

STAFF REPORT

TO: Hailey City Council
FROM: Beth Robrahn, Planning Director 
RE: Final Plat – CSM Condominium
HEARING: September 13, 2010

Applicant: Scott Miley
Location: Lot 1A, Block 3, Airport West Subdivision, Phase II (1760 Lear Lane)
Zoning: Service Commercial Industrial-Industrial (SCI-I)
Note: Staff analysis is in lighter type.

Notice

Notice for the public hearing was published in the Idaho Mountain Express and mailed to property owners within 300 feet on August 25, 2010.

Application

Scott Miley, has submitted an application for final plat approval of a 3-unit commercial condominium project located at Lot 1A, Block 3, Airport West Subdivision, Phase II (1760 Lear Lane). The ground under and around the units would be owned and maintained by the condominium association.

Section 3.4.1 of the Subdivision Ordinance allows for applications for platting condominium units in existing or approved structures to be reviewed through the short plat procedure. In this procedure, the Hearing Examiner or Commission reviews the preliminary plat only. Upon preliminary plat approval, the applicant submits a final plat for Council approval.

The application was heard by the Hailey Hearing Examiner on May 3, 2010 and approved with the following conditions:

- a) **The final plat shall include plat notes 1 through 7 as stated on the approved preliminary plat [with the following amendments and additions: if applicable]**
 - **The final plat shall include a note stating that the subdivision is subject to the recorded CC&R's, along with the instrument numbers thereof.**

This condition is met with Plat Note #5

- **A five foot (5') wide sidewalk with painted stripes connecting the**

pedestrian area at the front of the building (south elevation adjacent to Lear Lane), extending east to provide a future connection to Lot 1B shall be shown as a public pedestrian easement on the final condominium plat.

The Plat indicates a "5' Wide Sidewalk Easement"; this will be required to be changed to a "5' Wide Public Pedestrian Easement".

- **The private street snow storage area totaling the same square footage recorded on the plat of Lot 1A, Block 3 Airport West Subdivision, Phase II shall be indicated on the final condominium plat.**

1,125 square feet of snow storage for snow removed from the private street (Lear Ln) is required to be shown on the plat; A total of 1,238 square feet is indicated and noted by Plat Note #4 as being dedicated snow storage easements for the benefit of Lear Lane.

- b) **The association shall execute an agreement with the city for the delivery of water and sewer services and shall be responsible for payment of utilities, unless individual meters are installed for each unit.**

Individual utility meters were not installed. An agreement with the city for the delivery of water and sewer services and shall be responsible for payment of utilities is still required and is carried over as a condition of approval.

- c) **Landscaping, similar to what is found along Merlin Loop, be provided along Aviation Drive and planters be provided along the front elevation, between the two overhead garage doors (adjacent to Lear Lane) shall be installed.**

Landscaping is installed according to the approved Design Review plans on file with the City.

- d) **All improvements and other requirements shall be completed and accepted, or surety provided pursuant to Sections 3.3.7 and 5.9.1 of the Subdivision Ordinance, prior to recordation of the final plat.**

This condition will be carried over.

- e) **All provisions of the Zoning Ordinance #532, including but not limited to use regulations and parking requirements shall continue to be met. Additional parking may also be required upon subsequent change in use, in conformance with Hailey's Zoning Ordinance at the time of the new use.**

All applicable Zoning Ordinance requirements have been met or as subject to compliance prior to a Certificate of Occupancy being approved.

- f) **The final plat must be submitted within one (1) calendar year from the date of approval of the preliminary plat, unless otherwise allowed for within a phasing agreement.**

Findings of Fact of Preliminary Plat approval were signed by the Hailey Hearing Examiner on May 3, 2010. Final Plat application was submitted on August 2, 2010

- g) **Any applicable subdivision inspection fees due shall be paid prior to recording the final plat.**

No inspection of improvements by City personnel were required in excess of those covered by hook-up fees.

Department Comments:

The City Engineer confirmed the status of conditions b) and g)

Standards of Evaluation:

Bulk requirements:

Maximum Multi-Family Density – 1 unit per 1/10 acre.

SECTION 3 – PROCEDURE

3.3 Final Plat Approval.

The final plat, prepared by a Professional Land Surveyor, must be submitted within one (1) calendar year from the date of approval of the preliminary plat, unless otherwise allowed for within a phasing agreement or as otherwise provided herein. Plats not submitted for final approval within one (1) year or according to the phasing agreement, shall be considered expired and preliminary plat approval shall become null and void. The Council may extend the deadline for submitting the final plat upon holding a public hearing.

The Council's approval of the preliminary plat was on May 3, 2010.

3.3.2 The administrator shall review the Final Plat application to ensure that the application submitted is consistent with the approved preliminary plat. The conditions imposed on the preliminary plat approval must be either completed or shown on plans or the plat prior to any public notice for final plat approval.

The final plat is consistent with the preliminary plat approved by the Hearing Examiner. Conditions of preliminary plat approval have been met or are carried over.

SECTION 4 – DEVELOPMENT STANDARDS

Development standards were reviewed in detail during the preliminary plat approval process. Please refer to the preliminary plat Findings of Fact and Decision. No changes have been made to the plat since preliminary plat approval.

CONDOMINIUMS (Section 7 of the Subdivision Ordinance)

7.1 Plat Procedure. The Developer of a condominium project shall submit with the preliminary plat application as required by this Ordinance a copy of the proposed by-laws and condominium declarations of the proposed condominium development. The documents shall adequately provide for the control (including billing where applicable) and maintenance of all common utilities, common area, recreational facilities, and Green Space. The Developer may submit a final plat application following inspection and approval by the Building Inspector of the footings and setbacks of the condominium building. Prior to final plat approval, the Developer shall submit to the City a copy of the final by-

laws and condominium declarations to be recorded with the County Recorder, including the instruments number(s) under which each document was recorded.

Draft Declaration of Covenants, Conditions, and Restrictions have been submitted. The City has not and will not in the future determine the enforceability or validity of the Declaration of Covenants, Conditions, and Restrictions or other private agreements.

7.2 Garages. All garages shall be designated on the preliminary and final plats and on all deeds as part of the particular condominium units. Detached garages may be platted on separate sub-lots, provided that the ownership of detached garages is appurtenant to specific condominium units on the condominium plat and that the detached garage(s) may not be sold and/or owned separate from any dwelling unit(s) within the condominium project.

The garages are designated as part of each unit.

7.3 Storage/Parking Areas. Condominium projects shall provide parking spaces according to the requirements of Article IX of the Zoning Ordinance.

The on-site parking requirements are met.

