

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.

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

SETTLED AGENCY HEARING TRANSCRIPT ON APPEAL

Judicial Review from the Idaho Department of Water Resources
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1 BEFORE THE DEPARTMENT OF WATER RESOURCES
2 OF THE STATE OF IDAHO

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4
5 IN RE: THE MATTER OF THE APPLICATION FOR
6 TRANSFER NUMBER 87938
7 IN THE NAME OF THE CITY OF HEYBURN

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10 VERBATIM REPORT OF PROCEEDINGS
11 BEFORE
12 HEARINGS OFFICER PHIL HUMMER

13
14 JULY 9, 2024

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A P P E A R A N C E S

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(BEGINNING OF TRANSCRIPTION)

(Proceedings begin)

HEARINGS OFFICER: Okay. Good morning. My name is Phil Hummer. I'm the water right section manager for the Idaho Department of Water Resources in the department's state office.

I've been designated as the hearing officer for this proceeding on behalf of Director Matt Weaver. Assisting me today is Denise[phonetic]Malum, an administrative assistant in southern regional office.

The purpose for this hearing is to receive evidence and testimony in connection with application for Transfer Number 87938, filed May 11, 2023 by the City of Heyburn. Opposing the change the beneficial use of water rights 36 4233, 36 7970, 36 8332, 36 8744, and 36 17185 to municipal use.

In the change authorized points of diversion of those five rights and municipal water rights 36 8550 and 36 8738.

The hearing's beginning Tuesday, July 9, 2024 at 10:15, at the Twin Falls County West Building in Twin Falls. The hearing will be conducted

1 in compliance with applicable provisions of chapters 2
2 and 17 of the Title 42 Idaho code, chapter 52 of Title
3 67 Idaho code, and the department's rules of
4 procedure, ADAPA 37.01.01.

5 Participating in this hearing are
6 representatives for the City of Heyburn. And I'll ask
7 the city's representative to introduce the parties.

8 MR. BROMLEY: Chris Bromley, attorney,
9 McHugh Bromley, on behalf of City of Heyburn. Then I
10 have with me Dr. Charles Brockway, Brockway
11 Engineering, as my only witness.

12 HEARINGS OFFICER: Okay. Prior to the
13 hearing, the city has identified nine exhibits, one
14 witness.

15 In addition to those exhibits, I'll
16 take official notice of the department's file for the
17 application Transfer Number 87938, past decisions,
18 orders of the department, the department's water right
19 records, specifically the records for water rights 36
20 4233, 36 7970, 36 8332, 36 8550, 36 8738, 36 8744, 36
21 17185.

22 I'll take official record of reports,
23 measurements, (indecipherable) records in the
24 department's files, (indecipherable) reports in the
25 department files.

1 And with those preliminary matters
2 concluded, applicant may begin. Mr. Bromley.

3 MR. BROMLEY: Do you want to swear the
4 witness in?

5 HEARINGS OFFICER: Yes.

6 Please raise your right hand.

7 Do you solemnly affirm the testimony
8 you are about to give is the truth, the whole truth,
9 and nothing but the truth?

10 MR. BROCKWAY: I do.

11 HEARINGS OFFICER: Please be seated.

12 Thanks for the reminder.

13 MR. BROMLEY: Sure thing.

14

15 EXAMINATION

16 BY MR. BROMLEY:

17 Q. All right. Dr. Brockway, please state your
18 name.

19 A. Charles G. Brockway.

20 Q. And who do you work for?

21 A. Brockway Engineering.

22 Q. Where is Brockway Engineering located?

23 A. Twin Falls, Idaho.

24 Q. All right. What's your educational
25 background, Dr. Brockway?

1 A. I have a Bachelor of Science in civil
2 engineering from the University of Idaho and a Doctor
3 of Philosophy in civil -- civil and environmental
4 engineering from the University of Iowa.

5 Q. And how long have you been working as a
6 professional?

7 A. Thirty-one years.

8 Q. And generally, what's your experience with
9 water rights in the state of Idaho?

10 A. Pretty extensive experience from -- from
11 day one. Working on every aspect of water right
12 administration, hydrologic analysis, hearings like
13 this one, similar matters.

14 Q. Have you testified before as an expert
15 witness in the Department of Water Resources hearings?

16 A. Yes.

17 Q. Most recently, do you recall when you last
18 testified as an expert?

19 A. Most recently would be, I believe, the --
20 the hearing last fall relative to the Big Wood ground
21 water moratorium matter.

22 Q. And were you qualified as an expert there?

23 A. Yes.

24 Q. Okay.

25 MR. BROMLEY: Hearing Officer, I'd

1 move to introduce Dr. Brockway as an expert witness in
2 all matters concerning water rights and for his
3 testimony here today.

4 HEARINGS OFFICER: Okay.

5 Q. (BY MR. BROMLEY) Dr. Brockway, are you
6 here today to provide expert opinions as to the
7 transfer we're discussing?

8 A. Yes.

9 MR. BROMLEY: Okay. I'm going to -- I
10 realize that a lot of these documents are already in
11 the record. However, just for ease of reference, if
12 you could mark this as Exhibit 1. This is the
13 application for transfer.

14 HEARINGS OFFICER: (Inaudible.)

15 MR. BROMLEY: Which should also be in
16 the file. Just again for ease of reference.

17 HEARINGS OFFICER: Thank you.

18 Q. (BY MR. BROMLEY) All right. I am handing
19 you what's been marked as Exhibit 1. If you could
20 identify this document and explain it to us, please.

21 A. This is the application for transfer that
22 was submitted by our office to the Department of Water
23 Resources for the -- the matter that we're here today
24 discussing.

