

CHRIS M. BROMLEY
IDAHO STATE BAR NO. 6530
CANDICE MCHUGH
IDAHO STATE BAR NO. 5908
MCHUGH BROMLEY, PLLC
Attorneys at Law
PO Box 107
Boise, ID 83701
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Attorneys for City of Heyburn

**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

**CITY OF HEYBURN'S
MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

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

Petitioner, the City of Heyburn (“City” or “Heyburn”), by and through its counsel of record, McHugh Bromley, PLLC, and pursuant to I.R.C.P. 84 and I.A.R. 42, hereby files this *Memorandum in Support of Petition for Rehearing*, asking the Court to reconsider its *Memorandum Decision and Order* (“Memorandum Decision”) and *Judgment* issued in this

proceeding on May 1, 2026, which rejected the City’s request that transfer at issue in this proceeding be approved with inclusion of what is referred to as the “Enlargement Condition.”

I. BACKGROUND

At issue in this proceeding is the fate of 40.30 acre-feet of water associated with the Wayside Rights and whether all, some, or none of the volume may be transferred. In its *Memorandum Decision*, the Court affirmed IDWR’s decision to reduce the volume of water to zero, noting that the Enlargement Condition was brought forward by the City with too little detail and too late in the proceeding to be adequately considered. The City respectfully requests the Court reconsider this portion of the *Memorandum Decision* and 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.

II. ARGUMENT

According to I.C. § 42-222(1), the Director “shall approve [a transfer] in whole or in part, or upon conditions, provided . . . the change does not constitute an enlargement in the use of the original right The director may consider consumptive use . . . as a factor in determining whether a proposed change would constitute an enlargement in the use of the original water right.”¹ Emphasis added. Because of the nature of the integrated municipal system, the City proposed inclusion of the Enlargement Condition to guard against future enlargement by guaranteeing that 40.30 acre-feet of water would continue to be discharged to the Snake River, consistent with over forty years of past practice, with regular reporting of the same to the Idaho Department of Water Resources (“Department” or “IDWR”). However, IDWR failed to address

¹ The other factors associated with this statute are not at issue, including injury to other water rights, conservation of water resources within the state of Idaho, the local public interest, and the local economy of the watershed.

the proposed condition and the supporting evidence, contrary to the statutory requirement to do so if the evidence and proposed condition would not constitute an enlargement of the use of the original water right (“shall approve [a transfer] . . . upon conditions . . .”).

As correctly recognized by the Court, the Enlargement Condition is intended to preserve the “status quo when it comes to historic return flows into the Snake River.” *Memorandum Decision* at 11. This is because municipal water rights “can be fully consumed.” *Id.* at 6. Nevertheless, the Court wondered if the status quo could be maintained, ultimately determining that the Director did not act arbitrarily and capriciously when he zeroed out the 40.30 acre-feet that was at issue:

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 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 to the subject rights, issues of administration must be considered, including the possibility that the replacement water rights 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.

Memorandum Decision at 11-12 (emphasis added).

Thus, the Court questioned: (1) if the water rights that would be used as the source of the replacement were defined; (2) if the priority dates of the water rights that were the source of the

replacement were known; and (3) if the volume that was requested in the Transfer was adequate to replace water that was consumptively used from the “waters of the state.”

As to the water rights that would be the source of replacement to the Snake River, the Enlargement Condition describes them as the water rights that were the subject of the Transfer, specifically water right nos. 36-4233, 36-8744, 36-17185, 36-7970, and 36-8332:

PROPOSED CONDITION

The commercial and domestic volumes under water right nos. 36-4233, 36-8744, 36-17185, 36-7970, and 36-8332, in the amount of 40.3 acre-feet per annum, shall continue to be discharged by the City of Heyburn to the Snake River at the City’s wastewater treatment plant [insert DEQ number] and an annual report shall be filed with the Idaho Department of Water Resources by [insert date] to demonstrate that this requirement is met.