7.4 Construction Standards. All condominium project construction shall be in accordance with the IBC, IRC and IFC.

Compliance with all applicable construction standards is required by the Building Official prior to issuance of a certificate of occupancy.

7.5 General Applicability. All other provisions of this Ordinance and all applicable ordinances, rules and regulations of the City and all other governmental entities having jurisdiction shall be complied with by Condominium developments.

Upon meeting proposed conditions of approval, the proposed application does not appear to conflict with other provisions.

7.6 Conversion. The conversion by subdivision of existing units into Condominiums shall not be subject to Section 4.10 of this Ordinance.

This subdivision is not subject to Section 4.10 of the Subdivision Ordinance.

Summary and Suggested Conditions

The City Council shall hold a public hearing and approve, conditionally approve, or deny the final plat application.

Any aggrieved party is entitled to judicial review of any preliminary plat or final plat decision by the Council in accordance with the provisions of Idaho Code §§67- 5201, *et. seq.*

The following conditions are suggested to be placed on any approval of this application:

- a) The final plat shall include a note stating that the subdivision is subject to the recorded CC&R's, with the instrument numbers thereof.
- b) The final plat submitted for signature shall include plat notes 1 through 7 as stated on the approved final plat.
- c) The association shall be responsible for payment of utilities. Billing and utility payment information shall be addressed in the Condominium Declarations. An agreement with the city for the delivery of water and sewer services and shall be responsible for payment of utilities is still required and is carried over as a condition of approval.
- d) All improvements and other requirements shall be completed and accepted, or surety provided pursuant to Sections 3.3.7 and 5.9.1 of the Subdivision Ordinance, prior to recordation of the final plat.
- e) All provisions of the Zoning Ordinance #532, including but not limited to use regulations and parking requirements shall continue to be met. Additional parking may also be required upon subsequent change in use, in conformance with Hailey's Zoning Ordinance at the time of the new use.
- f) The final plat shall be recorded within one year of the date of final plat approval (unless otherwise provided for within a phasing agreement.) The final plat submitted for signature shall conform to the requirements found in Article 50-1301 (*et. seq.*) of the Idaho Code (as amended) and to the requirements set forth by Blaine County for digital plat submittals. The applicant shall provide the City with a letter-size or ledger-size photocopy of the recorded plat showing the instrument number and date of recordation.

Motion Language:

Approval:

Motion to approve the Final Plat of CSM Condominiums located at Lot 1A, Block 3, Airport West Subdivision, Phase II (1760 Lear Lane), finding that that final plat does substantially conform to the approved preliminary plat.

Denial:

Motion to deny the Final Plat of CSM Condominiums located at Lot 1A, Block 3, Airport West Subdivision, Phase II (1760 Lear Lane), finding that _____ [the Council should cite which standards are not met and provide the reason why each identified standard is not met].

Continuation:

Motion to continue the public hearing upon the Final Plat application of CSM Condominiums to _____ [the Council should specify a date].

STAFF REPORT

TO: Hailey City Council
FROM: Beth Robrahn, Planning Director *BR*
RE: Complete Streets Plan
HEARING: September 13, 2010

Note: Staff analysis is in lighter type.

Notice

Notice is not required for consideration of the Complete Streets Plan, however notice for the presentation and public hearing on September 13, 2010 was published in the Idaho Mountain Express and mailed to public agencies and area media on August 25, 2010 in an effort to increase public awareness and encourage citizen participation.

Procedural History

The purpose of the Complete Streets Plan is to implement components of Hailey Transportation Master Plan (TMP) involving pedestrian and bicycle infrastructure improvements by setting the framework to formally adopt the following:

Hailey Municipal Code	• Standards for pedestrian and bicycle infrastructure projects
	• Process for engaging the public in the development of pedestrian and bicycle infrastructure projects
	• Process for coordination between city departments and other agencies
	• Procedure for project design, review and approval.
	• Policies for maintenance
Capital Improvement Plan (CIP)	• Criteria for prioritizing pedestrian and bicycle infrastructure projects
	• Guidelines for funding

On September 7, 2010, the Planning and Zoning Commission recommended the City Council adopt the Complete Streets Plan by resolution, finding that the Complete Street Plan is in accordance with the Comprehensive Plan and would be implemented by amendments to the Municipal Code.

Some of the Municipal Code amendments suggested above are still in the process of being reviewed by the Planning and Zoning Commission and will be forwarded to the Council in October.

Standards of Evaluation

No standards are required for the Council to adopt the Complete Streets Plan. However, given the fact the Complete Streets Plan serves as the basis for the drafting of new standards, it would be appropriate to consider the relationship of the proposed Complete Streets Plan to the Comprehensive Plan.

The purpose of the Complete Streets Plan is to implement components of Hailey Transportation Master Plan (TMP) involving pedestrian and bicycle infrastructure improvements by setting the framework to formally adopt standards and procedures for pedestrian and bicycle infrastructure projects.

The Hailey TMP was developed with consideration of all of the 1998 – 2003 Comprehensive Plan goals and policies related to transportation. The focus of the 1998 – 2003 Comprehensive Plan was the safe and efficient movement of people, while minimizing the adverse impacts of all forms of transportation with recognition of the importance of transportation choices, street design, and land use patterns. The 1998 – 2003 Plan detailed the three components to manage traffic and create a healthy transportation system: Engineering, to build multi-modal and pedestrian-friendly transportation elements; Enforcement, to provide both incentives for positive actions and disincentives for undesirable actions; and Education, to increase social awareness and encourage personal change.

The Hailey Transportation Master Plan (TMP) was adopted by the City Council in November 2007 (Resolution 2007-18). The TMP was intended as the City's implementation of the 1998 – 2003 Comprehensive Plan. The TMP made recommendations pertaining to specific policy decisions; the Complete Streets Plan with the associated amendments to the street standards and procedures, also before the Commission for review and consideration, are intended to be the next step in the implementation process.

Summary

The Council should consider whether to adopt the Complete Streets Plan by resolution; a draft resolution accompanies the Complete Streets Plan.

Motion Language

Should the Council wish to adopt the Complete Streets Plan, the following motion language can be used:

Motion to adopt the Complete Streets Plan by Resolution 2010-_____, finding that the Complete Street Plan is in accordance with the Comprehensive Plan and would be implemented by amendments to the Municipal Code.

CITY OF HAILEY
RESOLUTION 2010-___

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF HAILEY, IDAHO, ADOPTING THE CITY OF HAILEY COMPLETE STREETS PLAN

WHEREAS, purpose of the Complete Streets Plan is to implement components of Hailey Transportation Master Plan (TMP) involving pedestrian and bicycle infrastructure improvements by setting the framework to formally adopt changes to the Municipal Code and Capital Improvement Plan.