25 Q. Okay. And generally, Dr. Brockway, what

1 was the city trying to accomplish with this transfer?

2 A. It's relatively simple. The city had
3 recently acquired some water rights known as the
4 Wayside rights, and the purpose of the transfer was to
5 incorporate those water rights and wells into the city
6 system by converting the beneficial use of the rights
7 to municipal use and simultaneously adding those new
8 wells as points of diversion on the city's existing
9 right and adding the Wayside wells as points of
10 diversion -- excuse me -- adding the city's existing
11 wells as points of diversion on the Wayside rights so
12 that all rights would be incorporated into city's
13 place of use with all points of diversion authorized
14 on them.

15 Q. And what were the purposes of use
16 associated with these rights the city had acquired?

17 A. There -- they were irrigation, domestic,
18 and commercial.

19 Q. When I look at the last page of the
20 transfer document and I see a map, if you could just
21 turn there.

22 A. Yes.

23 Q. And this was prepared by -- by your office.
24 So when we look at this map, which is the last page of
25 Exhibit 1, if you could explain where these wells were

1 going to be. The -- the water rights that we were
2 just talking about that the city had acquired and were
3 trying to transfer, and just talk us through this map,
4 where those wells are located. Generally just how the
5 city system is set up, if you would.

6 A. The orange line on this map is the city's
7 service area. The wells designated as wells number 2,
8 3, and 4 are the city's -- I call -- I will call them
9 the existing municipal wells prior to the transfer.

10 Wells number 5A, 5B, and the Joshnick
11 well are the wells appertinent to the Wayside rights.
12 And those are the rights that the city acquired and
13 wishes to incorporate into the system.

14 Q. Okay. And so then if you go one page
15 before that, we've got a -- another map that I see.
16 It appears to me this is a zoomed-in look of -- of the
17 -- I guess that would be the northeast corner that we
18 were looking at in the prior map. Is that correct?

19 A. That's correct.

20 Q. Okay. So this is -- this is showing then
21 what -- what was going on on the ground, the water
22 then that was being used to supply these areas. Is
23 that your understanding?

24 A. Correct.

25 Q. Okay. And I see there's a Fearless Farris

1 well and a Heyburn Estates well and a Wayside well and
2 then that Joshnick well.

3 A. Yes.

4 Q. And those then correspond with -- on the --
5 on the prior map that we were looking at on the last
6 page as wells 5A, 5B, and Joshnick?

7 A. Yes. With the exception of the Fearless
8 Farris well.

9 Q. Okay. And is that no longer being used?

10 A. That's my understanding. Yeah.

11 Q. Thank you. All right. So the city then
12 files this application for transfer. And I'm going to
13 hand you what's been marked as Exhibit 3.

14 MR. BROMLEY: Or I will ask for it to
15 be marked as Exhibit 3.

16 HEARINGS OFFICER: Thank you.

17 Q. (BY MR. BROMLEY) And quickly, before we
18 talk about Exhibit 3, just going back to the Exhibit 1
19 and when this transfer was filed. Was it your opinion
20 that the transfer as file was approvable without
21 injury, without enlargements to other water rights?

22 A. Yes.

23 Q. And why was that?

24 A. Historically, these -- the water diverted
25 into the Wayside rights was diverted from the same

1 aquifer from which the existing city wells divert, and
2 that water was discharged to the city waste water
3 system just as all the other city water, collected and
4 conveyed to the waste water treatment plant, treated
5 along with all the other water and discharged to the
6 Snake River.

7 So we felt that by incorporating these
8 rights, nothing was going to change, and we didn't see
9 how that would be an enlargement or an injury.

10 Q. Okay. Thank you. So then you have in
11 front of you what's been marked as Exhibit 3. What's
12 this document?

13 A. This is the approved transfer.

14 Q. And what -- what happened in the approved
15 transfer?

16 A. So the department disagreed with our
17 analysis and said that, as I understand it, because
18 the use was being changed to municipal, none of the
19 domestic use volumes could be allowed to be
20 transferred. So the department reduced all of those
21 volumes to zero.

22 They maintained the commercial volume of, I
23 believe, .9 acre feet, because it was initially
24 determined that that use, the commercial use, could be
25 a hundred percent consumptive and therefore

1 transferable.

2 So the result was that those volumes that I
3 mentioned were zeroed out and the approved volume was
4 about half what was applied for.

5 Q. Okay. And when I look at Exhibit 3, toward
6 the back -- and you just explained your just shorthand
7 as to what happened with volumes being reduced, some
8 being zeroed out -- I see a memo on page 23, which is
9 five pages from the back, dated January 15, 2024, from
10 Cory Skinner to the file.

11 Are you -- are you there?

12 A. Yes. I see it.

13 Q. Okay. Have you seen this memo before?

14 A. Yes.

15 Q. And who's Cory Skinner?

16 A. He is the regional manager of the department
17 of water resources southern region.

18 Q. Okay. When I look at the first page of
19 this memo, the -- the last line there, it says, injury
20 to other water rights. Do you see that?

21 A. Yes.

22 Q. And what was Mr. Skinner's opinion?

23 A. None anticipated.

24 Q. Okay. Then I go to the next page, and
25 there is a paragraph explaining enlargement of use.

1 If you could read that paragraph into the
2 record, and then let's talk about it.

3 A. The applicant proposed allowing more volume
4 through the change in nature of use than what will
5 ultimately be approved. A meeting was held between
6 me, IDWR administration, and IDWR eastern and western
7 regional managers.

8 During this meeting, it was decided that
9 IDWR cannot allow volume credit in a conversion from
10 in-house domestic use to municipal use. See Transfer
11 Number 82259, approved in 2018. However, credit for
12 diversion rights for in-house use could be allowed.

