

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
AMENDMENT OF PERMIT NO. 63-32225 IN
THE NAME OF INTERMOUNTAIN SEWER &
WATER, CORP. AND APPLICATION FOR
TRANSFER NO. 83875 IN THE NAME OF
GREGORY B. JOHNSON

PRELIMINARY ORDER APPROVING
APPLICATION FOR AMENDMENT OF
PERMIT WITH CONDITIONS AND
DENYING TRANSFER

PROCEDURAL HISTORY

On January 31, 2020, Intermountain Sewer & Water, Corp. (“Intermountain”) filed with the Idaho Department of Water Resources (“Department, IDWR”) an Application for Amendment of Permit (“*Permit Amendment*”) to add two additional ground water well points of diversion to its Permit no. 63-32225 (“*Permit*”).

On the same day, Gregory B. Johnson (“Johnson”) filed with the Department Application for Transfer no. 83875 (“*Transfer Application*”) to add three additional ground water well points of diversion to his Water Right no. 63-32616 (“*Water Right*”), including two points identical to those under the *Permit Amendment*, and add the Mayfield Springs Planned Community project site to the place of use. Intermountain and Johnson will be referred to together as the “Applicants.”

The Department published notice of both applications on February 20 and 27, 2020. Mary Walsh (“Walsh”) filed a protest against the *Permit Amendment* asserting that the addition of the new points of diversion would negatively impact ground water levels in the Mountain Home Groundwater Management Area and potentially the Cinder Cone Butte Critical Groundwater Management Area, and reduce the water available in surrounding domestic wells. Gayle Remine (“Remine”), Lacey Wilde (“Wilde”), and Walsh each filed protests against the *Transfer Application* asserting that use of the additional points of diversion would negatively impact the Mountain Home Groundwater Management Area and surrounding domestic wells, and the transfer of irrigation water for use on the Mayfield Springs site would increase water use. Walsh, Remine, and Wilde will be referred to collectively as the “Protestants”.

The Department held a pre-hearing conference to discuss both the *Permit Amendment* and *Transfer Application* on May 28, 2020, and a status conference on June 5, 2020. At the June 5 conference, the parties asked to schedule a hearing and to initiate discovery. The parties did not oppose a proposal to consolidate the contested applications for hearing. Pursuant to Rule 556 of the Department’s rules of procedure (IDAPA 37.01.01), the Department issued an order on June 19, 2020 consolidating the contested cases for the *Permit Amendment* and *Transfer Application* for hearing.

The Department conducted an administrative hearing on August 27, 2020 in Boise, Idaho. Intermountain and Johnson were represented by attorney Bryce Farris of Sawtooth Law Offices, PLLC, and the Protestants represented themselves.

The only parties offering evidence at the hearing were the Applicants. Exhibits 101, 102, 105, and 106 offered by the Intermountain and Johnson were admitted. The Department's water right files for the *Permit* and *Water Right* were identified and admitted as Exhibits IDWR1 and IDWR2 respectively. The hearing officer took official notice of records of the Department, specifically considering the following records: 1) water right files associated with permit nos. 63-32499, 61-12096, and Water Right Transfer no. 78356; 2) the following decisions and orders of the Department pertaining to the I-84 corridor between Boise and Mountain Home, the Department's November 13, 2013, *Final Order Regarding Water Sufficiency* ("I-84 Corridor Order"), the Department's May 31, 2012 memo titled *Sufficiency for Water Right Applications and Transfers Along the I-84 Corridor* ("IDWR memo"), the Department's May 7, 1981 *Order Establishing the [Cinder Cone Butte] Critical Groundwater Area* ("CWMA"), and the Department's November 9, 1992 *Order Establishing the [Mountain Home] Ground Water Management Area* the Mountain Home Groundwater Management Area ("GWMA").

Tim Farrell ("Farrell") was the only witness at the hearing. He testified on behalf of the Applicants. Walsh, Remine, and Wilde did not testify, but did cross-examine Farrell.

