simply rely on the fact that the facility exceeded the percentile cap to prove inefficiency. To do so would be to reinstate the presumption and make it irrebuttable as appellant argues. Once the presumption is rebutted there no longer remains an assumption that the provider's facility is inefficiently operated and the Department has the same evidentiary burden as the facility. . . . . Once the presumption has been rebutted it cannot be used to bar reimbursement to the facility. Under these circumstances the findings of the Department must be based on some evidence in addition to the presumption to show that the facility was inefficiently operated. Once a facility has rebutted the presumption by presenting evidence that the costs in excess of the percentile cap are beyond its control, the hearing officer must make a finding based on the evidence without reliance on the presumption."); *Manion v. Waybright*, 59 Idaho 643, 656, 86 P.2d 181, ___ (1938) ("this presumption is only prima facie and may be rebutted and overcome by evidence adduced during the trial, by the testimony of any of the parties to the suit").

Consistent with the decisions of the Court, the Department recently recognized in the contested case proceeding involving the Snake River Basin Moratorium that it is both technically

and legally incorrect to apply a blanket presumption of consumptive use with municipal water rights. On October 21, 2022, former Director Spackman issued his *Amended Snake River Basin Moratorium Order* ("2022 Moratorium Order") in which he stated: "Applications for municipal use . . . shall be considered fully consumptive." *2022 Moratorium Order* at 28.[4] Moreover, if "[d]omestic, commercial, industrial, or other water use [is] discharge[d] . . . to a municipal or publicly owned treatment works [those uses] will be considered consumptive." *Id*. (emphasis added). Then-Director Spackman implemented this unrebuttable presumption despite candidly admitting that the Department "lack[s] information on the consumptive use associated with the commercial, municipal, and industrial water rights . . . ." *Id*. at 21 (emphasis added).

Municipal providers from across the State sought reconsideration of this issue, with an evidentiary hearing held before Director Weaver from October 16-19, 2023. *Amended Snake River Basin Moratorium Order* at 2 (July 16, 20224) ("2024 Moratorium Order").[5] Unsurprisingly, the evidence presented by the Municipal providers established "that [] municipal water use rarely (if ever) is fully consumptive . . . ." *2024 Moratorium Order* at 3 (emphasis added). In considering the evidence, Director Weaver reversed former Director Spackman, finding "it necessary and appropriate to adopt an amended consumptive use policy. As detailed in the third paragraph in the Order below, the Director will presume new municipal and domestic uses to be fully consumptive but will allow an applicant to submit evidence to rebut the presumption." *Id*. at 4 (emphasis added). According to that paragraph: "Applicants may rebut the presumption by providing substantial, detailed evidence that the proposed [municipal] use is

[4] The 2022 Moratorium Order is located on the Department's website: idwr.idaho.gov/wp-content/uploads/sites/2/legal/orders/2022/ESPA-Moratorium-20221021-Amended-Snake-River-Basin-Moratorium-Order.pdf (visited Jan. 22, 2026).

[5] The 2024 Moratorium Order is located on the Department's website: Amended Snake River Basin Moratorium Order | SRB Moratorium | July 16, 2024 (visited Jan. 22, 2026).

not fully consumptive, will not become more consumptive or fully consumptive over time, and will not injure existing vested water rights." *Id*. at 33 (emphasis added).

Here, and as described above, the City carried its burden of rebutting the fully consumptive presumption through expert testimony and expert reports. First, the City proved its municipal rights are not fully consumptive; rather, those rights are 45% consumptive. Second, the City proved the Commercial and Domestic Rights consume 40.30 acre-feet, with that volume conveyed to the WWTP. Third, the City proved it presently discharges 240 acre-feet of treated effluent from the WWTP to the Snake River, which is significantly more the 40.30 acre-feet that the Commercial and Domestic Rights consume. Finally, and through the Enlargement Condition, the City established that its municipal rights will not become more consumptive over time. By denying the Transfer of 40.30 acre-feet, the Department ignored the substantial, competent evidence in the record, erroneously defaulting to its unsubstantiated, fully consumptive presumption.