13 Accounting for this, the following allowed
14 rate and volumes for the rights will be approved.

15 Q. Okay. And then as we scroll through the
16 rest of this memo, it then is an explanation, as I
17 understand it, of how the volumes are being reduced.
18 Is that correct?

19 A. Yes. That's right.

20 Q. Okay. So Mr. Skinner then explains a
21 policy for reducing volumes. Was this policy based on
22 fact or was this policy based on just merely policy?

23 A. In my opinion, it's just merely policy.

24 Q. Okay. And we will come back to this memo
25 later on, but for right now, let's -- let's move

1 forward.

2 Is it your understanding then, Dr.
3 Brockway, that after this preliminary order was issued
4 ap -- we'll say in quotes approving the transfer,
5 however reducing volumes, that the city then
6 petitioned for reconsideration?

7 A. Yes.

8 Q. Okay. And that was also supported, if you
9 recall, by a declaration of Tony Morley?

10 A. Yes.

11 MR. BROMLEY: Those documents, Mr.
12 Hearing Officer, are already in the record. I -- I do
13 have them marked -- you know, what I would ask to be
14 marked as Exhibits 4 and Exhibits 5. Again, just for
15 ease of reference.

16 So petition to reconsideration, mark
17 that as Exhibit 4. And then the declaration of Tony
18 Morley will be Exhibit 5.

19 HEARINGS OFFICER: Thank you.

20 Q. (BY MR. BROMLEY) Add that to your pile,
21 but I don't think we're going to talk about it.

22 A. Okay.

23 Q. All right. So I am going to then ask you,
24 Dr. Brockway, to look at what I've got as Exhibit 6,
25 and will be marked as such. And this is the

1 preliminary order.

2 MR. BROMLEY: Again, another document
3 that's in the record, but just for ease of reference.
4 Thank you.

5 Q. (BY MR. BROMLEY) Okay. What is this
6 document?

7 A. This is a preliminary order granting the
8 petition for reconsideration and amending the transfer
9 approval.

10 Q. Okay. And generally, what happened then
11 with the preliminary order?

12 A. So as I understand it, the department
13 reviewed the record, decided that insufficient
14 evidence was provided for the historic consumptive use
15 at the Wayside area, including the commercial use from
16 one of the Wayside wells, and further reduced the
17 annual volume by .9 acre feet. Thereby disallowing
18 all of the domestic and commercial volume.

19 Q. Okay. So again, the transfer was I'll say
20 approved in quotes, but this iteration of the approval
21 actually reduced the volumes from the first approval,
22 correct?

23 A. Correct.

24 Q. Okay. Let's look then at conclusion of law
25 paragraph 7, which is on page 3 of the preliminary

1 order. And if you could please read paragraph 7 into
2 the language -- into the record.

3 A. The applicant's transfer and petition did
4 not include evidence confirming the historic
5 consumptive use wat -- excuse me -- consumptive water
6 use in the Wayside Cafe, Stinker Station, and in-house
7 use. The domestic and commercial uses for rights 36
8 4233, 36 7970, 36 8332, 36 8744, and 36 17185 prior to
9 the transfer.

10 The department must limit the
11 transferred volumes of these rights to ensure the
12 proposed change to municipal use does not result in an
13 enlargement in use of the water rights.

14 Q. Okay. Let's talk about that second
15 sentence. We will come back to the first sentence
16 when we talk about waste water later. But let's talk
17 about that second sentence where it says, the
18 department must limit the transferred volumes of these
19 rights to ensure the proposed changes to municipal use
20 does not result in enlargement in use of the water
21 rights.

22 Is there anything in the preliminary order
23 that you understand that explains this to ensure idea?
24 Is there anything in this order that is factual in
25 your belief?

1 A. I -- well, I think there's some facts in
2 here. But the -- the most important fact is -- is
3 omitted, which is the before and after analysis to
4 determine what the actual effect of the change is.

5 Q. And what is that?

6 A. The actual effect of the change is zero,
7 because hydraulically and hydrologically, the water
8 usage, distribution, collection, and return will be
9 the same.

10 Q. So is it your opinion then that no
11 enlargement can occur in this transfer?

12 A. Yes. That's my opinion. And we make -- we
13 make Mr. Bromley come to a potential condition to
14 substantiate that opinion.

15 Q. So long as nothing changes, there would be
16 no enlargement. Is that your opinion?

17 A. That's a better way to state it.

18 Q. Okay. Sometimes it takes me a couple
19 bites.

20 All right. I'm going to hand you what I
21 will have marked as Exhibit 8. All right. What is
22 Exhibit 8?

23 A. This is a technical memorandum prepared by
24 Greg Sullivan in our office and myself as the expert
25 report in this matter.

1 Q. All right. So let's -- let's talk through
2 this memo. It appears to me that you've got various
3 tables, and you're explaining on page 1 what the water
4 rights look like before the transfer.

5 Is that a fair statement?

6 A. Yes.

7 Q. Okay. Then I see below Table 1, you have
8 some statements here. IDWR policy in general is to
9 allow only the consumptive portion of a water right to
10 be changed to municipal use -- usage. However, this
11 policy cannot be properly implemented unless the
12 actual hydrology of individual situations is analyzed.

13 Is that what you were just discussing with
14 me in regards to the preliminary order with this to
15 ensure language that we were looking at, that second
16 sentence of -- in the conclusions of law?

17 A. Yes.

18 Q. Is this an idea that not all transfers are
19 the same? Every transfer is different, and in order
20 to evaluate it, it should be evaluated on a
21 case-by-case basis rather than broad-brush strokes?