GOVERNING LAW AND EVALUATION CRITERIA

1. Application for Amendment of Permit

Idaho Code § 42-211 sets forth the standards for evaluating an application for amendment of a permit:

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment..." and "it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder. The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny same.

The Department may consider whether an application for amendment of a permit is in the local public interest. *Hardy v. Higginson*, 123 Idaho 485 (1993)

2. Applications to Change a Water Right (“Transfer Application”)

Idaho Code § 42-222(1) sets forth the criteria used for evaluating transfer applications:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. 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. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby.

3. Burden of Proof

The Applicants bear the burden of proof for all of the pertinent criteria listed in Idaho Code §§ 42-211 and 42-222. *See e.g. Barron v. Dept. of Water Resources*, 135 Idaho 414, 420 (2000), *Shokal v. Dunn*, 109 Idaho 330 (1985).

After considering the evidence in the administrative record in the light of these statutory criteria, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. The Mayfield Springs Planned Community (“Mayfield Springs”) is located in the Ada County within Sections 34 and 35, T1NR4E¹. The project site for the planned community is owned by Mayfield Development, LLC.
2. Intermountain owns and operates a public water supply system. The *Permit*, owned by Intermountain, authorizes diversion from ground water for municipal use within Intermountain’s public water supply system. The permitted place of use is generally located within Sections 27, 28, 29, 32, 33, 34, 35, and Section 2, T1SR4E, and includes all of Mayfield Springs. Ex. IDWR1.
3. The *Permit* has a priority date of September 16, 2005. It authorizes a diversion rate of 10 cfs for municipal use from January 1 to December 31, and an annual diversion volume limit of 1,815 af. Five points of diversion (“PODs”) in sections 28 and 33 are currently authorized under the permit. Ex IDWR1. One production well and one monitoring well have been constructed in Section 33. Ex. 105. Pumping capacity and other tests have been performed on the existing production well, but water has not been diverted for municipal use under the *Permit*. Testimony by Farrell.
4. The *Water Right* is owned by Johnson and authorizes irrigation from ground water of up to 145 acres, of which 104 acres are currently being irrigated under the *Water Right* and 41 acres are leased to the Idaho Water Supply Bank. Ex. 105 and IDWR2. The *Water Right* has a priority date of October 17, 1974 and has one POD in the NESW of Section 28. Id.
5. Johnson is the authorized agent of Intermountain and the Mayfield Development, LLC. Ex. 105.
6. The elements of the *Permit* and *Water Right* are described in the table below:

Identification No.	Priority Date	Source	Beneficial Use	Period of Use	Diversion Rate	Annual Volume
Permit 63-32225	9/16/2005	Ground Water	Municipal	1/01-12/31	10 cfs	1,815 AFA
Water Right License 63-32616*	10/17/1974	Ground Water	Irrigation	3/15-11/15	2.37 cfs	651.3 AFA
*A portion of the <i>Water Right</i> is leased to the Water Supply Bank, expiration date 12/31/22: 0.67 cfs and 184.2 AFA.						

¹ Unless otherwise noted, all legal descriptions in this order are within Township 1 North, Range 4 East, B.M.

I. **Permit Amendment**

7. The *Permit* was approved with the following conditions related to monitoring and use:

Condition 6: Prior to the diversion of water in connection with this right, the right holder shall provide the department with a plan for monitoring ground water levels in the vicinity of the place of use for this water right. The monitoring should occur in parallel with development and production and should include identification of non-productions wells and timelines for measuring and reporting. The right holder shall not divert water in connection with this right until the monitoring plan is approved by the Department. Failure to comply with the monitoring plan once it is accepted shall be cause for the Department to cancel or revoke this right.

Condition 8: After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.

Condition 10: Common areas, parks, school grounds, golf courses, and any other large parcels may only be irrigated under this water right with wastewater that has been previously beneficially used for potable or culinary purposes, has been treated in a wastewater treatment plant, and is delivered from the wastewater treatment plant to the parcel to be irrigated.