WHEREAS, On September 7, 2010, the Planning and Zoning Commission recommended the City Council adopt the Complete Streets Plan by resolution, finding that the Complete Street Plan is in accordance with the Comprehensive Plan and would be implemented by amendments to the Municipal Code.

WHEREAS, The Hailey TMP was developed with consideration of all of the 1998 – 2003 Comprehensive Plan goals and policies related to transportation. The focus of the 1998 – 2003 Comprehensive Plan was the safe and efficient movement of people, while minimizing the adverse impacts of all forms of transportation with recognition of the importance of transportation choices, street design, and land use patterns. The 1998 – 2003 Plan detailed the three components to manage traffic and create a healthy transportation system: Engineering, to build multi-modal and pedestrian-friendly transportation elements; Enforcement, to provide both incentives for positive actions and disincentives for undesirable actions; and Education, to increase social awareness and encourage personal change.

WHEREAS, The Hailey Transportation Master Plan (TMP) was adopted by the City Council in November 2007 (Resolution 2007-18). The TMP was intended as the City's implementation of the 1998 – 2003 Comprehensive Plan. The TMP made recommendations pertaining to specific policy decisions; the Complete Streets Plan with the associated amendments to the street standards and procedures, also before the Commission for review and consideration, are intended to be the next step in the implementation process.

WHEREAS, input provided through the 2010 Comprehensive Plan update process and the 2009 Citizen Satisfaction Survey was incorporated into the drafting of the Complete Streets Plan. The Comprehensive Plan update process emphasized the importance of safe streets. The Citizen Survey noted sidewalk connections as a priority.

WHEREAS, the Hailey City Council has received and reviewed the attached City of Hailey Complete Streets Plan dated September 2010 from the Hailey Planning Department.

CITY OF HAILEY
COMPLETE STREETS PLAN
Enhancing Pedestrian and Bicycle Travel

DRAFT

Table of Contents

Introduction.....	1
Background.....	1
Purpose.....	2
Complete Streets Citizen’s Advisory Committee.....	2
Complete Streets.....	3
City of Hailey Complete Streets Policy.....	4
Street Classification.....	5
Designated Bicycle and Pedestrian Corridors.....	6
Designated Truck Route.....	6
Traffic Calming.....	6
Pedestrian System.....	7
Bicycle System.....	8
Defining Bicycle Users.....	8
Sidewalks and Bicycle Use.....	9
Liability of Using Sidewalks as Bicycle Facilities.....	10
AASHTO Guide Highlights.....	11
Bike Lane Symbols and Markings.....	12
Bicycle Route Signing.....	13

DRAFT

CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Introduction

The Hailey Complete Streets Plan was developed to comprehensively plan and design Hailey streets to properly address multi-modal needs, enabling safe access for all users; pedestrians, bicyclists, motorists and transit vehicles and passengers. The Complete Streets approach was used as the best practices basis for the plan and the subsequent adoption of standards in the Hailey Municipal Code.

Background

Following adoption of the Transportation section of the 1998-2003 Hailey Comprehensive Plan, the City identified the need to build on and expand the Transportation section to include a more thorough assessment and consideration of pedestrian and bicycle system needs and amenities in and throughout Hailey. The 1998-2003 Hailey Comprehensive Plan transportation goals, policies and implementation measures are summarized in Appendix A.

The City of Hailey 2007 Transportation Master Plan (TMP) is intended as the City's implementation of the 1998-2003 Hailey Comprehensive Plan Transportation section and includes of the following elements as action items:

- Plan and map for all modes, including pedestrian, bicycle, transit, motor vehicles and trucks.
- Street Design Standards and Functional Classification Policy & Map
- Traffic Management Plan with Traffic Calming application and program guidelines
- Parking Plan
- Public Transportation Plan
- Transportation Finance

The TMP provides the City with a guide for transportation system improvements to meet existing and future travel needs. The purpose of the TMP is to provide a link between the City's land use assumptions and the transportation facilities and services needed to support the growth projected over a 20 years period. The TMP focuses on safety, capacity, and operational improvements on SH-75 and the city's arterial and collector streets. The TMP incorporates pedestrian and bicycle programs to meet the overall transportation needs of the community. Appendix E of the TMP identified needed revisions to the City's street standards for consistency with the most recent federal bicycle and pedestrian standards and policies.

CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Purpose

The purpose of the Hailey Complete Streets Plan is to build upon the recommendations of the TMP and to implement components of the TMP involving pedestrian and bicycle infrastructure improvements by setting the framework to formally adopt the following:

Hailey Municipal Code	<ul style="list-style-type: none"> Standards for pedestrian and bicycle infrastructure projects
	<ul style="list-style-type: none"> Process for engaging the public in the development of pedestrian and bicycle infrastructure projects
	<ul style="list-style-type: none"> Process for coordination between city departments and other agencies
	<ul style="list-style-type: none"> Procedure for project design, review and approval
	<ul style="list-style-type: none"> Policies for maintenance
Capital Improvement Plan (CIP)	<ul style="list-style-type: none"> Criteria for prioritizing pedestrian and bicycle infrastructure projects
	<ul style="list-style-type: none"> Guidelines for funding

Complete Streets Citizen’s Advisory Committee

A Citizen’s Advisory Committee was formed with the primary goal of assisting the development of a set of street designs for specific corridors that will help make planning and land development processes more predictable for developers, city staff, the City Council, and the public.

The intent of the street designs is to meet the needs of all users in a manner compatible with a Complete Streets policy and concepts adopted or proposed in the Comprehensive Plan and Council strategic planning initiatives.

The Complete Streets Citizen’s Advisory Committee sought a modified approach from previous efforts to create street standards by identifying the needs and uses for each area of town, rather than identify streets as “arterial”, “collector” or “local” and having a standard cross section for each definition.

CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Complete Streets

In communities across the country, a movement is growing to provide transportation networks that are safer, more livable and welcoming to everyone.

The national Complete Streets movement focuses on communities adopting a Complete Streets policy to help ensure that transportation planners and engineers consistently design and operate the entire roadway with all users in mind - including bicyclists, transit vehicles and passengers and pedestrians of all ages and abilities.

Complete Streets Principle

- Complete Streets are designed and operated to enable safe access for all users of all ages and abilities.
- Creating Complete Streets means changing the policies and practices of transportation agencies.
- A Complete Streets policy ensures that the entire right of way is routinely designed and operated to enable safe access for all users.
- Transportation agencies must ensure that all road projects result in a Complete Street appropriate to local context and needs.