22 A. That's right. And I think that's
23 particularly apropos in the case of municipal usage,
24 because the usage of water and the treatment method
25 and potential return flows can vary quite a bit

1 between cities. So it's very important to use actual
2 science, actual hydrologic information, and evaluate
3 things on a case-by-case basis.

4 Q. Okay. So then if I turn to page 2, the top
5 two paragraphs on page 2, I see that you're evaluating
6 the consumptive use for -- for irrigation. You're
7 saying it was evaluated based on ET Idaho.

8 Is that how it's typically done with the
9 department?

10 A. Yes, it is.

11 Q. Okay. And that's -- that's a scientific
12 analysis, then, is that your understanding, of how to
13 determine what's consumptive?

14 A. Yes.

15 Q. Okay. And then I see in the second
16 sentence of that first paragraph that there's a -- an
17 assumed value of what's consumptive. Is that your
18 understanding of how the department looks at
19 irrigation from the Burley station?

20 A. Yes.

21 Q. Okay. So that's a number 3.21 acre feet
22 per acre.

23 A. Yes.

24 Q. Okay. So then that second paragraph, the
25 domestic portion of the rights in Table 2, could you

1 explain how the department is -- or how you were
2 viewing the domestic portion.

3 A. The domestic portion historically has been
4 diverted from the aquifer used for primarily in-house
5 purposes, which typically has negligible consumptive
6 loss.

7 The -- the effluent from that use return to
8 the city's municipal waste water system, as I
9 discussed earlier, and then after the transfer would
10 continue to be used in that same manner.

11 Then the same analysis goes for the
12 commercial portion of those rights.

13 Q. That then, as we were discussing at the
14 beginning when you believe there would be no injury or
15 enlargement, that has to do with water is being pumped
16 out of the eastern Snake plain aquifer and being
17 routed through the city system and into the waste
18 water treatment plant, ultimately then discharged to
19 the Snake River so that it is -- in your words when I
20 am looking back on page 1, this is then wholly
21 consumptive to the aquifer since there is no return to
22 ground water.

23 A. That is correct.

24 Q. Okay. And that in your mind is just
25 hydrologic fact?

1 A. Unless there's leakage from the pipes,
2 which can occur, but is typically negligible, that is
3 the case.

4 Q. Okay. If I look at page 3, at the top of
5 page 3, you reference this longstanding internal
6 policy of the department identifying stock water
7 commercial and industrial use as a hundred percent
8 consumptive.

9 A. Yes.

10 Q. How long have you been aware of this
11 policy?

12 A. I think this policy, not to speak for
13 everybody in the department, appeared to me to have
14 its genesis perhaps 25 years ago in the plethora of
15 transfer applications to convert irrigation use to
16 dairy use.

17 Eventually, the department came to a policy
18 that it was just going to assume that commercial use
19 such as in a dairy was just a hundred percent
20 consumptive, even if it wasn't.

21 And we -- we, the science community, didn't
22 like it then any more than we like it now, but that
23 that was kind of the genesis of it, I think.

24 And I'm sorry. What was the question?

25 Q. No. I was just trying to understand, you

1 know, how long you've been aware of this -- this
2 policy.

3 A. Oh, it's, yes, probably 25 years. But
4 specifically for municipal, it's really come more to a
5 head maybe in the past five to 10 years, I would say.

6 Q. And by that, what do you mean?

7 A. Well, up until that point, for example, the
8 department would -- would approve new municipal
9 applications for in-house use only, assuming it was
10 essentially nonconsumptive, as an example.

11 The policy then seemed to morph into, nope,
12 we have to assume that everything is a hundred percent
13 consumptive, even if it isn't, because it could be,
14 because a city or a subdivision might at some point in
15 the future, for example, change its waste water
16 disposal method to a more consumptive or a fully
17 consumptive method.

18 And so my understanding was to guard
19 against that, this assumption of full consumption was
20 simply adopted as policy

21 Q. Okay. Thank you. So then I see in
22 paragraph C on page 3 a discussion about the Cory
23 Skinner memo that we went over. Is that correct?

24 A. Yes.

25 Q. Okay. And then when I turn to page 4, I

1 see another reference here in the third sentence in
2 the first paragraph that the department determined
3 that the applicant did not provide sufficient
4 historical consumptive use analysis for the domestic
5 and commercial uses.

6 We discussed that, correct?

7 A. Yes.

8 Q. All right. Let's then talk about paragraph
9 D, which is what you say is the water balance reality.
10 If you could just explain to me what your opinions are
11 in paragraph D.

12 A. So this section describes a -- an example
13 water balance, if you will, of this -- that describes
14 the water use before and after this transfer.

15 Based on the best -- our best understanding
16 of the actual hydrology of the historical and the
17 future usage under those are five rights.

18 So it accounts for diversion from the
19 aquifer, consumptive use from the overall water
20 resource, the return to the aquifer, and the discharge
21 from the Heyburn waste water system back to the Snake
22 River.

23 It accounts for consumptive use from
24 irrigation. It accounts, again, for the fact that the
25 Wayside rights were fully consumptive to the aquifer

1 and will continue to be. It accounts return flows to
2 the river.

3 And I guess the purpose of the exercise was
4 just to demonstrate that this is an example of the
5 science that we would expect the department would
6 evaluate, perhaps do on their own, or ask consultants
7 to do, and adhere to when determining injury or
8 enlargement.

9 And in this case, it's so straightforward
10 that it can be demonstrated that really nothing's
11 going to change relative to aquifer depletion,
12 consumptive use, or return flow.