Condition 11: Water diverted under this right may be used for direct irrigation of up to 1/2 acre per residential lot upon which a home has been constructed.

These conditions, in part, allow the Department to monitor impacts of the water use under the *Permit* on nearby wells or water users. Intermountain has not asked for these conditions to be removed from the *Permit*.

8. Intermountain filed the *Permit Amendment* to add two new PODs (“new well 1” and “new well 2”) in Sections 34 and 35 respectively, within the Mayfield Springs project area. The application states: “The new PODs would allow new municipal wells to be located on the Mayfield Springs property, resulting in new municipal wells being constructed and operated within the boundaries of the planned community. The new PODs would also provide greater separation distance from existing wells...The intent of the amendment is to optimize water availability in the local area and efficiently use the available water on the project site. The allowable diversion rate, volume, and period of use will not change from the existing permit.” Ex. 105 and Testimony by Farrell.

9. The *Permit* POU includes an area larger than the Mayfield Springs project area. Ex. 105. As the consulting hydrologists and engineers, SPF Water Engineering filed the original application for permit on behalf of Intermountain and did not include PODs located within Mayfield Springs.
10. The only witness, Farrell, is Vice President of the Civil Engineering consulting firm Mountain Waterworks, which focuses primarily on wastewater and water development projects. Testimony of Farrell. Farrell testified he is now the project manager for the Mayfield Springs Planned Community project. He testified to his opinions set forth in a report submitted on June 29, 2020 (Ex. 105). He is a Licensed Professional Civil Engineer with drinking water treatment and distribution licenses, and has professional experience in water system operations, utility rate and budget analysis, new water system planning and development, engineering and water infrastructure design, water rights, well permitting, and operation and maintenance of water utilities. As the sole witness in this proceeding his testimony is undisputed.
11. Farrell testified that when Mountain Waterworks became the consultant for Intermountain, and upon review of the scope of the project, Mountain Waterworks decided it would be “prudent to add PODs that are located within the planned community development and have the wells, storage tanks, and boosters all contained within the development. So it was an engineering and planning decision to file the amendment of permit, not to develop more water or use it in any other way.” Farrell testified they would prefer to contain the “backbone infrastructure” including wastewater treatment, ground water supply, storage for fire protection, and pumping facilities within the Mayfield Springs project.
12. Farrell also testified that any of the authorized *Permit* PODs could be developed now; however, when Mountain Waterworks became involved, “we thought it would be better, for several reasons, to add PODs and have the initial wells drilled within the planned community versus on the other side of the private developments and then pipe the water down Desert Wind Road or across property to this project...If these new PODs were approved we would start with, more than likely, in [sections] 34 and 35 to drill the wells there.”
13. Three of the existing *Permit* PODs are located north of Indian Creek (SENW, NWNE, and NWSE Section 28) and two are located south of Indian Creek (SESE Section 28 and NENW Section 33). He stated his preference to develop wells further from Indian Creek which receives recharge from Indian Creek drainage, and further from and “down gradient” from the existing homes than the locations of the permitted PODs. Testimony of Farrell. The IDWR Memo states the general groundwater flow direction in the regional aquifer is to the southwest towards the Snake River. Farrell testified that in his professional opinion the locations of the proposed PODs will have less of a potential impact on the existing homeowner wells than the existing

Permit POD locations. The proposed new PODs are located further from the protestant's properties and further south of Indian Creek than the existing PODs. Fig 1, Ex. 105. He also testified a longer pipeline from the existing *Permit* PODs to the project would be more costly.

