



36-7970	Ground water	03/10/1981	Domestic	0.2 cfs / 27.6 afy	01/01-12/31
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The Court will refer to these water rights as the “subject rights.” They cumulatively authorize a diversion rate of 0.56 cfs and a diversion volume annually of 61.1 acre-feet. R., 142. Ground water under the subject rights is diverted from the Eastern Snake Plain Aquifer via wells located within the City’s municipal service area. R., 208.

With respect to each subject right, the transfer application seeks to change the purpose of use to “municipal.” R., 1. In conjunction, the application seeks to transfer the entire cumulative diversion rate (0.56 cfs) and diversion volume (61.1 afy) authorized under the subject rights to a municipal use purpose. R., 1. The application was advertised and no protests were filed. R., 164, 167, 169.

On January 16, 2024, the Department approved the transfer request in part. It approved the transfer to the extent it sought to change the purpose of use to municipal. R., 142. The approval included the full 0.56 cfs cumulative diversion rate. R., 142. However, it denied the request to transfer the full 61.1 afy diversion volume to municipal use. To prevent an enlargement of consumptive use, the Department reduced the volume of water that may be diverted annually under the transfer from 61.1 acre-feet to 28.7 acre-feet. R., 142. Thus, the Department approved the transfer of the full cumulative diversion rate to a municipal use but did not approve the transfer of the full cumulative diversion volume to a municipal use. R., 142.

The reduction in diversion volume results from the Department’s decision to deny the transfer of the nonconsumptive portions of the subject rights. R., 165. Out of the cumulative diversion volume of 61.1 acre-feet, the Department found 32.4 acre-feet to be nonconsumptive and 28.7 acre-feet to be consumptive. R., 165. Domestic in-home uses under the subject rights were found to be nonconsumptive. R., 165. Irrigation uses under the subject rights were found to be partially consumptive. R., 165. And, commercial uses under the subject rights were found to be fully consumptive. R., 165. With respect to the 32.4 acre-feet of water found to be nonconsumptive, the Department found that permitting that volume of water to be transferred to a municipal use would result in an unlawful enlargement of consumptive use. R., 165. The Department’s decision is based on the reasoning that municipal use, due to its nature, may be fully consumptive. R., 165.

The City timely filed a petition for reconsideration. R., 170. On reconsideration, the City again asked the Department to transfer the entire cumulative volume of water to a municipal use. R., 174. On February 20, 2024, the Department issued its preliminary order on reconsideration. R., 179. The Department found that “[t]o ensure the proposed change to municipal use, which may be fully consumptive, does not result in an enlargement in use of the water rights, the Department should limit the Transfer approval to the volume of water historically consumed by the use of water” under the subject rights. R., 181. It denied the City’s request to transfer the entire cumulative volume of water to a municipal use. R., 186. Additionally, the Department found it had improperly allowed the transfer of .90 acre-feet of water for commercial use under water right no. 36-8332 because the City did not provide evidence of historic consumptive use under that right. R., 181, 186. It therefore further reduced the volume of water that may be diverted annually under transfer from 28.7 acre-feet to 27.8 acre-feet. R., 186.

The City timely filed a request for hearing with the Department under Idaho Code § 42-1701A(3). R., 54. The Director granted the request and appointed Department employee Phill Hummer as hearing officer. R., 57. A hearing was held before the hearing officer on July 9, 2024. R., 67. At this hearing, the City offered the following proposed enlargement 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.

R., 213, Tr., p.37. On October 2, 2025, the Department issued its Preliminary Order Affirming Approval of An Application for Transfer. R., 66. That order limited the volume of water that may be diverted annually under the transfer to 27.8 acre-feet. R., 73-74.

On October 21, 2025, the Director issued an Amended Final Order Approving Application for Transfer, In Part (“Final Order”). In the Final Order, the Director approved the transfer request to change the purpose of use to municipal, including a transfer of the full 0.56 cfs diversion rate. R., 142. However, he denied the request to transfer the entire cumulative diversion rate to a municipal use. The Director limited the volume of water that may be diverted annually under the transfer to 27.8 acre-feet, stating:

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 [subject 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 historical 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 [subject rights] is warranted.
4. 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.
5. Because there is no historical consumptive use associated with water rights 36-8332 and 36-17185, these two rights are excluded from the transfer approval. The Department will adopt an annual volume limit of 11.1 af for water right 36-7970, 16.1 af for water right 36-4233, and 0.6 af for water right 36-8744. These volume limits represent the historical consumptive use occurring under the respective water rights.