13 That was the purpose of the exercise.

14 Q. Okay. And Table 5 then, is that a summary
15 of what you conclude --

16 A. Yes.

17 Q. -- from a numbers standpoint.

18 And that's these are the volumes that you
19 believe, in your expert opinion, should be approved?

20 A. Yes.

21 Q. So in summary, your opinions in Exhibit 8,
22 what are those opinions?

23 A. Well, one overarching thing would be, and
24 we've discussed it, is that every case is a little
25 different. Some are very different than others. And

1 so it's very important that each case look -- be
2 looked at from a hydrologic standpoint on a
3 case-by-case basis considering the hydrologic facts of
4 the case. So that's -- that's perhaps an overarching
5 opinion.

6 You know, it's good to have policies. We
7 need policies, but to -- it's -- it's not the best
8 science to, you know, have presumptions and policies
9 that override pretty clear scientific facts of the
10 case. So that's -- that's definitely opinion that I
11 have.

12 In the -- in the specific case that we're
13 dealing with here, one opinion would be that this
14 water usage is consumptive to the aquifer, there is no
15 doubt about that, and will continue to be. That
16 regardless of the historic consumptiveness of the
17 Wayside rights, it will -- they will continue to be
18 discharged into the waste water system and continue to
19 be returned, absent some major change with the city's
20 system.

21 And that if there is an enlargement
22 concern, which, again, based on the hydrology, I don't
23 think there is, but if there is, that can certainly be
24 taken care of with -- with proper approval and
25 conditioning of -- of the water right with -- with a

1 simple condition similar to many conditions that the
2 department often approves.

3 So I guess the bottom line, Mr. Bromley, is
4 I don't -- I don't see how there's any enlargement. I
5 don't see how there's any additional depletion to the
6 aquifer, any additional depletion to the Snake River
7 before or after the change -- the transfer.

8 Q. Thank you. All right. Let's shift gears
9 here and talk about waste water disposal.

10 So if we go back to Exhibit 6, which is the
11 preliminary order.

12 A. All right.

13 Q. So paragraph 8 on page 3 is a recitation of
14 the definition of consumptive use in Idaho Code
15 42-202B sub 1. Do you see that?

16 A. Yes.

17 Q. Do you have any reason to agree or disagree
18 with that definition?

19 A. No. I mean, it's a broad definition. The
20 only caveat I would make is that it -- on a
21 case-by-case basis, sometimes you have to look at
22 different sources, and a use might be consumptive to
23 one source and less consumptive or not consumptive to
24 another source.

25 So other than that, yeah, that's a -- I

1 think it's a correct definition.

2 Q. Okay. I am going to have what we've
3 identified as Exhibit 2 marked. And this is a -- some
4 email discussion from James Cefalo to you and me and
5 some other parties to a different City of Heyburn
6 transfer.

7 And you've seen Exhibit 2 before?

8 A. Yes.

9 Q. Okay. And generally, what is Exhibit 2
10 talking about?

11 A. Well, as you mentioned, it's a different
12 application. But in general, it's talking about the
13 City of Heyburn's water usage and how consumptive that
14 usage may be.

15 Q. Okay. So if we look at the second page of
16 this email, the paragraph above where it says, I look
17 forward to our discussion, James, I see a line that
18 starts with the word further. It's most of the way
19 down in that paragraph.

20 A. Yes.

21 Q. Would you read that sentence and the next
22 two sentences, please.

23 A. Further, the city's waste water flow for
24 2013 suggests that the diversion volume reported for
25 that year is not reliable. Most of the water pumped

1 by the city is not consumed and is discharged into a
2 drain channel connected to the Snake River.

3 For example, in 2022, the city diverted
4 513.7 acre feet and returned 510.5 acre feet to the
5 drain channel through its waste water facility. The
6 waste water plant returns the water to the reach of
7 the Snake River most impacted by the pumping from the
8 city's wells.

9 Based on the current ESPA model, over 40
10 percent depletion impacts from the city's wells
11 propagate to the newly (indecipherable) reach of the
12 Snake River.

13 Q. All right. And who is Mr. Cefalo?

14 A. He is the regional manager for the
15 Department of Water Resources eastern region.

16 Q. All right. And if I recall, in that memo
17 from Mr. Skinner that was part of the original
18 transfer approval, he said he had had a discussion
19 with regional manage -- regional managers, including
20 the eastern regional manager.

21 Do you recall that?

22 A. Yes.

23 Q. Okay. So that would be a discussion then
24 also involving James Cefalo.

25 A. I believe so.

1 Q. All right. It would have to be. I'm not
2 aware of any either eastern regional manager. Are
3 you?

4 A. I'm not either.

5 Q. All right. Let's look then again at
6 Exhibit 6, if you got that in front of you. That's
7 the preliminary order.

8 A. Oh. Yes, I have it.

9 Q. And we had been talking about conclusion of
10 law paragraph 7, if you recall that.

11 A. Yes.

12 Q. And there are two sentences in that
13 conclusion of law paragraph 7. And we had talked
14 about the second sentence of this to ensure idea.
15 This was this policy idea.

16 So that first sentence, what does that say?

17 A. It says that the -- or it asserts that the
18 transfer and petition did not include evidence
19 confirming the historic consumptive water use for the
20 Wayside uses.

21 Q. All right. Is it your understanding -- and
22 if we need to look at the declaration of Tony Morley,
23 we can do that. But is it your understanding that
24 this Wayside area has historically been discharging
25 into the city's waste water treatment plant?