14. Farrell testified Intermountain does not propose to change any of the current *Permit* conditions (see Finding of Fact no. 7), including the authorized quantity. As conditioned in the *Permit*, wastewater (treated potable and culinary water) will be used to irrigate common areas, parks, school grounds, golf courses, and any other large parcels. Testimony of Farrell. Municipal ground water will be used only for in-home use and irrigation of lawns. *Id.*
15. Farrell stated he anticipates *Permit* condition no. 6 would apply to the *Amended Permit* and Intermountain would provide a plan for monitoring ground water levels that would include installation of well transducers in each well and a "human interface" to track ground water level trends over time, water utilization, instantaneous power, and pumping rates for individual wells. The monitoring plan must be approved by the Department and Intermountain will have to develop a Water Facility Plan as required by the Idaho Department of Environmental Quality. Testimony by Farrell. Farrell testified that he recently developed a ground water monitoring plan for the "Simco wells" in the vicinity which includes instrumentation and reporting requirements that could apply at the *Permit Amendment* and Mayfield Springs project. The monitoring plan will identify changing conditions in the aquifer and alert homeowners and Department to reductions in water supply to existing homes and the area. Testimony by Farrell.
16. Farrell stated the Idaho Department of Environmental Quality requires a minimum of two wells and pumping redundancy for systems with greater than 25 service connections; therefore, it is likely Mayfield Springs will require at least three wells. Farrell testified Intermountain is planning to develop three to five municipal wells depending on their productivity, and recommends prioritizing development of new wells 1 and 2. Water delivery from wells within the Mayfield Springs project area is more efficient and is less likely to have an impact on the water supply for existing residences, and will likely result in the development of fewer wells.
17. Farrell testified that it is unlikely all of PODs authorized under the *Permit Amendment* would be pumping at the same time. For systems similar to the proposed water distribution system, a single well [at a time] will pump water into a storage tank and a booster pump will pressurize the system, limiting the amount of time the wells will be pumping. Testimony by Farrell. He stated there will not be a significant pumping from the wells until several hundred homes developed; most of the pumping occur to deliver water from the storage tanks. *Id.* This type of system

operation will likely reduce the possibility impact of pumping at the proposed POD's on existing residences.

II. Transfer Application

18. Johnson filed the *Transfer Application* with the Department to add three PODs to the *Water Right* and change the existing place of use ("POU") to include the Mayfield Springs project site. One of the three proposed PODs is located northwest of the Mayfield Springs site (SESE of Section 28) and was constructed under the *Permit* ("existing well"). Ex. 105 and IDWR2. Pumping capacity and other tests have been performed on the existing well, but water has not been diverted for use. Testimony by Farrell. The other two proposed PODs are the same PODs proposed in the *Permit Amendment* (new wells 1 and 2) and are located within the Mayfield Springs property in Sections 34 and 35. Ex. 105 and IDWR2.
19. The *Transfer Application* proposes to use water under the *Water Right* for irrigation purposes within Mayfield Springs in areas not irrigated with wastewater. Common areas are irrigated with wastewater using the *Permit*. Testimony by Farrell. Farrell testified use of the irrigation *Water Right* for lawns will reduce the amount of municipal water used for lawn irrigation, while the common areas will be irrigated with treated wastewater. As stated in the *Transfer Application*: "The water right is planned to be used to supplement/supply irrigation needs within the new planned community. Wastewater reuse is to be utilized to irrigate common areas as the community grows...The transfer would allow irrigation water to be supplied from the Mayfield Springs existing and planned municipal wells and used on project site." Ex. 105.
20. Farrell testified: "We are not just moving the water from one place of use to another place of use...we want to be able to irrigate the fields and [use the irrigation water] if there is a demand in the subdivision. That is the most efficient use of that water. It will minimize the withdrawals on the *Permit*, if we use this irrigation water right to feed the [residential] irrigation then we don't need to use the municipal right to feed the [residential] irrigation, so it is less water over time."
21. The *Transfer Application* does not propose a change in the 145 acre limit, diversion rate, volume, or period of use authorized under the *Water Right*. Ex. 105 and IDWR2.
22. Farrell testified water diverted under the irrigation *Water Right* and the municipal *Permit* will be commingled and diverted from the same pump [well]. There is "no way to count molecules of irrigation [water] but we will be able to tell exactly how much of the irrigation water right we are using and the municipal right, so together will have a water balance and will be able to track that pretty closely." *Id.*

