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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

**RESPONDENT'S
MEMORANDUM IN
OPPOSITION TO PETITION
FOR REHEARING**

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 87938 IN THE NAME OF THE
CITY OF HEYBURN

Respondent, the Idaho Department of Water Resources ("Department"), by and through its counsel of record, and pursuant to I.R.C.P. 84, I.A.R. 42, and the Court's *Notice of Hearing on Petition for Rehearing*, hereby files *Respondent's Memorandum in Opposition to Petition for*

Rehearing, asking the Court to deny the City of Heyburn’s (“City” or “Heyburn”) *Petition for Rehearing* (“*Petition*”).

I. INTRODUCTION

Heyburn’s *Petition* should be denied. The *Petition* does not identify any point of law or fact that the Court overlooked. Rather, Heyburn asks the Court to reconsider the same proposed enlargement condition that the Court already addressed and rejected in its *Memorandum Decision and Order* (“*Memorandum Decision*”) issued in this proceeding on May 1, 2026.

Heyburn’s argument rests on a mistaken premise: that because I.C. § 42-222(1) permits approval of a transfer “upon conditions,” the Director was required to approve Heyburn’s transfer with the condition Heyburn proposed. But § 42-222(1) authorizes conditional approval only where the transfer, as conditioned, does not constitute an enlargement in use of the original right. The statute does not require the Director to accept an applicant’s proposed condition where the condition fails to prevent enlargement in use of the original right.

The Court correctly held that Heyburn’s proposed condition did not limit the post-transfer diversion and consumptive use of the subject rights to their historical consumptive use. *Memorandum Decision* at 11. Instead, the condition attempted to maintain a wastewater discharge volume to the Snake River. The Court properly characterized that as a replacement-water condition, not a limitation on the consumptive use of the transferred rights themselves. *Id.* Because the condition would still allow Heyburn to divert and consumptively use more water under the transferred municipal rights than was historically consumptively used under the subject rights, the Court correctly affirmed the Director’s order. Moreover, Heyburn is not legally entitled to the relief requested.

II. ARGUMENT

A. Heyburn misreads Idaho Code § 42-222(1).

I.C. § 42-222(1) requires the Director to examine “all the evidence and available information,” including consumptive use, and approve a transfer “provided . . . the change does not constitute an enlargement in use of the original right” The limiting phrase “provided” is dispositive. The Director may approve a transfer upon conditions only if those conditions prevent enlargement. Nothing in the statute requires the Director to impose or accept a condition that does not accomplish that statutory requirement.

Heyburn’s reading would convert the Director’s conditional-approval authority into an obligation to approve a transfer whenever an applicant proposes a return flow condition. That is not what the statute says. The Director must examine whether the proposed change, including any proposed condition, prevents enlargement of the original right. If it does not, the Director may deny the transfer in whole or in part.

The Court applied this statute correctly. The Director determined the subject rights historically consumptively used 27.8 acre-feet annually. *Memorandum Decision* at 11. According to the Court, “[t]his determination is supported by substantial and competent evidence” in the record. *Id.* The proposed condition, however, would allow Heyburn to divert and potentially consumptively use 61.1 acre-feet annually under municipal rights. The Court therefore correctly concluded that the condition would still permit an enlargement in consumptive use.

B. The enlargement condition was rejected on its merits.

Heyburn suggests rehearing is warranted because the Court misunderstood or the Department failed to adequately consider the enlargement condition. *City of Heyburn’s Memorandum in Support of Petition for Rehearing* at 2–6 [hereinafter *Memorandum in Support*].

The Director did not allow the transfer of the entire authorized diversion volume of the subject rights, even with the enlargement condition, because the condition does not adequately prevent enlargement. The Court agreed with this conclusion, addressing the condition directly and accurately explaining why it does not cure the enlargement problem. *Memorandum Decision* at 11. The enlargement condition was not overlooked by the Court or the Department; it was rejected on its merits.

As recognized by the Court in its *Memorandum Decision*, and reiterated by Heyburn, the enlargement condition “is essentially a replacement water condition” intended “to address the issue of enlargement by maintaining the status quo when it comes to historic return flows into the Snake River.” *Memorandum Decision* at 11; *Heyburn’s Memorandum* at 3. Heyburn relies on this language in the *Memorandum Decision* as support for the proposed condition. *Heyburn’s Memorandum* at 3. On the contrary, the Court identifies this as the reason the condition is inadequate: its intent is to maintain the status quo rather than “to limit the diversion and consumptive use . . . to that which was consumed historically.” *Memorandum Decision* at 11. The Court then goes on to hold that “the Director did not abuse his discretion in 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.” *Id.* (emphasis added).