Elements of a Good Complete Streets Policy

A good Complete Streets policy:

- Specifies that 'all users' includes motorists, transit vehicles and passengers, pedestrians and bicyclists, of all ages and abilities and must be able to safely move along and across a complete street.
- Aims to create a comprehensive, integrated, connected transportation network.
- Recognizes the need for flexibility; all streets are different and user needs will be balanced.
- Is adoptable by all agencies to cover all roads.
- Applies to both new and retrofit projects, including design, planning, maintenance, and operations, for the entire right of way.
- Makes any exceptions specific and sets a clear procedure that requires high-level approval of exceptions.
- Directs the use of the latest and best design standards.
- Directs that Complete Streets solutions fit in with context of the community.
- Establishes performance standards with measurable outcomes.

Implementation

An effective Complete Streets policy should prompt transportation agencies to:

- Restructure their procedures to accommodate all users on every project.
- Re-write their design manuals to encompass the safety of all users.
- Re-train planners and engineers in balancing the needs of diverse users.
- Create new data collection procedures to track how well the streets are serving all users.

CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

City of Hailey Complete Streets Policy

The safety and convenience of all users of the transportation system will be accommodated and balanced in the design, operation, and maintenance of all new and retrofit transportation and development projects so that pedestrians, cyclists, transit vehicles and passengers, motor vehicle drivers, and people of all ages and abilities are able to travel safely and comfortably within the public right of way in a manner consistent with Complete Streets principles.

Complete Streets implementation will be appropriate to the context and function of the street and the surrounding neighborhood, and will recognize that balancing user needs may be achieved in different ways depending on the area in which the street is located and its classification.

The City of Hailey will use the latest and best design practices to create a connected, integrated, and comprehensive network of transportation facilities that enables all users to safely travel along and across streets.

Procedures for evaluating projects will be established and will include measures of pedestrian, cyclist, and transit levels of service and use.

Exceptions to providing Complete Streets in transportation and development projects will be made only when:

1. specific modes or users are prohibited by law from using the roadway. In such case, a greater effort shall be made to accommodate these users and modes elsewhere;
2. the project consists entirely of ordinary maintenance activities designed to keep assets in serviceable condition (e.g. mowing, cleaning, sweeping, spot repair)
3. establishment of facilities would be contrary to public health and safety; or
4. extraordinary conditions exist that are documented and approved by the City Council.

The Complete Streets approach provides a framework for designing public spaces to meet the needs of all users, including vehicle drivers, cyclists, pedestrians, transit riders, maintenance personnel, and people of all ages and abilities. There is no single design or template for a complete street. For instance, not all streets require bike lanes in order to provide safe conditions for cyclists—in many cases a shared lane is more appropriate to the context and use of the street. Some streets, based on their predominant use or need to accommodate specific uses, such as transit or truck traffic, might have wider travel lanes and larger turning radii on certain corners, while other streets can have narrowed travel lanes, bulb-outs and wider sidewalks. A variety of available treatments allows for different solutions based on the needs and constraints of each corridor.

The City of Hailey will move beyond the adoption of a Complete Streets policy and will concurrently adopt new street standards that incorporate the Complete Streets principles in Title 12 of the Hailey Municipal Code.

CITY OF HAILEY COMPLETE STREETS PLAN

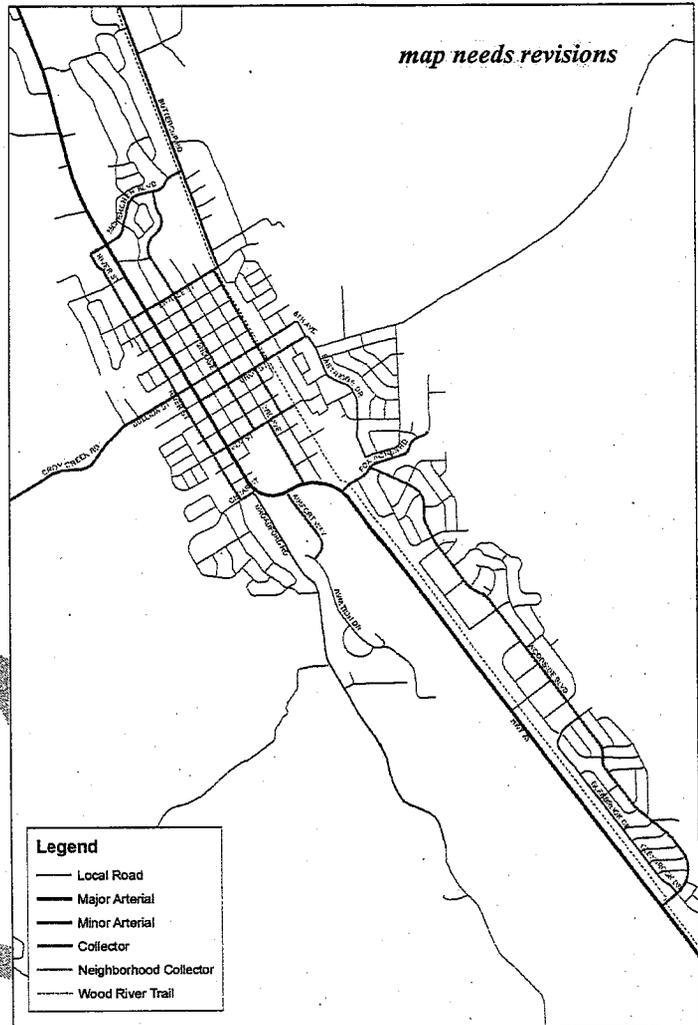
Enhancing Pedestrian and Bicycle Travel

Street Classification

A street classification outlines a hierarchy of roadways to meet the City's differing transportation needs and serves as a guide for future development of the overall street network. The purpose of the street classification is to provide a hierarchy of streets, including arterials, collectors, and local streets. Arterial streets serve higher traffic volumes and may have few access points. Collector streets link arterials and local streets and may provide access to individual parcels. Local streets provide neighborhood circulation and access to individual parcels. A well-connected hierarchy of streets enhances overall mobility and access within the City, while also facilitating greater opportunities for pedestrian and bicycle travel.

The street classifications for the City of Hailey include five types of streets: major arterials, minor arterials, collector streets, neighborhood collectors, and local/access streets. The Transportation Master Plan has identified minor modifications to the

city's historical classification system to incorporate more pedestrian and bicycle friendly design treatments; these modifications are an update from the City's 2000 Comprehensive Plan. The TMP reclassified collectors into two distinct classifications, collectors and neighborhood collectors. The neighborhood collector is designated by the surrounding land use. Through the process of developing Complete Street sections for the various street classifications and areas of town, the number of classifications was paired back down to three; arterials, collectors, and local streets.



CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Designated Bicycle and Pedestrian Corridors

The following streets have been identified as the designated bicycle and Pedestrian Corridors in the City of Hailey. Improvements to these streets should include Bicycle Route signage placed according to current MUTCD and AASHTO standards.

East West

McKercher
Myrtle
Bullion
Croy

Quigley Rd
Elm
W. Cedar
Fox Acres

North South

River
Main
Broadford

Second Ave
Eastridge
Woodside

Designated Truck Route

The issue of an alternate route for truck traffic was thoroughly considered within the Transportation Master Plan process. The inability to effectively remove truck traffic, without also removing valued through traffic (people driving through Hailey who should be enticed to stop and explore) from Main Street results in the challenging need to reduce the impact of truck traffic on Main Street while maintaining it as the designated truck route. Main Street should be designated as the truck route by ordinance in combination with improvements to Main and River Street to minimize the impact of truck traffic.

Traffic Calming

Traffic Calming is the combination of mainly physical measures that reduce the negative effects of motor vehicle use, alter driver behavior and improve conditions for pedestrians and bicyclists. Definitions of traffic calming vary, but they all share the goal of reducing vehicle speeds, improving safety and enhancing quality of life. Most definitions focus on engineering measures to change driver behavior. Some focus on engineering measures that compel drivers to slow down, excluding those that use barriers to divert traffic.

Traffic Calming measures are categorized as volume control or speed control. Volume control measures are primarily used to address cut-through traffic problems by blocking certain movements, thereby diverting traffic to streets better able to handle it. Speed control measures are primarily used to address speeding problems by changing vertical alignment, changing horizontal alignment, or narrowing the roadway.

Measures such as roundabouts, chicanes, neckdowns, chokers, lateral shifts and speed humps have been demonstrated to reduce traffic volume by 20-35% and reduce speed by 7-22%.ⁱ

CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Pedestrian System

Each day, nearly everyone moving within Hailey is a pedestrian for at least some part of every trip. Yet within the last 20-30 years pedestrian travel has typically received secondary attention with greater emphasis given to mobility and access for the automobiles and trucks. Pedestrians and bicyclists are often designed for as an afterthought and the facilities are not always the best design for the circumstance of a given street.

The Pedestrian System design standards adopted in Title 12 of the Hailey Municipal Code improve pedestrian conditions and in doing so, make Hailey more walkable and livable, increase pedestrian accessibility and mobility and comply with the Americans with Disabilities Act (ADA)ⁱⁱ and Americans with Disabilities Act Accessible Guidelines (ADAAG) regulationsⁱⁱⁱ. Design features relative to the ADA requirements are based on the premise that accessible design is the foundation for all good pedestrian system design.

Rather than develop a fully independent and comprehensive guide, the Pedestrian System standards directly reference a number of federal and professional sources for the full range of pedestrian elements including: FHWA's Designing Sidewalks and Trails for Access^{iv}, AASHTO's Guide for Pedestrian Facilities^v and FHWA's Pedestrian Facility User's Guide^{vi}. The Pedestrian System standards summarizes only those elements of the pedestrian system crucial to planning, design and construction of critical pedestrian facilities in Hailey.

CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Bicycle System

Design standards are important for the consistent development of a system of bicycle infrastructure. Significant guidance is provided at the federal and state level in assisting the City in revisions for design guides to bicycle facilities, including: AASHTO's *Guide for the Development of Bicycle Facilities*^{vii} and the MUTCD.^{viii}

Defining Bicycle Users

There are a variety of bicyclists distinguished by their skills, confidence and preferences. According to AASHTO, "some riders are confident riding anywhere they are legally allowed to operate and can negotiate busy and high speed roads that have few, if any, special accommodations for bicyclists. Most adult riders are less confident and prefer to use roadways with a more comfortable amount of operating space, perhaps with designated space for bicyclists, or shared use paths that are away from motor vehicle traffic. Children may be confident riders and have excellent bike handling skills, but have yet to develop the traffic sense and experience of an everyday adult rider."

For the purpose of developing standards for bicycle facilities in Hailey the following categories of bicycle user types are applied. Regardless of the skill level, programs that teach cyclists good technique and rules of the road are essential.

Advanced or Experienced Riders. Generally use their bicycles as they would a motor vehicle, are riding for convenience and speed and want direct access to destinations with a minimum of detour or delay. They are typically comfortable riding with motor vehicle traffic; however, they need sufficient operating space on the traveled way or shoulder to eliminate the need for themselves or a passing motor vehicle to shift position.

Basic or Less Confident Adult Riders. May also be using their bicycles for transportation purposes, e.g., to get to the store or to visit friends, but prefer to avoid roads with fast and busy motor vehicle traffic unless there is ample roadway width to allow easy overtaking by faster motor vehicles. Basic riders are comfortable riding on neighborhood streets and shared use paths and prefer designated facilities such as bike lanes or wide shoulder lanes on busier streets.

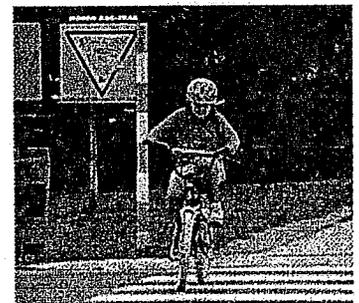
Children. May ride on their own or exclusively with their parents and require access to key destinations in their community, such as schools, stores and recreational facilities. Residential streets with low motor vehicle speeds, linked with shared use paths and busier streets with well-defined pavement markings can accommodate children without encouraging them to ride in the travel lane of major arterials and can offer safe alternatives to riding on the sidewalk.



Source: www.canada.com/ottawacitizen/news



Source: www.contextsensitivesolutions.org



Source: www.Indygreenways.org

CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Bicycle Planning Definitions

The City of Hailey begins more proactive planning for bicycle facilities by first expanding upon and clarifying the definitions of the various bicycle facilities, especially for the on-street bicycle system. Historical plan documentation refers to the mapping of a "Bikeway" or "Bikeway Route" network, some of which is implied to mean on-street bicycle lanes. Without further clarity in these definitions, the bicycle planning intentions will be unclear to planners, engineers, policy officials and the general public. To help advance consistent dialogue between the City of Hailey and the community regarding bicycle facility planning and design, within the context of multi-modal systems development and consistency with AASHTO and the MUTCD, the following definition of terms concerning bicycle facilities are adopted as part of the amendments to Title 12 of the Hailey Municipal Code:

Bicycle Facilities (or Infrastructure) – a general term denoting improvements and provisions that accommodate or encourage bicycling, including parking and storage facilities, and shared roadways not specifically defined for bicycle use.