R., 86.

The City subsequently filed a Petition seeking judicial review of the Director's Final Order. The City asserts the Director's Final Order is contrary to law and requests the Court set it aside and remand for further proceedings. The parties submitted briefing on the issues raised on judicial review and a hearing on the Petition was held before the Court on April 2, 2026.

## II.

### STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. 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 court shall affirm the agency decision unless it 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). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

### III. ANALYSIS

Idaho Code § 42-222 governs water right transfers. It requires that any person who desires to make a change to the point of diversion, place of use, period of use, or nature of use of a water right shall make application to the Department for approval of such change. I.C. § 42-222(1). The Director shall approve a transfer application provided, among other things, the change does not constitute an enlargement in use of the original right. *Id.*

The term enlargement is not defined by statute. That said, the statute's prohibition against enlargement is generally understood as forbidding any transfer that would result in an increase in the use or consumption of water under a water right as a result of a transfer. For instance, the Idaho Supreme Court has directed that the term enlargement "includes increasing the amount of water diverted or consumed to accomplish the beneficial use."<sup>1</sup> *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001).

Idaho Code § 42-222(1) provides the "director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." Consumptive use means "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

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<sup>1</sup> As additional examples, the Idaho Supreme Court has directed an enlargement may also include any increase in the beneficial use to which an existing water right has been applied, an increase in the volume of water diverted, an increase in the number of acres irrigated, or an increase in the duration of the diversion. *3G AG LLC v. Idaho Department of Water Resources*, 170 Idaho 251, 259, 509 P.3d 1180, 1188 (2022).

products, or otherwise does not return to the waters of the state.” I.C. § 42-202B(1). The Idaho Supreme Court has likewise acknowledged that “the director may consider historical consumptive use . . . as a factor in determining whether a proposed transfer would result in an enlargement in use . . . .” *Barron*, 135 Idaho at 419, 18 P.3d at 224.

**A. The Director’s determination that the nature of a municipal use is such that water diverted may be fully consumed is affirmed.**

The record establishes the subject water rights authorize three uses: domestic use, commercial use, and irrigation use. R., 80. The City proposes to change these uses to municipal use. In examining this proposed change, the Director first determined that the nature of municipal use is such that water diverted can be fully consumed:

Water rights authorizing municipal use are treated differently than other beneficial uses because they facilitate 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. This occurs because "other components of the municipal water use may consume, either now or in the future, more water" than was historically used prior to the transfer. 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, water rights authorizing municipal use are treated differently because effluent production is inherent in municipal use. Treated effluent 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. 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 are intended to be 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. 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., 83-84 (internal citations omitted).

The Court agrees. This Court has previously held “[t]he nature of the beneficial use of a municipal right is such that the right can be fully consumed without engaging in waste or violating a beneficial use duty of water. *Memorandum Decision and Order*, p.10, CV14-21-5008 (Dec. 28, 2021). For example, “a municipal right holder electing to fully treat, recycle and continuously reuse its effluent within the parameters of its water right may do so under principles of recapture and reuse also without increasing beneficial use or violating a duty of water.” *Id.* Thus, “the nature of the purpose of use of a municipal right is such that the right can be fully consumed without violating a beneficial use duty of water and without exceeding the authorized scope of the water right.” *Id.* The Director’s determination that the nature of municipal use is such that water diverted can be fully consumed is affirmed.

**B. 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 is affirmed.**

The Director next determined that unconditionally transferring the non-consumptive portions of the subject rights to municipal use would permit an enlargement in the historic consumptive use of those rights. Given that the nature of a municipal use is such that water diverted can be fully consumed, it is appropriate for the Director to closely examine changes from a non-consumptive use to a municipal use. Such transfers may result in the reduction or elimination of historic return flows to the waters of the state due to an increase in consumptive use, thereby affecting other water users.

**i. Domestic use to municipal use.**

Four of the five subject rights authorize domestic use. These include water rights 36-4233, 36-7970, 36-8744, and 36-17185. R., 80. The domestic use associated with water rights 36-4233, 36-8744, and 36-17186 was found to consist only of in-home use. The Director found this in-home domestic use to be historically non-consumptive. That is, the water diverted “is returned to waters of the State through Heyburn’s effluent treatment system and was discharged into the Snake River as treated effluent without a reduction in volume.” R., 84. The Director

found the historical consumptive use of water under the domestic portions of these three water rights to be 0.0 afy. R., 84.