B. The Final Order Incorrectly Concludes that the Transfer will Result in Enlargement

In addition to incorrectly determining that the City failed to present evidence to rebut the Department's presumption of consumptive use, the Final Order erred in concluding that enlargement would result if the Department allowed a transfer of volume from the Commercial and Domestic Rights to municipal:

> The Department considers any future consumptive use that is in excess of the historical consumptive use to be an enlargement.
>
> . . . .
>
> A municipality cannot always guarantee it will discharge treated effluent into the "waters of the state" because the methods of discharging treated effluent may change in the future.

R. 000082-83.

Here, the City filed the Transfer to change the purpose of use of the Wayside Rights to municipal. Pursuant to I.C. § 42-222(1),[6] the Director is authorized to approve a transfer if "the change does not constitute an enlargement . . . ." According to the Court, "the meaning of 'enlargement' under Idaho Code section 42-222(1) is not defined by statute or rule." *3G AG LLC v. Idaho Dept. of Water Res.*, 170 Idaho 351, 358, 509 P.3d 1180, 1187 (2022). According to the Court in *3G*, and in reviewing its prior decisions in *Baron* and *Fremont-Madison Irr. Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996), it stated that "enlargement is understood to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation or other means. An enlargement can also include an increase in the volume of water diverted as a result of the transfer." *Id*. (internal citations and quotations removed). "Thus, there are two types of enlargement: (1) an increase in the number of acres irrigated; and (2) an increase in the rate of diversion or duration of diversion." *Id*. In giving further guidance to the types of enlargement, the Court established four factors that can lead to a finding of enlargement: (1) "unstacking the overlapping rights"; (2) increase in "period of use"; (3) increase in "rate or volume"; and (4) increase in the "number of acres irrigated, i.e. an increase in overall beneficial use." *3G* at 359, 509 P.3d at 1188.

The Final Order does not address what type of "enlargement" will occur. However, regardless of which type of "enlargement" might be asserted, enlargement will not occur as explained by the testimony of Dr. Brockway. As to the first two enlargement factors, approval of the Transfer will not lead to unstacking or an increase in the period of use. This is because the

[6] Other factors include but are not limited to the conservation of the State's water resources and the local public interest. R. 000085-86; I.C. § 42-222(1).

Commercial and Domestic Rights that are at issue are within the City's municipal service area and already possess a year-round period of use.

Regarding the third and fourth factors, substantial evidence in the record establishes that there will not be an increase in rate, volume, or overall beneficial use. As explained above, the Wayside Rights were either licensed by IDWR or partially decreed by the SRBA district court, with volumes and rates of diversion. Pursuant to the Transfer, the City did not seek to increase the rates of diversion or volumes beyond what were licensed and decreed, nor would the law allow for this to occur. In his expert report and through testimony, Dr. Brockway quantified the consumptive use associated with the Commercial and Domestic Rights as 40.30 acre-feet. Pursuant to his analysis of the City's 2018 Wastewater Collection System Master Plan, Dr. Brockway showed that, in 2023, the City pumped 530 acre-feet and, when subtracting infiltration, the City returned 240 acre-feet of treated effluent to the Snake River from the WWTP, thereby establishing the City's municipal consumptive use as 45%:

> The annual well production for [] 2023 is 530 acre feet. Total WWTP discharge for 2023 is 594 acre feet. Calculated infiltration and inflow to the waste water collection system is 304 acre feet. By adding the total well production volume of 530 acre feet to the calculated infiltration and inflow volume of 304 acre feet and then subtracting out the actual[] volume amount of 594 acre feet discharged by the WWTP a consumptive use volume of City of Heyburn is calculated to be 240 acre feet or 45% of the volume of water pumped by the City's well.

R. 000209.

Because the Department stated it was concerned with what *might* happen in the future with the City's disposal methods, R. 000083 (citing *Mem. Decision & Order, Riverside Irr. Dist. v. Idaho Dept. of Water Res.*, No. CV-14-21-05008), the City committed, through the Enlargement Condition, to the ongoing discharge of 40.30 acre-feet to the Snake River at the WWTP:

> 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.

R. 000213; Tr. p. 37, lns. 17-19 ("the city would still be obligated to return 40.3 acre feet to the river so that nothing would change").