23. Farrell stated municipal water use under the *Permit* includes in-home use and yard irrigation. Farrell testified, based on professional experience, "in-home use in neighborhoods is relatively consistent...but the variable is the irrigation component of the yard irrigation." He stated water application limitations, individual yard acreage restrictions and monitoring procedures will be controlled through Covenants, Conditions, and Restrictions rather than through the water right approval process. *Id.*
24. Johnson proposes monitoring the water diverted under the *Water Right* for irrigation by identifying and reporting to the Department the number of acres to be irrigated with the irrigation *Water Right* and where the acres would be located. Testimony of Farrell. Farrell stated the amount of water used for irrigation of lawns can be monitored by calculating evapotranspiration rate and identification of acres to be irrigated. *Id.* Farrell did not provide additional details about the process for evaluation of consumptive use relative to amount of water diverted through the municipal system under the *Permit Amendment*.
25. Farrell testified "molecule for molecule" of water diverted cannot be tracked, but the total diversion rate and the volume used can be measured. He noted a number of other municipalities monitor comingled water but did not provide factual information about the monitoring methods at the hearing to support his testimony.
26. Farrell stated the developer may not use the entire irrigation *Water Right* within Mayfield Springs, but seeks flexibility to irrigate residential yards as the development is built out and within the existing *Water Right* diversion limits. Testimony of Farrell.

III. Mountain Home GWMA and Cinder Cone Butte CGWA

27. The Department established the Cinder Cone Butte CGWA in 1981 as a result of declining ground water levels (*In the Matter of the Cinder Cone Butte Critical Groundwater Area, Order Establishing Critical Groundwater Area dated May 7, 1981*). A subsequent study of the entire Mountain Home area was conducted, including the Cinder Cone Butte area, and the Mountain Home GWMA was designated in 1982 (*In the Matter of the Mountain Home Ground Water Management Area, Order Establishing Ground Water Management Area dated November 9, 1992*). The GWMA area includes Elmore and Ada counties and was also established due to declining ground water levels. While new ground water appropriations are not allowed in the Cinder Cone Butte CGWA, the GWMA order states "there appear to be sub-areas where new appropriations could be authorized without injuring existing water rights." *Id.*

28. The five existing PODs authorized under the *Permit* and the existing POD associated with *Water Right* are located outside the GWMA. Exs. IDWR1 & 2. New wells 1 and 2 proposed in both the *Permit Amendment* and *Transfer Application* are located within the GWMA. All of the wells used, or proposed to be used, by the Applicants are located outside the Cinder Cone Butte CGWA. Id.
29. A significant portion of the *Permit* POU, including the Mayfield Springs project site, is located within the GWMA. The existing *Water Right* POU is located outside the GWMA. The *Transfer Application* proposes to add the Mayfield Springs project site to the *Water Right* POU. This is an area that is more likely to be subject to administration because it is within the GWMA, Idaho Code § 42-233b (“The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis...”).

IV. Final Order Regarding Water Sufficiency and IDWR Water Sufficiency Memo

30. Department staff completed the IDWR memo, dated May 31, 2012, evaluating the sufficiency of water supply along the I-84 corridor prior to the hearing. IDWR memo. The memo established an 11-mile wide study boundary (“study boundary”), which includes areas within and outside the GWMA, in which to develop a water budget and estimated the sufficiency of supply within the boundary for existing and new uses. The sufficiency study considered consumptive use for existing water rights, including water rights that were not fully developed. IDWR memo. It included the consumptive use associated with the *Water Right* and *Permit* and the POU. Ex. 105. The POU for both the *Water Right* and *Permit* are also located within the study boundary. IDWR memo. The IDWR Memo concluded the estimated net recharge rate for the study area is positive, “indicating that existing consumptive uses, including those for the water rights not fully developed, are less than the rate of recharge.”
31. On November 13, 2013, the Department issued the I-84 Corridor Order in the matter of several pending water right and transfer applications for planned communities and irrigation projects along the I-84 corridor near the Ada County/Elmore County line. “The applications were consolidated for the purpose of evaluating the sufficiency of water supply in the same geographic area of the Western Snake River Plain aquifer along the I-84 corridor.” I-84 Corridor Order.
32. The I-84 Corridor Order found that an estimated net annual recharge volume for the study area of 7,440 acre-feet per year, or 10.3 cubic feet per second on a continuous basis, to be the maximum additional consumptive use that can be authorized in the study area. I-84 Corridor Order. The I-84 Corridor Order does not preclude