Bicycle Lane - a portion of a roadway that has been designated by signs and pavement markings for preferential or exclusive use by bicyclists. Bicycle lanes are facilities that are placed on both sides of a street, and they carry bicyclists in the same direction as adjacent vehicle traffic. In addition to lane striping, pavement and signage identify lanes.



Bikeway - a generic term for any road, street, path that in some manner is specifically designated for bicycle travel, regardless of whether such facilities are designated for the exclusive bicycle use or are to be shared with other travel modes.

Designated Bicycle Route - a system of bikeways designated by the roadway's jurisdictional authority with appropriate directional and informational route signs, with or without specific bicycle route numbers. Bicycle routes, which might be a combination of various types of bikeways, should establish a continuous routing. Designated bicycle routes can be divided into *shared roadway* and *shared-use path* facilities.



Paved Shoulder – a paved area at least four feet in width adjacent to the travel lane and separated from travel lanes with a lane stripe. This facility is typically applied to a rural cross-section that does not have curb and gutter.

Shared Roadway - where bicyclists and motorists use the same travel lane. Shared roadways bicycle routes can be placed on streets with wide outside travel lanes, along streets with bicycle route signing, or along local streets where motorists have to weave into the adjacent lane in order to safely pass a bicyclist. Shared roadways may be undesignated or designated bike routes. The formal designation and signing of a shared roadway should indicate to bicyclists that particular advantages exist to using the routes compared to other routes.



CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Shared-Use Path – a bikeway physically separated from motorized vehicular traffic by an open space or barrier, and is either within the highway right-of-way or within an independent alignment. Shared-use paths are also used by pedestrians (including skaters, users of manual and motorized wheelchairs, and joggers) and other authorized motorized and non-motorized users. The Wood River Trail is a Shared-Use Path.



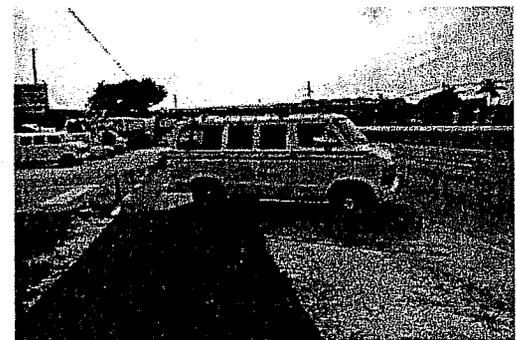
Sidewalk or Pedestrian Corridor - the portion of a street right-of-way designed for preferential or exclusive use by pedestrians.

Wide Curb Lane or Shared Lane - an outside lane usually adjacent to a curb and wider than 12 feet to accommodate both bicyclists and motorists in the same lane providing enough room where motorists will not need to change lanes to pass a bicyclist. AASHTO recommends a width of 14 feet.

Sidewalks and Bicycle Use

Some of Hailey's streets were constructed prior to the City's adoption of street standards and lack sidewalk facilities on both sides of the street. Some of these streets have since been retrofitted with pedestrian facilities along one side of local streets rather than a sidewalk on both sides.

In general, these one sided sidewalks are likely to attract two-way, pedestrian and bicycle travel, regardless of their width. State laws prohibits bicycle use on sidewalks, therefore existing sidewalks on one side of the street are referred to as "sidepaths". Sidepaths are a design not in the *AASHTO Pedestrian Guide*, which is used by many cities and counties as the base design guideline and policy for pedestrian facilities.



Liability of Using Sidewalks as Bicycle Facilities

These sidepaths are often referred to locally as a bike path because of the resemblance to the Wood River Trail and the implied use is for both pedestrians and cyclists. A summary regarding the liability of such paths was prepared by bicycle design and planning experts. The paper *Liability Aspects of Bicycle Environments: Bicycle Facilities and Roads*, by three notable experts on bicycle transportation, Alex Sorton, P.E., Tom Walsh, P.E. and John Williams was presented at the Institute of Traffic Engineers 1990 Annual Meeting and specifically recommends against sidewalks and sidepaths as bicycle facilities.

Sidewalk Bike Paths Often Fail.

(1) Each driveway can be a conflict to bicyclists. Half of all riders come against traffic. (2) Where does the designer place the facility laterally? Too close to the road and there are serious operational problems. The motorist blocks the path, and some bicyclists are inclined to go to the front. Too far back the turning motorist picks up speed and fails to notice the crossing. This motorist lost in court when the bicyclist was injured while going in front.

CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

AASHTO Guide Highlights

The AASHTO Guide is easily summarized by the following two recommendations:

- DO NOT put two-way bikeways on one side of a street. Such facilities cause serious conflicts at intersections and driveways due to bicyclists traveling riding against the flow of traffic. For this reason two-way bike lane use has led to a number of fatal head-on collisions across the country. In addition such facilities encourage wrong-way riding on other streets.
- DO NOT designate sidewalk bikeways.

In general, AASHTO qualifies the designated use of sidewalks (as a signed shared facility) for bicycle travel as unsatisfactory. Furthermore, the proximity of two-way, shared-use paths (discussed above as sidepaths) to adjacent streets can also cause several operational problems.

AASHTO emphasizes the importance of recognizing that the development of extremely wide sidewalks does not necessarily add to the safety of sidewalk bicycle travel, since wide sidewalks encourage higher speed bicycle use and increase potential for conflicts with motor vehicles at intersections, as well as with pedestrians and fixed objects.

AASHTO recommends that sidewalk bikeways should be considered only under certain limited circumstances, such as:

- a. To provide bikeway continuity along high speed or heavily traveled roadways having inadequate space for bicyclists, and uninterrupted by driveways and intersections for long distances.
- b. On long, narrow bridges. In such cases, ramps should be installed at the sidewalk approaches. If approach bikeways are two-way, sidewalk facilities also should be two-way.

While not recommended, in the case sidewalk bikeways are established, unnecessary obstacles should be removed. Whenever bicyclists are directed from signed shared roadways to sidewalks, curb cuts should be flush with the street to assure that bicyclists are not subjected to problems associated with crossing a vertical lip at a flat angle. Curb cuts at every intersection are necessary, as well as bikeway yield or stop signs at uncontrolled intersections. Curb cuts should be wide enough to accommodate adult tricycles and two-wheel bicycle trailers.