1 A. Yes.

2 Q. Okay. So if we look at this paragraph 7
3 that we were just discussing, and we think also about
4 what the Cory Skinner memo said with his -- his
5 meeting with the other regional managers, and then we
6 look at this -- excuse me -- email from James Cefalo
7 that we were just discussing where it believes that
8 the city is nearly one hundred percent nonconsumptive,
9 might that have been a reason that the department was
10 not willing to transfer any volumes for the domestic
11 and commercial uses?

12 A. It might have been.

13 Q. Okay. Let's look now at Exhibit 9, which
14 is -- I will ask to be marked. This is the waste
15 water treatment memo that now has a much nicer looking
16 first page than it did before.

17 What is this document?

18 A. This is a memo prepared by Greg Sullivan of
19 our office concerning current water usage and return
20 flow data for the City of Heyburn.

21 Q. All right. So is it fair to say that this
22 was prepared in order to address that sentence that we
23 were looking at in paragraph 7 in the preliminary
24 order, that the transfer and petition did not include
25 evidence confirming historic consumptive use?

1 A. Yes.

2 Q. And is this another way of looking at the
3 consumptive use question? The first way that -- that
4 you discussed consumptive use was all pumping from the
5 eastern Snake plain aquifer by the City of Heyburn is
6 consumptive to the aquifer. Is that correct?

7 A. Correct.

8 Q. Okay. So this then would be an alternative
9 way of looking at consumptive use that would address
10 the -- the definition in Idaho Code 42-202B sub 1. Is
11 that correct?

12 A. Yes. This -- this is a black box method,
13 if you will, looking at the overall water resource.
14 How much was pumped out of the water re -- overall
15 water resource, and how much returned to the overall
16 water resource, without regard to source.

17 Q. Okay. And what then is found in Exhibit 9?
18 What did you all conclude, based on your analysis?

19 A. So this -- by way of background, this --
20 this analysis involved data provided by the City of
21 Heyburn for 2023. The data included monthly data for
22 well pumping, waste water treatment plant discharge,
23 and estimated inflow and infiltration into the waste
24 water system, which is considerable, because there is
25 very shallow ground water in the area and there's

1 considerable infiltration into the system.

2 And that has been estimated by the city's
3 engineering firm that they hired in 2018 to complete
4 the -- the facility plan. And that was JUB Engineers.

5 Doing the arithmetic. With all of that
6 data, one can determine any inflow/outflow balance and
7 thus determine the amount of water that is
8 consumptively, i.e., does not return to the overall
9 water resource.

10 So it was -- it was determined, based on
11 that data, that the consumptive volume for 2023 was
12 240 acre feet, which equated to 45 percent of the
13 volume of the water pumped by the city's well field.

14 Q. Okay. And there's a narrative then of that
15 on page 1. Is that correct?

16 A. Correct.

17 Q. And then tell me about page 2.

18 A. Page 2 is the monthly data that I just
19 described. And the calculations at the bottom.

20 Q. Okay. And then what do we see on page 3?

21 A. Page 3 is a breakdown of the individual
22 well pumping data by month. And that data is simply
23 summarized on page 2.

24 Q. All right. So then the bottom line is in
25 calendar year 2023, if I look in the table on page 2,

1 that of the total volume that was pumped, 45 percent
2 of that volume was consumed, no longer returning to
3 the waters of the state. Is that correct?

4 A. Or unaccounted for. Yes. So it no longer
5 returned to the waters in the state.

6 Q. Okay. And again, this is an alternative
7 way of -- of looking at the consumptive use question.
8 Again, your first opinion was that all water pumped by
9 the City of Heyburn from the eastern Snake plain
10 aquifer does not return to the aquifer, correct?

11 A. Correct.

12 Q. This then is --

13 A. Less, again, as I mentioned, pipe leakage,
14 which may occur.

15 Q. Correct. And this then is an alternative
16 way of looking at the question, which is that of all
17 of that water that's pumped, 45 percent of it is lost
18 to the waters of the state, i.e., not returned to the
19 Snake River.

20 A. Correct.

21 Q. Thank you. The last line of questioning
22 that I have for you, Dr. Brockway, is that you've
23 hinted in your testimony about conditioning. Based on
24 your experience, do you typically see the department
25 -- why does -- let me ask it this way.

1 Why does the condition water right
2 approvals or transfer approvals?

3 A. Why do they do it?

4 Q. Correct.

5 A. Well, in my experience, it's -- it's most
6 frequently done to make sure that the department is
7 following the law and that those five criteria are
8 met. So they may condition a right to prevent
9 enlargement, to restrict a volume, for example, to
10 prevent that, or they may condition it in such a way
11 that they believe will prevent injury to another water
12 right holder.

13 I would say those are the two prime
14 reasons.

15 Q. Okay. And a condition, in your experience,
16 is it -- sometimes it directs the department to do
17 something to collect data. Other times it directs the
18 right holder to use the right in a particular way. Is
19 that fair?

20 A. I'm not sure I have seen one that directs
21 the department to collect data. Or maybe I
22 misunderstood the question.

23 Q. No. That's actually how I asked it.

24 A. Okay.

25 Q. So it would direct the department to

1 collect data from a -- from a water right holder who's
2 supposed to also be collecting data.

3 A. To -- to require the applicant to --

4 Q. Uh-huh.

5 A. -- submit data to the department. Yes.

6 Q. Okay.

7 A. Yeah.

8 Q. Your opinion when we've -- the City of
9 Heyburn filed this application for transfers, there
10 was no injury and no enlargement, correct?

11 A. Correct.

12 Q. Based on -- on your testimony then and what
13 we've been discussing today, do you think an approval
14 here could be conditioned in a way to ensure that the
15 City of Heyburn doesn't change its practices to become
16 more consumptive with the water that's at issue in
17 this transfer?