The condition provides that 40.3 acre-feet per year associated with the domestic and commercial volumes under the Wayside Rights “shall continue to be discharged” to the Snake River at Heyburn’s wastewater treatment plant, with an annual report to IDWR.¹ The Court

¹ There appears to be a mistake in how Heyburn calculated this 40.3 acre-feet number. Heyburn states “the 40.30 acre-feet that was described in the Enlargement Condition is the amount of water that is diverted from the ESPA for the domestic and commercial elements of the Wayside Rights that the Director did not allow to transfer.” *Memorandum in Support* at 4. Even assuming a condition could be appropriate, the 40.3 acre-feet figure is not supported by the record. The City appears to have started from 57.0 acre-feet as the total diversion volume, rather than 61.1 acre-feet authorized under the subject rights. *See* R. 205 tbl. 2. The City then subtracted the consumptive portions of water right numbers 36-4233 and 36-8744, which the Department allowed to transfer, to arrive at 40.3

recognized that maintaining the status quo for return flows into the Snake River does not resolve the issue of enlargement. *Id.* Although enlargement is not defined by statute, the Court states that the “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.” *Id.* at 5. Here, the proposed condition would allow 61.1 acre-feet of the Wayside Rights to be consumed despite only 27.8 acre-feet having been consumed historically. That additional consumptive use is, by any definition, an enlargement.

Requiring the City to maintain historical return flows does not eliminate the increased consumptive use, it simply preserves the amount of water returning to the Snake River. The condition therefore allows Heyburn to consume a substantially greater amount of water than was historically consumed under these rights, while changing nothing else. For example, Heyburn’s own system-wide analysis identified that there is “considerable infiltration into the system,” Tr. p. 33, L. 1, and the City’s wastewater collection system has an infiltration and inflow volume of as much as 304 acre-feet per year, *see* R. 209–10. Heyburn could increase the consumptive use associated with the Wayside rights but maintain return flows to the Snake River based on water that simply infiltrates into its water systems. This would be an enlargement of the original rights. The statutory question is not whether Heyburn can maintain an aggregate discharge at the wastewater treatment plant; it is whether the change enlarges the use of the original rights being transferred. The Court correctly concluded that the condition would still permit an enlargement in consumptive use.

acre-feet. The City, however, failed to subtract the consumptive portion of water right number 36-7970 which the Department allowed to transfer, or 11.1 acre-feet. Using the City’s 57.0 acre-feet baseline, subtracting the additional 11.1 acre-feet of consumptive use that was allowed to transfer reduces the remaining volume from 40.3 acre-feet to 29.2 acre-feet. Nevertheless, for consistency, the Department will continue to use the 40.3 acre-feet figure throughout this response since the discrepancy does not affect the legal analysis of the appropriateness of the condition.

C. The enlargement condition is insufficient or infeasible.

Even if a replacement-water condition could theoretically prevent enlargement, Heyburn did not develop the record or propose condition terms necessary to support that approach here. As the Court properly noted, the source of the replacement water has not been identified. The enlargement condition identifies the Wayside Rights as the source of the replacement water to the Snake River, yet necessarily depends on other water rights or water sources within the City's system to provide the full amount of replacement water proposed.²

The Court states in its *Memorandum Decision*:

[V]ery 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. . . . 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.

Id. at 11–12. In response, Heyburn identifies the water rights that were the subject of the transfer, the Wayside Rights, as the source of replacement to the Snake River. *Heyburn's Memorandum* at 4. The assertion that the Wayside Rights can be the source of replacement water is logically inconsistent with the purpose of the transfer. The transfer seeks to convert 40.3 acre-feet of historically nonconsumptive domestic and commercial use into municipal use, which is at least partially consumptive. If the Wayside Rights are being used more consumptively after the transfer, they cannot continue supplying the same 40.3 acre-feet of historical return flows the condition requires.

² The proposed condition reads: "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.

Heyburn simultaneously argues that the City can easily continue discharging this amount because it already returns substantially more than 40.3 acre-feet through its wastewater treatment facility. *Id.* This implies that the replacement water will come from the City’s broader municipal system rather than the Wayside Rights. If the replacement water comes from other sources within the City’s system, the Court properly noted that the source of the replacement water has not been identified. If the sole source of replacement water is the Wayside Rights—which is not feasible—it is not relevant how much water the City as a whole discharges.

