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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 REPLY BRIEF

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

Honorable Eric J. Wildman, Presiding

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I. INTRODUCTION

In the Opening Brief, the City argued that the Department created an unrebuttable presumption that domestic and commercial water use is always non-consumptive, despite substantial and competent evidence of the City's use of its Commercial and Domestic Rights at Wayside to the contrary.[1] In Response, the Department sidesteps the City's argument, simply asserting, through Footnote 4, that the law concerning presumptions "is not relevant . . . . By framing this issue as rebutting a presumption, Heyburn ignores that it sought to transfer the full *authorized* diversion volume without quantifying the actual *historic* nonconsumptive use and without submitting sufficient reporting, measuring, and mitigation data to ensure the historic nonconsumptive use would not be enlarged." *Resp. Br.* at 14, fn. 4 (italics in original).[2] As evidenced through the Response Brief, the unrebuttable presumption is alive and well, with the Department relying on nothing more than policy to support the *Amended Final Order*. By tracing the ground water that is pumped by the City from the Eastern Snake Plain Aquifer ("ESPA") for beneficial use at Wayside until it is disposed by the City into the Snake River at the City's wastewater treatment plant ("WWTP"), the Department's policy-based errors become obvious.

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[1] The Commercial and Domestic Rights are water right nos. 36-8332, 36-4233, 36-8744, 36-12185, and 36-7970, respectively. *Opening Br.* at 3.

[2] Indeed, to ignore the City's argument, the Department has reframed the issues on judicial review to suit its own purposes, without citation to any rule of procedure that allows it to do so. Here, the City is the petitioner and the Department is the respondent. *Procedural Order* at 1. As the petitioner, it is the City, not the Department, who frames the issues for review. IRCP 84(c)(5). Because the Department did not file a "cross-petition" for judicial review that would allow it to assert its issues, the Department must respond to the issues framed by the City. IRCP 84(b)(2).

II. ARGUMENT

A. Substantial And Competent Evidence In The Record Establishes That The City's Use Of The Commercial and Domestic Rights Is Consumptive To The Waters Of The State

The Department correctly cites I.C. § 42-202B(1) for the definition of "consumptive use," which is defined 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 . . . ." *Resp. Br.* at 9 citing I.C. § 42-202B(1) (emphasis added). The Department, however, misinterprets both the law and the facts to support its policy-based presumption that the use of water for domestic and commercial purposes is always non-consumptive. The City should prevail in this matter because the water use at Wayside is consumptive to the waters of the state.

1. The Use of Water at Wayside is Consumptive to the ESPA

The State of Idaho divides water into two categories: surface and ground. I.C. §§ 42-103, 42-226, 42-229, 42-237a.g. When waters are diverted from below ground, without return to the aquifer from which it originates to make it available for other appropriators, the use is fully consumptive to those "waters." I.C. § 42-202B(1). The Department argues that in order to qualify as consumptive, both ground water and surface water sources must be simultaneously depleted. *Resp. Br.* at 12-13 ("the in-home domestic and commercial portion of the Wayside Rights have historically been treated at the WWTP and discharged back into the Snake River. By statutory definition, those portions of the rights are historically nonconsumptive because that water is returning to the waters of the State."). However, there is nothing in the plain language of the statute to suggest that depletion to both sources must occur to render the use consumptive. *Norgaarden v. Kiebert*, 171 Idaho 883, 890, 527 P.3d 486, 493 (2023) ("If the statutory language

is unambiguous, we need not engage in statutory construction and are fee to apply the statute's plain meaning."). The understanding that depletion to a source may render the use fully consumptive is consistent with the Court's prior opinion: "Also, it is necessary to distinguish between nonconsumptive water use and consumptive water use. Nonconsumptive water use does not deplete the supply of water. In contrast, consumptive water use occurs when water is removed from the available supply without its return to the water supply system (this includes groundwater claims)." *In re CSRBA Case No. 49576 Subcase No. 91-7755*, 165 Idaho 517, 555, 448 P.3d 322, 360 (2019).