18 A. Yes.

19 MR. BROMLEY: All right. I'm going to
20 ask for this to be marked as Exhibit 10.

21 Q. (BY MR. BROMLEY) Okay. Dr. Brockway, what
22 is Exhibit 10?

23 A. There is a possible condition that would
24 place a requirement on the city to ensure that there
25 is -- if there -- if there was a concern about

1 enlargement, that there would definitely be no
2 enlargement or no change in use that could lead to
3 enlargement under these rights in question.

4 So it would require that the commercial and
5 the domestic volumes that have historically been
6 diverted and will continue to be diverted under these
7 water rights, which -- which amount to 40.3 acre feet
8 per year, shall continue to be discharged and returned
9 by the city to the Snake River via the treatment
10 plant.

11 So if -- if some extreme scenario were to
12 happen where the city radically changed its treatment
13 process so that it became more consumptive or maybe
14 fully consumptive -- it's difficult to envision any
15 scenario where that might happen, but let's -- let's
16 hypothesize.

17 In that case, the city would still be
18 obligated to return 40.3 acre feet to the river so
19 that nothing would change hydrologically under the --
20 relative to the before and after usage for the Wayside
21 water rights.

22 And as I have mentioned before, it is
23 important to look at consumptive use and do the water
24 balance as we've done, but this case is so
25 straightforward that at the end of the day it doesn't

1 really matter how historically consumptive the water
2 rights were, because whatever it was, they are going
3 to continue to be that and this condition is a way to
4 ensure that under the worst case scenario, there is no
5 possible way for enlargement to occur.

6 Q. The type of -- of data that would be
7 gathered in this annual report that's referenced, is
8 -- is that the kind of data that the city already
9 keeps?

10 A. Yes.

11 Q. And I believe I've understood that this is
12 the kind of data that the city's already submitting to
13 DEQ.

14 A. That is correct. They -- they have a -- a
15 discharge permit, and they're -- they are regulated by
16 DEQ and they are required to measure and report. It's
17 called a discharge monitoring report, or DMR. A very
18 detailed report on the amount and quality of water
19 that they're returning to the river.

20 Q. Do you work with clients in the DEQ field?

21 A. Yes.

22 Q. Are there consequences to water users if
23 they don't comply with DEQ requirements?

24 A. Yes.

25 Q. Do you know what any of those might be?

1 A. Well, as a broad brush, there's a --
2 there's a wide range, but up to and including fines or
3 even criminal charges.

4 Q. So if the city is required to submit this
5 kind of data to DEQ, with the threat of consequences
6 and penalties, do you think it's reasonable to assume
7 then that the city would be able to provide that data
8 to the Department of Water Resources?

9 A. Yes.

10 Q. How many water right conditions have you
11 looked at over the course of your career?

12 A. Hundreds.

13 Q. When you read a condition, are you able to
14 gather a sense of whether it's demonstrable or not?

15 A. Yes. I think so.

16 Q. All right. Is this kind of condition
17 administrable?

18 A. In my opinion, very much so. This is just
19 about as simple as they come.

20 Q. Okay. I have no further questions. Thank
21 you very much, Dr. Brockway.

22 A. Thank you.

23 HEARINGS OFFICER: I have a couple of
24 questions before we conclude.

25 Earlier in your testimony, you were

1 speaking about the systems involved with the Wayside
2 wells and the city wells and talking about how the
3 system's not going to be changed. Are the -- the
4 question was, are the Wayside wells, they currently
5 connected to this -- a distribution system where water
6 diverted from those wells could serve the rest of the
7 -- or the entire service area of the city?

8 DR. BROCKWAY: I do not believe so.

9 HEARINGS OFFICER: So the -- the water
10 that's diverted under the water that's before the
11 transfer is separate from the city system currently
12 discharged to the treatment facility?

13 DR. BROCKWAY: The Wayside wells draw
14 from the same aquifer, but piping wise there is not a
15 physical connection.

16 MR. BROMLEY: It's planned.

17 DR. BROCKWAY: Yeah.

18 HEARINGS OFFICER: Okay. I was
19 quickly scanning the -- that answers that question.

20 So the condition proposed in Exhibit
21 10, just for clarification, it lists an amount of 40.3
22 acre feet being discharged to the city -- or
23 discharged by the City of Heyburn.

24 That volume is the number-to-acre feet
25 that's calculated to be currently discharged. That's

1 right?

2 DR. BROCKWAY: From the -- from the
3 domestic and commercial --

4 HEARINGS OFFICER: Okay.

5 DR. BROCKWAY: -- portions.

6 HEARINGS OFFICER: That's the number
7 that's the portion of the water rights involved in the
8 transfer. The nonmunicipal water, that's their
9 portion that the city discharges.

10 DR. BROCKWAY: Correct.

11 HEARINGS OFFICER: Okay. I think the
12 last question I had. You were asked about the
13 definition of consumptive (inaudible) go to 42202B.

14 DR. BROCKWAY: Right.

15 HEARINGS OFFICER: And you said that
16 you thought it was worth -- or that the department
17 should consider a source. Are you looking at historic
18 consumptive volume?

19 DR. BROCKWAY: I do think that
20 considering the potential for different sources
21 involved is an important part of the hydrologic
22 analysis. And there are -- there are cases where
23 that's really not a relevant factor, that there maybe
24 is only one source involved. So it -- so it -- that
25 factor would not play in.

1 HEARINGS OFFICER: Okay. In your --
2 your experience working with water rights, water right
3 transfers, are you familiar with a time when the
4 department has considered different sources
5 considering consumptive volume?