In residential areas, sidewalk riding by young children is common. With lower bicycle speeds and lower cross street auto speeds, potential conflicts are somewhat lessened, but still exist. Nevertheless, this type of sidewalk bicycle use is generally accepted. However, it is inappropriate to sign these facilities as bicycle routes. In general, bicyclists should not be encouraged through signing to ride facilities that are not designed to accommodate bicycle travel. The City of Hailey and Mountain Rides Safe Routes to School program should provide parents and children a consistent message about the limited acceptability and the associated hazards of riding bicycles on sidewalks.

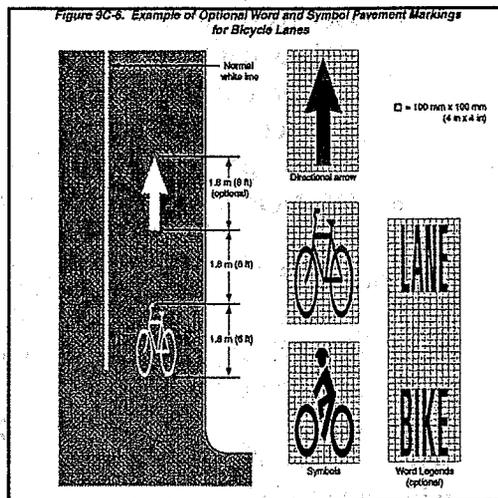
CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Bike Lane Symbols and Markings

The standards for pavement markings and signing follows guidance provided by the Manual of Uniform Traffic Control Devices (MUTCD)^{ix} for striping bicycle lanes on its arterial and collector streets.

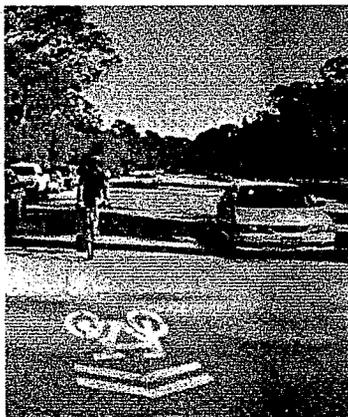
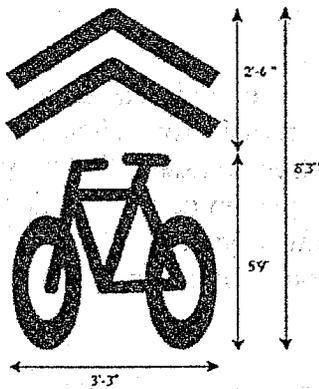
MUTCD Standard Bike Lane Symbols



Shared-Lane Symbols and Markings

In the absence of sufficient space to include on-street bicycle lanes on several major streets, it is important to provide greater route designation for shared travel lanes. These shared lanes, if posted and marked appropriately, indicate significant bicycle traffic to both the motorists and cyclists. The use of “sharrow” pavement markings should be considered in the future for these conditions. While this pavement marking has been adopted by other states, the Idaho Transportation Department (ITD) has not yet considered and approved use of “sharrow” pavement markings for shared-lane designation. Further statewide policy consideration may be required before application and appropriate designation of sharrow pavement markings within the City of Hailey. San Francisco’s research and findings in report titled “San Francisco’s Shared-Lane Pavement Marking Study”^x indicates caution should be used in “sharrow” pavement marking placement, particularly along streets with on-street parking.

“Sharrow” Shared-Lane Symbol and Pavement Marking



Source: San Francisco’s Shared-Lane Pavement Marking Study, February 2004.

CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

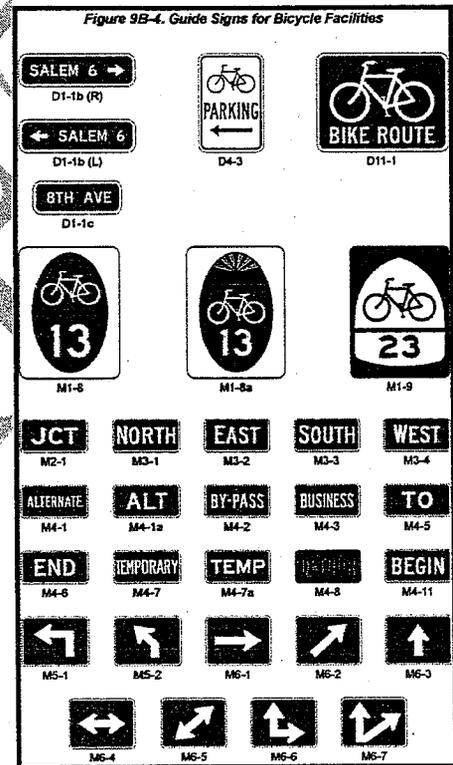
Bicycle Route Signing

A city-wide bike route signing program that better links the on-street facilities and the shared-use paths using MUTCD guidelines should be implemented as funds become available. Auxiliary signs may be used with standard bicycle route signs to inform cyclists of route continuity and major cycling attractions.

Revised research by MUTCD sub-committee work has recently been completed and the MUTCD will be updated to include findings. Once the MUTCD is revised, the City will consider the following for use in the installation of *junction*, *cardinal direction* and *alternative route auxiliary* signs (in conjunction with appropriate Bicycle Route Guide signs, Bicycle Route signs, or US Bicycle Route signs):

- Advance Turn Arrow (M5 series) and Directional Arrow (M6 series) auxiliary signs should be mounted below the appropriate Bicycle Route Guide signs, Bicycle Route signs, or US Bicycle Route signs.
- Route sign auxiliaries carrying word legends that are used on bicycle routes should have a minimum size of 12 x 6 inches.
- Route sign auxiliaries carrying arrow symbols that are used on bicycle routes should have a minimum size of 12 x 9 inches.
- All route sign auxiliaries are to match the color combination of the route sign that they supplement.
- Destination may be mounted below Bicycle Route Guide to furnish additional information, such as directional changes in the route, or intermittent distance and destination information.

Example of Auxiliary Bike Signs



CITY OF HAILEY COMPLETE STREETS PLAN

Enhancing Pedestrian and Bicycle Travel

Endnotes

ⁱ trafficalming.org

ⁱⁱ Americans with Disabilities Act Accessibility Guidelines, U.S. Access Board, 2002.