The Enlargement Condition, with its ongoing discharge and reporting requirements, is fully consistent with the rationale expressed by Director Weaver in the *2024 Moratorium Order*, wherein a municipal provider may commit to ongoing discharge through monitoring and reporting: "A rebuttal of the presumption must address monitoring, reporting, and mitigation measures, to ensure that the proposed use does not become more consumptive or fully consumptive after it has been established." *2024 Moratorium Order* at 33 (emphasis added). Substantial evidence in the record establishes that the City is capable of meeting the reporting requirements, with Dr. Brockway explaining that the City of Heyburn is heavily regulated, used to reporting to Idaho administrative agencies, and subject to criminal charges if compliance is not met. Tr. p. 38, lns. 6-25, p. 39, lns. 1-9.

As recognized both by Idaho Code and the Court's decisions, water right conditions, such as the Enlargement Condition, are lawful and enforceable. I.C. § 42-222(1) ("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"); I.C. § 42-1411(2)(i) ("The director shall . . . define and administer the water rights acquired under state law [upon] . . . (i) Conditions on the exercise of any water right included in any decree, license, or approved transfer application"); *Whittaker v. Idaho Dept. of Water Res.*, 174 Idaho 60, 67, 551 P.3d 729, 736 (2024) (discussing subordination conditions); *3G* at 263, 509 P.3d at 1192 (discussing the use of "conditions on the exercise of any water right"); *City of Pocatello v. State*, 152 Idaho 830,

835, 275 P.3d 845, 850 (2012) ("The very fact that Pocatello contests the [alternate point of diversion] condition is an acknowledgement that without the condition the priorities of existing water rights will be diminished"). Based on his decades of experience, and with no evidence to the contrary. Dr. Brockway opined that the Enlargement Condition is straightforward, administrable, and prevents future enlargement. Tr. p. 39, lns. 10-19.

C. The Department Violated the City's Substantial Rights when it Denied the Transfer of Volume from the City's Commercial and Domestic Water Rights

By denying the transfer of volume from the Commercial and Domestic Rights, which reduced the beneficial use volumes to zero, the Final Order violated the City's substantial rights. I.C. § 67-5279(4). By eliminating volume, the Final Order works an undeniable injury to the previously licensed and decreed elements of these water rights that are real property rights of the City, thereby obviating the priority date that is associated with the City's use. *Sagewillow v. Idaho Dept. of Water Res*., 138 Idaho 831, 837, 70 P.3d 669, 675 (2003) ("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder."). Moreover, the Final Order incorrectly evaluated the Transfer by relying on an unlawful and unrebuttable presumption, incorrect application of the law concerning enlargement, and ignoring the substantial evidence in the record establishing consumptive use, non-consumptive use, and prevention of future enlargement through the Enlargement Condition. *Lane Ranch v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007) ("Lane Ranch has a substantial right to have its application evaluated properly").

D. The Department Violated the City's Individual Liberty

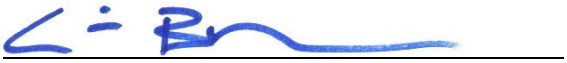
As recently established by the Legislature, the City is entitled to have its Transfer evaluated in a manner that "limits agency power and maximizes individual liberty." I.C. § 67-5279(5). The Court must not "defer to an agency's interpretation of the law or rule and shall

interpret its meaning and effect de novo." *Id*. Here, the Final Order relies on the unrebuttable presumption that municipal water use is always fully consumptive, which it supports through interpretation of law and prior decisions, and against the substantial evidence to the contrary. The Final Order incorrectly interprets the law at the expense of the City's liberty interests to be free from unreasonable and unlawful governmental interference.

V. CONCLUSION

Based on the foregoing, the City rebutted the Department's presumptions, with substantial evidence, that municipal use is always fully consumptive and commercial and domestic use is always non-consumptive. The Final Order's denial of the transfer of volume from the Commercial and Domestic Rights to municipal is unsupported by the record, making it arbitrary and capricious. Because approval of the Transfer, in full, will not result in enlargement, the Final Order should be reversed, in part, with instructions to the Department to grant the transfer of 40.30 acre-feet from the Commercial and Domestic Rights to municipal, with inclusion of the Enlargement Condition.

DATED this 23rd day of January, 2026.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of January, 2026, I served a true and correct copy of the foregoing document on the parties to this action via iCourt:

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