R. 000213, Ex. 10.

As to those rights, they carry their own unique priority dates and volumes. *Memorandum Decision* at 1-2. Approval of the Transfer does not modify the priority dates of the water rights, R. 000089-000100, nor does any law exist that would allow the change in purpose of use from domestic and commercial to municipal to alter administration, including curtailment. If the Wayside Rights are curtailed, then the City would not be able to discharge 40.30 acre-feet to the Snake River because the rights could not be lawfully diverted. Conversely, if the Wayside Rights are in-priority, then they would be pumped and 40.30 acre-feet would be discharged.

Lastly, as to the overall volume, 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.

Reply Brief at 5. The volume was partially decreed in the SRBA and licensed by IDWR as legitimate elements of the rights. *Opening Brief* at 2-3. Because the City discharges greatly in excess of 40.30 acre-feet to the Snake River, it is arbitrary and capricious for the Director to

believe that the City cannot continue to do so, nor that enlargement would result.² If the City were to ever cease discharging 40.30 acre-feet to the Snake River, then the transfer would be “rescind[ed].” *Reply Brief* at 8 citing R. 000092, 000094, 000098, 000100.

What appears to have been missed in this proceeding is the purpose of the Enlargement Condition is to ensure that the City does not fully consume the Wayside Rights. Thus, the Transfer at issue was not an end run around the Court’s decision in *Riverside Irr. Dist. v. Idaho Dept. of Water Res.*, Canyon County Case. No. CV14-21-05008 (Dec. 28, 2021);³ to the contrary, the Enlargement Condition was offered as a way in which to work with the decision. Indeed, in *Riverside*, the City of Nampa litigated its ability to cease discharging treated wastewater to Indian Creek in return for discharging the same into the Phyllis Canal for consumption by Pioneer Irrigation District’s patrons, pursuant to I.C. § 42-201(8). Here, unlike Nampa, Heyburn is asking to be bound by its ongoing discharge of 40.30 acre-feet to the Snake River “upon conditions” as provided for in I.C. § 42-222(1). By granting inclusion of the Enlargement Condition, the Court will ensure that the legitimate water right element of volume, associated with the Wayside Rights, is not rendered a nullity through an impossible and unduly harsh statutory construction of I.C. § 42-222(1). *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004) (“it is incumbent upon a court to give a statute an interpretation which will not render it a nullity”); *Id.* (“The Court disfavors constructions that would lead to absurd or unreasonably harsh results.”). Indeed, the ongoing and continuous discharge of 40.30 acre-feet will preserve the status quo and benefit downstream water users.

² In 2023, the City discharged 594 acre-feet of water to the Snake River, of which 240 acre-feet is attributable to the City’s municipal pumping. *Opening Brief* at 8. The ongoing discharge of 40.30 acre-feet, therefore, constitutes seventeen (17) percent of discharge to the Snake River under valid water rights.

³ It must be noted that the City never challenged the Court’s prior decision or the Director’s decision in this proceeding that municipal water can be fully consumed: “The Director’s determination that the nature of municipal use is such that water diverted can be fully consumed is affirmed.” *Memorandum Decision* at 7.

III. CONCLUSION

Based on the foregoing, the City presented the Enlargement Condition as a way in which to preserve the legitimately decreed and licensed elements of the Wayside Rights, while offering a reasoned path forward to ensure that it does not fully consume those rights. The City is not some rogue water user. There is no evidence in the record to suggest that the City cannot be trusted; to the contrary, the City has a professional staff who manage its rights, with compliance demonstrated through its actions. Accordingly, it is proper to reverse the Amended Final Order and require inclusion of the Enlargement Condition. If the Court does not believe that the Enlargement Condition was fully addressed or considered by IDWR in light of the evidence in the record, summarized above, then a remand back to the Department is the appropriate remedy so that Heyburn's evidence can be fully considered and that IDWR's decision is grounded in that proof rather than disregarded.

DATED this 29th day of May, 2026.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for City of Heyburn