Here, water that is pumped by the City for beneficial use at Wayside is sourced from the ESPA. Tr. p. 21, lns. 3-23. The unrebutted, expert evidence in the record establishes that when the City pumps 40.30 acre-feet of water from the ESPA for the Commercial and Domestic Rights, the use is "wholly consumptive to the aquifer since there is no return to ground water." Tr. p. 21, lns. 20-21 (emphasis added); *see also* Tr. p. 24, ln. 24, p. 25, ln. 1 (use at Wayside is "fully consumptive to the aquifer and will continue to be."); R. 000209 ("There is no amount of discharged treated wastewater that is returned or recharged back into the ground water aquifer."). Said another way, when water is brought to the surface by the City at Wayside, it is no longer in connection with the ESPA, making the City's use fully consumptive to those "waters." I.C. § 42-202B(1). Thus, the location of the City's pumping from the ESPA, and the aquifer's lack of connection to the Snake River in that area was critical in forming the basis of Dr. Brockway's opinion.[3]

[3] This is not to say, however, that every time a city diverts ground water it is fully consumptive. This is why the cities advocated and won the concessions that in transfers and other proceedings, the Department would consider actual evidence, on a case-by-case basis. *Opening Br.* at 14 (discussing *Amended Snake River Basin Moratorium Order*).

In an attempt to preserve its unassailable presumption that the City's use of water at Wayside is non-consumptive, the Department ignored the specific facts in this case, instead referencing overall principles of "conjunctive administration" associated with the interconnection of the ESPA and the Snake River. *Resp. Br.* at 8. While it could be reasonable for IDWR to presume, in the face of evidence to the contrary, that pumping from the ESPA returns to the waters from which it came – making the use non-consumptive, *see In re CSRBA* – the Court has long-recognized this is not always the case: "[G]round water in the [Eastern Snake Plain] Aquifer is hydraulically connected to the Snake River and tributary surface waters at various places and in varying degrees." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 794, 252 P.3d 71, 75 (2011) (emphasis added). Thus, the Court has expressly determined that the presumption of interconnection and the consumptive use of water to a source may be rebutted, on a case-by-case basis, consistent with I.C. § 42-202B(1): "[I]t's a broad definition. The only caveat I would make is that it – on a case-by-case basis, sometimes you have to look at different sources, and a use might be consumptive to one source and less consumptive or not consumptive to another source." Tr. p. 27, lns. 19-23.

Therefore, substantial evidence in the record demonstrates that the Department erred when it denied the transfer of 40.30 acre-feet associated with the Commercial and Domestic Rights, as pumping by the City at Wayside is fully consumptive to the waters of the ESPA, rendering IDWR's decision arbitrary and capricious.

2. The Use of Water at Wayside is Consumptive to the Snake River

When water from the ESPA is brought to the surface at Wayside for the Commercial and Domestic Rights, the water is used by residents, discharged into the City's collection system for treatment at the WWTP, and ultimately disposed of into the Snake River. *Opening Br.* at 2. The

City has been collecting water from Wayside for treatment and disposal since 1982, well before the Commercial and Domestic rights were partially decreed and licensed. *Id.* at 1-2. As explained in the Opening Brief and acknowledged by the Department in response, 65% of the water that is collected by the City for treatment and disposal is returned to the waters of the Snake River; put differently, 45% is consumptively lost. *Opening Br.* at 15; *Resp. Br.* at 8-9.

The Department correctly states that these losses are system wide. *Resp. Br.* at 9. However, because the City discharges significantly more than 40.30 acre-feet of water into the Snake River, it was error for the Department to deny the transfer of this volume.[4] Overall system-based accounting is a reasonable way of tracking water use, and is routinely used by IDWR when multiple water rights are involved in a common system, such as combined use limitations as to overall diversion rates and volumes per acre of irrigation (generally 0.02 cfs and 3.5 acre-feet when multiple rights are combined). If the Department were to require molecule-based administration as a requirement for transfer approval in this case, it would treat the City differently from other water users, with no discernible benefit to the waters of the state, elevating form over function.[5] *Alpine Vill. Co. v. City of McCall, Corp.*, 154 Idaho 930, 937, 303 P.3d 617, 624 (2013) (discussing equal protection requirements).

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[4] In the alternative, but by no means conceding the argument, and because system-wide consumptive use is 45%, the consumptive use of the Commercial and Domestic Rights that could be transferred under a system-wide analysis of consumptive use is 18.14 acre-feet. Because there is no hydraulic connection between the Snake River and the ESPA in this area, R. 000209 ("no amount of discharged treated wastewater [] is returned or recharged back into the ground water aquifer"), the losses are consumptive to both ground waters and surface waters of the state since there is no return to either source.