The domestic use associated with water right 36-7970 was found to be historically partially consumptive. R., 85. Water right 36-7970 authorizes both in-home domestic use and external domestic use, such as irrigation of lawns and landscaping. While the in-home portion was found to be non-consumptive for the reasons stated above, the Director found the historical consumptive use of water under the external domestic portion of this water right to be 11.1 afy. R., 85. Thus, with respect to domestic use, the Director limited the annual diversion volume that may be transferred under the subject rights to 11.1 afy to avoid an enlargement of consumptive use under Idaho Code § 42-222(1). R., 85.

The Director's determination in this respect is supported by substantial and competent evidence in the record. The Technical Memo submitted by the City's expert provides that "[t]he domestic portion of [the subject rights] has historically been used for in-house purposes with negligible consumptive loss and thence directed into the City of Heyburn wastewater system." R., 204. Dr. Charles Brockway testified that "[t]he domestic portion [of the subject rights] historically has been diverted from the aquifer and used for primarily in-house purposes, which typically has negligible consumptive loss." Tr., p.21. This evidence supports the finding that the in-home domestic use has been historically non-consumptive as it has been discharged as return flow into the Snake River.

Notwithstanding, the City argues domestic use under the subject rights has historically been fully consumptive. The evidence shows that water for domestic use under the subject rights has been (1) diverted from the Eastern Snake Plain Aquifer, (2) used primarily for in-house domestic purposes, (3) directed thereafter into the City's wastewater system, and (4) ultimately discharged into the Snake River. Tr., 21. Based on this evidence, the City asserts this domestic use has been wholly consumptive to the Eastern Snake Plain Aquifer as there is no return flow to the Aquifer.

The City's argument is contrary to the plain language of the Idaho Code § 42-202B(1). That statute does not define consumptive use in terms of the lack of return flow to a particular source. Rather, it defines consumptive use in terms of lack of return flow "to the waters of the state." I.C. § 42-202B(1). Here, the evidence shows that water diverted for in-home domestic use under the subject rights has historically been deposited as return flow into the Snake River.

R., 204; Tr. 21. The Snake River is part of the “waters of the state”. It follows the City’s argument that domestic use under the subject rights has been historically wholly consumptive must be rejected as contrary to Idaho Code § 42-202B(1).

The City next argues the Director’s finding must be rejected because the consumptive use of ground water in the City’s municipal system is 45%. The City relies upon its expert who quantified the City’s total municipal consumptive use in 2023 to be 45%:

The annual well production for the 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 actually 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., 209. This analysis shows consumptive use for the City’s entire municipal system. It is not specific to the subject rights, which are the subject of the transfer application. Therefore, this evidence does not establish that the Director erred in finding the in-home domestic use under the subject rights to be historically non-consumptive. The Director’s determination to limit the annual diversion volume of the domestic use portion of the subject rights to 11.1 afy is supported by substantial and competent evidence. 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 is affirmed.

**ii. Commercial use to municipal use.**

One of the five subject rights authorizes commercial use. This is water right 36-8332. R., 80. That right has historically provided 0.9 afy of commercial water for a gas station and convenience store. R., 204. The Director found this commercial use to be historically non-consumptive. Thus, with respect to commercial use, the Director limited the annual diversion volume that may be transferred under the subject rights to 0.0 afy to avoid an enlargement of consumptive use under Idaho Code § 42-222(1). R., 85.

The Director’s determination in this respect is supported by substantial and competent evidence in the record. The Technical Memo submitted by the City’s expert provides that water under this commercial use “has not been used consumptively, but has returned to the Snake River via the City’s wastewater system.” R., 204. The only arguments the City makes to the

contrary are those the Court rejected in the previous domestic use section. Those arguments are rejected here for the same reasons. The Director's determination to limit the annual diversion volume of the commercial use portion of the subject rights to 0.0 afy is supported by substantial and competent evidence. It follows 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 is affirmed.