consideration of new water withdrawals within the GWMA, and in fact, the Department has approved water right applications in the GWMA subsequent the I-84 Corridor Order.

ANALYSIS

Permit Amendment

Sufficiency of Water Supply, Injury to Other Water Rights, and Enlargement

The *Permit* authorizes a diversion rate of 10 cfs for municipal use from January 1 to December 31, and an annual diversion volume limit of 1,815 af. The *Permit Amendment* does not propose an increase in diversion rate or volume, or change the POU. The *Permit Amendment* proposes to add two new PODs within the Mayfield Springs project area. The existing authorized PODs are located outside the GWMA while the new proposed PODs are located within the GWMA. Idaho Code § 42-211 sets forth the standards for evaluating an application for amendment of a permit which requires the Department to examine whether an approval will result in the diversion and use of more water than originally permitted and if the rights of others will be adversely affected. In addition, Idaho Code § 42-233b, defines a Ground Water Management Area and authorizes the director to evaluate on an individual basis whether sufficient water is available and that other prior rights will not be injured.

Testimony indicates locating the proposed new PODs within the project area will improve efficiency of pumping water to planned community given the proximity of the wells to other water delivery infrastructure. Locating the PODs further south and downgradient of the homeowners north of Mayfield Springs may reduce the likelihood of impacts on existing homeowners' wells and Indian Creek from the currently authorized *Permit* PODs.

The IDWR memo found there is a net positive recharge rate for a study area that includes the POU for the *Permit Amendment*, *Transfer Application*, and surrounding properties within and outside the GWMA. The I-84 Corridor Order found the positive estimated net annual recharge volume would allow for additional consumptive use development in the study area. The consumptive uses for the existing *Water Right* and undeveloped *Permit* were included as existing uses in the study. The *Permit Amendment* does not propose to increase consumptive use, volume, or diversion rate, and the new PODs are proposed in an area determined to have sufficient water supply.

The two additional proposed PODs through the *Permit Amendment* will not result in an increase in the amount of water originally permitted and the existing monitoring conditions will prevent possible injury to the existing water rights.

Public Interest

“Local public interest” is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” (Idaho Code § 42-202B(3)).

The requested *Permit Amendment* does not change uses under the approved *Permit*. The *Permit Amendment* will reduce pumping and piping costs and provide water to a planned residential community. The *Permit Amendment* is in the local public interest.

Transfer Application

Validity of the *Water Right*

The Department must confirm that each water right, or portion thereof, included in a *Transfer Application* is valid as part of its review under Idaho Code § 42-222.

The *Water Right* authorizes irrigation from ground water of up to 145 acres, of which 104 acres are currently being irrigated under the *Water Right* and 41 acres are leased to the Idaho Water Supply Bank. The *Water Right* is a valid water right and the *Transfer Application* should be evaluated under the criteria set forth in Idaho Code § 42-222.

Enlargement

Pursuant to Idaho Code § 42-222(1), for any application for transfer the Department must determine whether the proposed change would enlarge the use of water under the water right or injure other water rights. Enlargement occurs when the total diversion rate, annual diversion volume, or extent of beneficial use, exceeds the amounts or beneficial use authorized under the water right prior to proposed transfer. Enlargement can cause injury by reducing the amount of water available to satisfy the water rights of other water users.