6 DR. BROCKWAY: Boy, that's a difficult
7 one to answer. I -- I can't think of any at the
8 moment.

9 There's -- there's a pending
10 application that the City of Twin Falls has for a
11 diversion from a spring source on the north side of
12 the Snake River, to be returned to the river via the
13 city's treatment plant. And I know that the source
14 issue has come up among other issues in that
15 application, but there's been no disposition of that
16 yet.

17 So in my experience, Mr. Hearing
18 Officer, it doesn't come up a lot, because just the
19 nature of things. Usually we're dealing with one
20 source. So...

21 HEARINGS OFFICER: Okay. I think --
22 I'm just checking my notes. I think the questions I
23 had written down ahead of time were answered.

24 You mentioned that the -- what was the
25 name -- Fearless Farris smell -- well that's marked in

1 the maps, in the application, you mentioned that that
2 is no longer in use.

3 DR. BROCKWAY: That's my
4 understanding. Or -- or will no longer be used.

5 HEARINGS OFFICER: Okay. Is that the
6 well that had in the past been used for the gas
7 station and the -- as the conventional use?

8 DR. BROCKWAY: I believe so.

9 HEARING OFFICER: Okay. I think those
10 were all the questions I had. If you had any
11 follow-up.

12 MR. BROMLEY: I don't. If we could
13 have five minutes.

14 HEARINGS OFFICER: Yeah.

15 MR. BROMLEY: And just go off the
16 record for five minutes and come back.

17 HEARINGS OFFICER: Sure.

18 (Recess taken.)

19 HEARINGS OFFICER: Okay. We are back
20 on the record for the City of Heyburn's transfer,
21 87938. It's now 11:26, and we are doing some
22 follow-up questions.

23 MR. BROMLEY: Just one follow-up,
24 Hearing Officer, on the first question that you'd
25 asked, which was the interconnection of the Wayside

1 wells to the city's drinking water system.

3 FURTHER EXAMINATION

4 BY MR. BROMLEY:

5 Q. So, Dr. Brockway, Exhibit 5 is a
6 declaration of Tony Morley. I had handed that to you
7 at one point.

8 A. Yes. I have it.

9 Q. The -- the first page there, paragraph 4,
10 Mr. Morley explains that the -- that the waste water
11 system at Wayside has been connected to the city's
12 waste water treatment plant since approximately July
13 6, 1982. Do you see that?

14 A. Yes.

15 Q. Okay. And is -- I think it was generally
16 your understanding that this area has long been
17 connected on the waste water side to the city's waste
18 water treatment plant. Is that correct?

19 A. Correct.

20 Q. So then my understanding was that the
21 hearing officer was asking questions about the -- the
22 potable side, the drinking water side of the supply
23 side pipes.

24 Was that your understanding?

25 A. Yes.

1 Q. Okay. So the waste water side has been
2 connected to the treatment plant since 1982. And then
3 what is your understanding about this area on the
4 drinking water side, when it will be interconnected
5 with the city system?

6 A. My understanding is that the drinking water
7 system is not currently connected, but it's in the
8 service area. And, and based on the city's planning
9 documents and communications with engineering staff,
10 that within roughly three years, the plan is to
11 connect the Wayside area to the rest of the city
12 drinking water system.

13 Q. Okay. Thank you.

14 A. Yes.

15 MR. BROMLEY: I don't have any further
16 follow-up, Hearing Officer, unless you have any
17 follow-up of Dr. Brockway.

18 HEARINGS OFFICER: One related
19 question.

20 Exhibit 1 is the application for
21 transfer submitted, and on page 2 there's a section A,
22 purpose of transfer. Do you see that section?

23 This is the section where the
24 applicant can mark what the intension is and the
25 application has a check box for the change in place of

1 use.

2 DR. BROCKWAY: Yes.

3 HEARING OFFICER: Is it your
4 understanding that besides the nature of use change
5 and the proposed changes to the points of diversion,
6 the place of use of the Wayside wells is also a
7 proposed change to the service area that -- the city's
8 service area?

9 DR. BROCKWAY: Yes.

10 HEARINGS OFFICER: And that's
11 represented by the map? The map on the last page of
12 the application?

13 DR. BROCKWAY: Yes.

14 HEARINGS OFFICER: Okay. Thank you.

15 DR. BROCKWAY: Thank you.

16 MR. BROMLEY: Okay. Just a
17 housekeeping matter. We'd move to admit the exhibits
18 that we discussed, which would be Exhibit 1, Exhibit
19 2, Exhibit 3, Exhibit 4, Exhibit 5, Exhibit 6, Exhibit
20 8, Exhibit 9, and Exhibit 10. That was everything I
21 had that I'd introduced.

22 Exhibit 7, which I did not introduce,
23 again, is part of the record. It was just our request
24 for hearing. I didn't see a need to introduce it
25 since we weren't going to discuss it.

1 HEARING OFFICER: Okay. Exhibits
2 offered and accepted.

3 (Exhibit Numbers 1 through 6 and
4 Exhibits 8 through 10 are admitted
5 into evidence.)

6 MR. BROMLEY: I think all of the
7 marked ones are over on your table. Just make sure to
8 give those back.

9 HEARINGS OFFICER: Okay.

10 DR. BROCKWAY: Put them over here so I
11 don't run off with them.

12 HEARINGS OFFICER: Then if there's
13 nothing else, that's all we need to discuss on the
14 record. The hearing is now concluded. The record is
15 closed.

16 And I will issue an order on this
17 matter in 90 days (indecipherable).

18 (Proceedings concluded.)

19 (END OF TRANSCRIPTION)

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TRANSCRIPTION CERTIFICATE

I, CHERYL J. HAMMER, the undersigned
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WITNESS MY HAND this 23rd day of November
2025.



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[acre - background]

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