**iii. Irrigation use to municipal use.**

Two of the five subject rights authorize domestic use. These include water rights 36-4233 and 36-8744. R., 80. The Director found the irrigation use to be historically partially consumptive. The Director found the historical consumptive use of water under the irrigation portions of these water rights to be 16.1 afy for water right 36-4233 and 0.6 afy for water right 36-8744. R., 84. Thus, with respect to irrigation use, the Director limited the annual diversion volume that may be transferred under the subject rights to 16.7 afy. R., 85. The City does not challenge the Director's findings in this respect on judicial review.

**C. The Director's determination to refuse the conditional transfer of the entire cumulative diversion volume of the subject rights to a municipal use is affirmed.**

The City initially sought the unconditional transfer of the entire cumulative diversion volume of the subject rights to municipal use. However, at the hearing before the hearing officer 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.

R., 213, Tr., p.37.<sup>2</sup> This condition was admitted into the record as Exhibit 10. R., 79.

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<sup>2</sup> It must be noted that the City did not propose the enlargement condition until well into the proceedings on its transfer application. For instance, when the Department originally approved the transfer request in part on January 16, 2024, the City had not yet proposed the enlargement condition. Likewise, when the Department issued its preliminary order on reconsideration on February 20, 2024, the City had not yet proposed the enlargement condition. The condition was not proposed until July 9, 2024.

The Director determined to refuse to transfer of the entire cumulative diversion volume of the subject rights despite the proposed condition. R., 86. The City presented evidence that its total municipal consumptive use in 2023 was 45%. R., 209. The Director rejected that evidence on the basis that statistics governing the consumptive use of the entire municipal system are not relevant to the historic consumptive use of the subject rights specifically. As to the subject rights specifically, the City provided no evidence of historic consumptive use. In conducting his own review, the Director determined the historic consumptive use of the subject rights to be 27.8 afy. R., 86. This determination is supported by substantial and competent evidence for the reasons stated in the preceding section.

The Director then determined that the City cannot transfer to municipal use a greater diversion volume than it has consumptively used historically. R., 86. To do so would constitute an improper enlargement of consumptive use under Idaho Code § 42-222(1). R., 86. The Court agrees. The Court notes that the Director has broad discretion in determining whether to accept a condition that purports to cure injury and/or enlargement under Idaho Code § 42-222(1). The condition proposed here would still allow the City to consumptively use more water under the transfer than the evidence shows its has consumptively used historical. That is, even with the condition, the City could still divert and consumptively use 61.1 afy under the transfer where it has only historically consumptively used 27.8 afy under the subject rights. This is an enlargement in consumptive use.

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, its intent is to address the issue of enlargement by maintaining the status quo when it comes to historic return flows into the Snake River. It proposes to address the diminution of return flow resulting from the transfer by using replacement water from one or more of its other water rights to maintain return flows at their historic levels. The Court holds the Director did not abuse his discretion is rejecting the proposed condition as the condition would still allow a greater diversion and consumptive use of water under the subject rights than has occurred historically.<sup>3</sup>

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<sup>3</sup> The Court additionally notes that very little information regarding this condition was provided. The specific water right or rights from which the replacement water would be provided have not been identified. As such the elements of those rights are not known, including their priority dates or the sources from which water would be diverted. For instance, if the replacement water rights are junior in priority to the subject rights, issues of administration must be

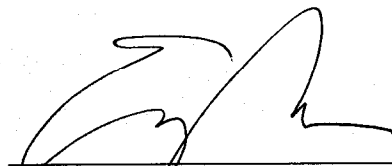
**D. Substantial rights.**

The City argues its substantial rights were prejudiced by the Director's Final Order. For the reasons set forth herein, the City has failed to establish the Director acted contrary to law in the Final Order. Therefore, the City has failed to establish its substantial rights were prejudiced. It follows the Director's Final Order must be affirmed.

**IV.  
ORDER**

Therefore, BASED ON THE FOREGOING, it is ordered the Director's Final Order is affirmed.

Dated May 1, 2026

  
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ERIC J. WILDMAN  
District Judge

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considered, including the possibility that the replacement water may be curtailed in times of shortage, etc... This lack of information in the record limits the Court's ability to properly evaluate whether the condition adequately resolves the enlargement issues identified by the Director.

**CERTIFICATE OF SERVICE**

5/1/2026 4:57:43 PM

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

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**Trent Tripple**

Clerk of the Court

By \_\_\_\_\_  
Deputy Clerk