The *Transfer Application* proposes to change the existing *Water Right* POU to include the Mayfield Springs project site and to add three PODs that are also authorized under the *Permit* as municipal use wells. The *Permit* requires common areas, parks, school grounds, golf courses, and any other large parcels only be irrigated under this water right with wastewater that has been previously beneficially used for potable or culinary purposes, has been treated in a wastewater treatment plant, and is delivered from the wastewater treatment plant to the parcel to be irrigated.

Water under the transferred *Water Right* will be used for irrigation purposes within Mayfield Springs, in areas not irrigated with wastewater as required under the *Permit*. Farrell testified use of the irrigation *Water Right* for lawns will reduce the amount of municipal water used for lawn irrigation, and common areas will be irrigated with treated wastewater. As stated

in the *Transfer Application*: “The water right is planned to be used to supplement/supply irrigation needs within the new planned community. Wastewater reuse is to be utilized to irrigate common areas as the community grows...The transfer would allow irrigation water to be supplied from the Mayfield Springs existing and planned municipal wells and used on project site.”

Intermountain will divert and deliver ground water for both the irrigation *Water Right* and the municipal *Permit* from the same municipal wells. The *Transfer Application* does not propose a change in the 145 acre limit, diversion rate, volume, or period of use authorized under the *Water Right*. Farrell testified the acres to be irrigated with the *Water Right* will be reported to the Department and consumptive use and associated volumes could be verified by calculating evapotranspiration rates. However, Farrell’s testimony indicated that Intermountain will not have control over how much water is used to irrigate the residential land or whether or when the acres are irrigated, even if the intended acres are identified. Insufficient evidence was provided to demonstrate how Intermountain will ensure that water diverted under the irrigation right will not, at times, be augmenting municipal demand. This additional use would be an enlargement of the *Water Right*.

The *Water Right* is currently used for agricultural irrigation and is only applied to meet crop demands and irrigation system requirements. Diversion would typically cease during harvest or high precipitation periods. Watering of residential land may also cease during high precipitation periods. However, if water withdrawals under the *Water Right* are commingled with water withdrawn for municipal purposes at times when residential land is not being irrigated, monitoring the *Water Right* based on the authorized annual volume limit will not ensure the irrigation *Water Right* will not be applied to municipal uses.

The irrigation *Water Right* has a 1974 priority date, while the municipal *Permit* has a 2005 priority date. In the event of priority administration, especially in the GWMA, water may continue to be delivered in priority under the irrigation *Water Right*. However, it would be comingled into the municipal system without a mechanism to control whether it is delivered and applied to irrigate designated residential land or used for in-house municipal purposes. This would injure water rights with priority dates between September 16, 1974 and October 17, 2005.

Johnson bears the burden of proof for all the pertinent criteria set forth in Idaho Code § 42-222. While monitoring and reporting conditions could be applied to the *Transfer Application*, and evidence was provided to demonstrate a willingness to comply with Department ground water monitoring, measurement, and reporting requirements, the transfer applicant did not demonstrate that delivery of irrigation water through a municipal system would not result in an enlargement of use of the original right nor injure other water rights.

CONCLUSIONS OF LAW

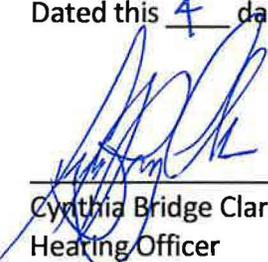
1. In the matter of Application for Amendment of Permit no. 63-32225, the applicant has met the burden of proof for the review criteria set forth in Idaho Code § 42-211 and *Application Amendment* should be approved.
2. In the matter of Application for Transfer no. 83875, the applicant has not met the burden of proof for the review criteria set forth in Idaho Code § 42-222. The *Transfer Application's* proposal to add three new PODs and the POU for Mayfield Springs Planned Community in order to divert and deliver water through the municipal delivery system will constitute an enlargement in use of the original right and other rights will be injured. The Department should deny the *Transfer Application*.