D. The Director reasonably rejected an after-the-fact reporting condition that lacked adequate accounting, measurement, and enforcement terms.

I.C. § 42-222(1) does not require the Department to approve any and all conditions proposed by an applicant. Rather, as noted by the Court, “the Director has broad discretion in determining whether to accept a condition that purports to cure injury and/or enlargement.” *Memorandum Decision* at 11. In the Final Order, the Director noted that “suitable controls over the end use” would be needed to ensure that water would not be fully consumed. R. 84. By not including the condition in the approval, the Director used his discretion to determine, among other things, that the proposed condition would not provide suitable controls over the end use. The reporting requirement fails to address the realities of enforcement of the condition and relies on after-the-fact enforcement rather than preventing enlargement in the first place. If the Department determines from an annual report that the condition has been violated, it must still investigate the violation, provide notice, and pursue appropriate enforcement. By the time this process is complete, the enlargement and resulting injury will have already occurred.

Municipal water systems change over time, and their patterns of use and return flows may become more or less consumptive. A condition requiring the continued discharge of a fixed volume would require elaborate monitoring systems and continual verification that future

changes in water use or disposal do not cause injury or enlargement. The Director is not required to approve a transfer that is contingent on the Department's indefinite oversight and monitoring to ensure enlargement does not occur.

The Department limited the transfer to the 27.8 acre-feet of historically established consumptive use. This limitation creates a fixed, objective limitation that can be administered without requiring perpetual monitoring of Heyburn's future operations. Rather than relying on enforcement after enlargement has occurred, it ensures compliance with I.C. § 42-222(1) at the time the transfer is approved.

E. The relief requested by Heyburn is improper.

Judicial review of agency action is governed by I.C. § 67-5279, which provides that "if the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings." In its *Memorandum in Support*, Heyburn requests that the court either "(1) reverse and remand this matter to the Department for inclusion of the Enlargement Condition; (2) remand this matter to the Department to take additional evidence as to the Enlargement Condition; or (3) rehear this matter for the limited purpose of better understanding the Enlargement Condition." *Memorandum in Support* at 2.

Heyburn's first and second forms of relief requested exceed the Court's authority on judicial review. In *Idaho Power Co. v. Idaho Dep't of Water Resources*, the Idaho Supreme Court explained that under I.C. § 67-5279, a reviewing court may only "affirm the agency action, or set it aside, in whole or in part, and remand for further proceedings as necessary"; it is not authorized to direct the agency to grant the substantive relief requested by a party. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 276, 255 P.3d 1152, 1162 (2011). Accordingly,

even if the Court does not affirm the Department's actions, it may not order the Department to include the enlargement condition or to take additional evidence as to the condition.

It is not entirely clear what Heyburn is requesting in the third request for relief. If Heyburn is asking for the opportunity to argue to the Court that the Court erred as a matter of law or fact in its *Memorandum Decision*, that is an appropriate application of a petition for rehearing. To the extent that Heyburn is asking this Court to take additional information, such a request would be improper. Judicial review is based on the agency record. Heyburn had the burden to present evidence sufficient to support its proposed transfer and any proposed condition during the administrative proceeding. It did not do so. A petition for rehearing is not a vehicle to cure an evidentiary deficiency after the Court has affirmed the agency's decision. The Court correctly reviewed the record as it existed, correctly applied the standard of review, and correctly affirmed the Final Order. The Court did not reject the enlargement condition because it misunderstood the condition. Rather, the Court concluded that the condition contained insufficient detail to allow for meaningful evaluation. *Memorandum Decision* at 11–12. Rehearing is not intended to provide a party with a second opportunity to present information it failed to present during the administrative proceeding.

III. CONCLUSION

Heyburn's *Petition* should be denied. Heyburn has not identified any overlooked fact or legal error. The Court correctly concluded that Heyburn's proposed enlargement condition was inadequate and failed to resolve the enlargement concerns identified by the Director. It instead attempted to preserve the same wastewater discharge volume while still allowing the transferred municipal rights to be used in a fully consumptive manner. The Director was not required to accept the condition and the Court correctly affirmed the Final Order. For these reasons, the

Department respectfully requests that the Court deny Heyburn's *Petition* and uphold its *Memorandum Decision* with regard to all issues.

DATED this 9th day of July 2026.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/s/ Kinsey K. Garn
KINSEY K. GARN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of July 2026, I caused to be served a true and correct copy of the foregoing, via iCourt E-file and Serve, upon the following:

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