[5] This idea of form over function, or policy over science was discussed by Dr. Brockway through his testimony: "You know, it's good to have policies. We need policies, but to – it's – it's not the best science to, you know, have presumptions and policies that override pretty clear scientific facts of the case. So that's – that's definitely [an] opinion that I have." Tr. p. 26, lns. 6-11. "I think that's particularly apropos in the case of municipal usage, because the usage of water and the treatment method and potential returns can vary quite a bit between cities. So it's very important to use actual science, actual hydrologic information, and evaluate things on a case-by-case basis." Tr. p. 19, lns. 22-25, p. 20, lns. 1-3.

B. The Enlargement Condition Guards Against Potential Changes

In the Opening Brief, the City explained the law of enlargement and how it applies and does not apply in this case. *Opening Br.* at 15-19. In reviewing the Response, it does not appear that the Department disagrees with the City's understanding of the law. Where the difference lies is in the Department's position that it does not like the Enlargement Condition, without any meaningful reasons as to why it will not work, suggesting it "contains insufficient monitoring, reporting, or mitigation components to ensure that any historic nonconsumptive portion would remain nonconsumptive post-transfer." *Resp. Br.* at 15. The Enlargement Condition states:

> 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.

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 explains that the City will commit to the ongoing discharge of 40.30 acre-feet to the Snake River, with reporting to ensure the same.[6] When converted to an annual flow rate, the City is committing to the ongoing discharge of 0.06 cfs to the Snake River.[7] Because the Commercial and Domestic Rights authorize a diversion rate of 0.56 cfs, R. 000206 (summing authorized diversion rates), it is reasonable to conclude that the City can continue to discharge 0.06 cfs to the Snake River. Said differently, the idea that the City cannot continue to

[6] For example, there could be semi-annual or annual reporting.

[7] *See* conversion factors at: https://waterrights.utah.gov/automm/cfs2af.asp (last visited March 13, 2026).

discharge the equivalent of three garden hoses worth of water to the Snake River is unsupported by evidence in the record, rendering IDWR's decision on this point arbitrary.

The Department goes on to claim "nothing in the Enlargement Condition addresses what happens if Heyburn does not meet the discharge volume requirement. This is something the Department would require to be spelled out in any condition." *Resp. Br.* at 16 (emphasis added). Apparently, the Department forgot that its own Condition of Approval No. 8 explains the consequences of this outcome, consistent with requirements imposed on any other water user: "Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind the approval of the transfer." R. 000092, 000094, 000096, 000098, 000100. Therefore, if the City fails to comply with the Enlargement Condition, the Transfer will be rescinded.

In summary, there is no evidence in the record to suggest that the City is some rogue water user who cannot be trusted. As the Court is aware, cities are already heavily regulated, many of which have professional staff who work on a daily basis to ensure regulatory compliance. Substantial evidence in the record establishes that the City is capable of meeting the reporting requirements, with Dr. Brockway explaining that the City is accustomed 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.

C. The Department Continues To Violate The City's Substantial Rights

By claiming that no volume is allowed to transfer when the evidence in the record shows otherwise, the Department continues to violate the City's substantial rights, I.C. § 67-5279(4), by reducing the volume associated with the Commercial and Domestic Rights to zero. The City incorporates, by reference, the arguments it made in its Opening Brief. *Opening Br.* at 19.

D. The Department's Misinterpretation Of The Law Violates The City's Liberty

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 Department's perpetuates the same illogical and incorrect interpretation of Idaho law as is found in the *Amended Final Order*. The Department's Response Brief flatly ignores the law concerning the prohibition against unrebuttable presumptions, misinterprets the plain meaning of I.C. § 42-202B(1), and claims the Enlargement Condition will violate the law without a legitimate basis in law or fact, all to the City's detriment.

III. CONCLUSION

Based on the foregoing, the *Amended Final Order* incorrectly denied the transfer of any volume associated with the Commercial and Domestic Rights, when substantial and competent evidence in the record establishes that the consumptive use to the waters of the state is 40.30 acre-feet, due to the fact that when water is pumped from the ESPA it is not returned to those waters. In the alternative, but by no means conceding the argument, the City's use of the Commercial and Domestic Rights is 18.14 acre-feet consumptive to both the ESPA and the Snake River. The Court should, therefore, reverse the *Amended Final Order*, in part, with instructions to the Department to grant the transfer of volume from the Commercial and Domestic Rights to municipal, with inclusion of the Enlargement Condition.

DATED this 13th day of March, 2026.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2026, I served a true and correct copy of the foregoing document on the parties to this action via iCourt:

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