ORDER

IT IS HEREBY ORDERED that Application for Amendment of Permit no. 63-32225 in the name of Intermountain Sewer & Water, Corp. and Application is APPROVED as set forth in the approval documents issued in conjunction with this order.

IT IS HEREBY FURTHER ORDERED that Transfer no. 83875 in the name of Gregory B. Johnson are DENIED.

Dated this 4 day of JUNE 2021.



Cynthia Bridge Clark
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January 2021, I served a true and correct copy of the foregoing document on the following by the method(s) indicated below:

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Jean Hersley
Technical Records Specialist II

State of Idaho
Department of Water Resources
Amendment of Permit

No. 63-32225

Priority: September 16, 2005

Maximum Diversion Rate: 10.0 CFS
Maximum Diversion Volume: 1,815 AF

This is to certify that

INTERMOUNTAIN SEWER & WATER CORP
 PO BOX 344
 MERIDIAN ID 83680

has applied to amend a permit, and the amendment is APPROVED for development of water as follows:

Source : GROUND WATER

<u>Beneficial Use</u>	<u>Period of Use</u>	<u>Rate of Diversion</u>	<u>Annual Volume</u>
MUNICIPAL	01/01 to 12/31	10.0 CFS	1,815 AF

Location of Point(s) of Diversion

GROUND WATER	SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 34, Twp 01N, Rge 04E, B.M.	ELMORE County
GROUND WATER	NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 35, Twp 01N, Rge 04E, B.M.	ELMORE County
GROUND WATER	NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 28, Twp 01N, Rge 04E, B.M.	ADA County
GROUND WATER	NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 28, Twp 01N, Rge 04E, B.M.	ADA County
GROUND WATER	SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 28, Twp 01N, Rge 04E, B.M.	ADA County
GROUND WATER	SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 28, Twp 01N, Rge 04E, B.M.	ADA County
GROUND WATER	NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 33, Twp 01N, Rge 04E, B.M.	ADA County

Conditions of Approval

1. Proof of application of water to beneficial use shall be submitted on or before **September 08, 2022**.
2. Subject to all prior water rights.
3. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
4. Water bearing zone to be appropriated is 300 to 1000 feet.
5. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.
6. Prior to the diversion of water in connection with this right, the right holder shall provide the department with a plan for monitoring ground water levels in the vicinity of the place of use for this water right. The monitoring should occur in parallel with development and production and should include identification of non-production wells and timelines for measuring and reporting. The right holder shall not divert water in connection with this right until the monitoring plan is approved by the department. Failure to comply with the monitoring plan once it is accepted shall be cause for the department to cancel or revoke this right.

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7. Prior to or in connection with the proof of beneficial use statement to be submitted for municipal water use under this right, the right holder shall provide the department with documentation showing that the water supply system is being regulated by the Idaho Department of Environmental Quality as a public water supply and that it has been issued a public water supply number.
8. Place of use is within the area served by the public water supply system of Intermountain Sewer & Water Corp. The place of use is generally located within Township 1N, Range 4E, Sections 27 - 29, 32 - 35, and Township 1S, Range 4E, Section 2.
9. Common areas, parks, school grounds, golf courses, and any other large parcels may only be irrigated under this water right with wastewater that has been previously beneficially used for potable or culinary purposes, has been treated in a wastewater treatment plant, and is delivered from the wastewater treatment plant to the parcel to be irrigated.
10. Water diverted under this right may be used for direct irrigation of up to 1/2 acre per residential lot upon which a home has been constructed.
11. A map generally depicting the service area for this water right at the time of this approval is attached to this document for illustrative purposes.
12. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
13. This right does not grant any right-of-way or easement across the land of another.
14. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 161.
15. Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.

This amendment of permit is issued pursuant to the provisions of Idaho Code § 42-211.

Signed this 4 day of JUNE, 2021.



CYNTHIA BRIDGE CLARK
Hearing Officer

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.