ⁱⁱⁱ See FHWA Memorandum, July 30, 2004. "The US Access Board, the federal agency responsible for developing accessibility guidelines under the Americans with Disabilities Act (ADA), published the ADA/ABA Accessibility Guidelines (ADA/ABA-AG) on July 23, 2004. The Access Board is charged with developing minimum guidelines to assist the Department of Transportation (DOT) and Department of Justice (DOJ) in establishing design standards. Although the publication of these guidelines marks the completion of the Access Board's responsibilities, these guidelines will not become ADA standards until the Departments of Justice and Transportation go through standard notice-and-comment rulemaking to adopt the new guidelines into the standards they maintain under the ADA, a process which is expected to take one to two years. In the interim, agencies must continue to use current ADA standards -- including those for detectable warnings at curb ramps and blended transitions -- when building new and altering pedestrian facilities. Therefore, there have been no changes to the existing requirements (since July 26, 2001) that detectable warnings must be applied to curb ramps in new construction and alterations.

As part of updating the guidelines, the Access Board has developed more specific guidelines for public rights-of-way. On June 17, 2002 the Board released a draft of these guidelines for public comment in advance of publishing a proposed rule. Included are provisions for sidewalks, curb ramps, street crossings and related pedestrian facilities that are not addressed in the newly published ADA/ABA-AG. Both FHWA and the Access Board encourage use of the June 17, 2002 draft's scoping and technical provisions for detectable warnings as an equivalent facilitation to the current requirements in the 1991 (current) ADAAG.

USDOT is an implementing agency for the title II of the Americans with Disabilities Act and for section 504 of the Rehabilitation Act; the FHWA is the USDOT agency responsible for overseeing Title II and 504 compliance for pedestrian access in public rights-of-ways. USDOT is evaluating the ADA/ABA-AG and considering possible changes to USDOT section 504 regulations to reflect current detectable warning requirements until such time as the new public rights-of-way guidelines can be issued. The FHWA MUTCD staff are also pursuing inclusion of detectable warnings in Chapter 3 Markings. NCHRP and FHWA research is also underway to improve truncated dome maintenance and contrast."

^{iv} Designing Sidewalks and Trails for Access: Part II – Best Practices Design Guide, U.S. Department of Transportation, 2002; and, Developing Curb Ramp Design Based on Curb Radius. Edward R. Stolof. Institute of Transportation Engineers Journal, April 2005.

^v Guide for the Planning, Design and Operation of Pedestrian Facilities, American Association of State Highway and Transportation Officials, 2004.

^{vi} Pedestrian Facilities Users Guide – Providing Safety and Mobility, Federal Highway Administration, March, 2002.

^{vii} Guide for the Development of Bicycle Facilities, American Association of State Highway and Transportation Officials, 1999.

^{viii} Manual of Uniform Traffic Control Devices, U.S. Department of Transportation, Federal Highway Administration, 2004. See also Washington State Modifications to the MUTCD, M 24-01.

^{ix} Manual of Uniform Traffic Control Devices, U.S. Department of Transportation - Federal Highways Administration, 2004.

^x Shared-Lane Pavement Marking Study, City of San Francisco, February 2004.

**Summary of Hailey Comprehensive Plan Transportation Goals and Policies
(1998-2003)**

Create and maintain a pedestrian and bicycle friendly community with a convenient and efficient multi modal system for all Hailey residents – “move people and not just cars.”

Provide adequate routes and accesses to accommodate different uses and circulation.

Implementation: Minimize potential conflicts between uses by planning for and designating separate areas, routes and accesses for pedestrians, bicycles, automobiles and trucks.

a. Designate truck routes

b. Designate bicycle and pedestrian routes that connect places

c. Ensure Main Street traffic flows smoothly and safely

d. Designate properly distributed pedestrian crossings on Main Street

e. Discourage future curb cuts on Main Street (Access policy)

Protect residential districts by building streets that encourage pedestrians and bicycles, while allowing automobiles at slower, safe speeds.

Implementation 1: Consider city standards that allow traffic to flow smoothly and safely while encouraging lower traffic speeds.

a. Consider standards for alternatives to stop signs and traffic lights, such as vertical displacements, traffic circles or roundabouts, innovative intersection designs and other traffic calming devices (Traffic Calming & Management Plan)

b. Consider street standards for less pavement and narrow travel lanes to encourage lower vehicle speeds (Functional Classification Policy & Street Design Standards)

c. Encourage limiting the length of streets; shorter blocks keep vehicles at a slower speed. (Block Length)

**Summary of Hailey Comprehensive Plan Transportation Goals and Policies
(1998-2003)**

<i>Implementation 2: Street standards should encourage pedestrian and bicycle use.</i>
a. Sidewalk or pathways should be provided for pedestrians and bicycles along designated routes and in business districts. Encourage sidewalks and pathways for pedestrians and bicycles in neighborhoods and other districts.
b. Encourage appropriate street trees in all neighborhoods that create a canopy that does not interfere with pedestrian use or create visual obstructions for vehicles. Require street trees in all commercial districts.
c. Explore medians and tree planting strips that would create boulevards and parkways.
d. Adopt street rights-of-way that are proportional to the heights and setbacks of adjacent structures.
e. Adopt residential setbacks that place an emphasis on the entrance to the house and not the garage.
f. Adopt residential street standards that include pedestrian access and on-site mail distribution.
<i>Implementation 3: Establish procedures determining the need for traffic control and traffic calming measures.</i>
a. Use information from a traffic counting program to determine areas of the city that require further study and possible installation of traffic control measures.
b. Establish a procedure to allow neighborhoods to petition the city for traffic calming measure to be installed. Set guidelines to determine the appropriateness of the requests and to determine the correct measure to be installed. (Traffic Calming & Management Plan)
c. A community-wide plan for stop signs should be implemented. Recognize that stop signs do not work well to control vehicle speeds.

**Summary of Hailey Comprehensive Plan Transportation Goals and Policies
(1998-2003)**

Ensure an interconnected community that provides multi-modal access to all neighborhoods.
<i>Implementation:</i>
a. Provide safe corridors for pedestrians and bicycles throughout our community.
b. All new streets should connect, wherever possible, to existing streets as well as future potential developments.
c. Include transit shelters in neighborhoods and business developments along designated routes.
Promote long-term planning and development of an interconnected and integrated multi-modal transportation system. Contain or reduce the number of single-occupant cars.
<i>Implementation:</i>
a. Create and implement a Transportation Master Plan
b. Participate in, and support, transportation planning for traffic and transportation management.
c. Support efforts to create a public transportation system that includes a local circulator shuttle within walking distance of most Hailey residents, as well as commuter service within the Wood River Valley corridor.
Promote land development that discourages urban sprawl, connects the community, and encourages multi-modal use.
<i>Implementation</i>
a. Create clear entrances at our north and south to define Main Street (where to slow down).
b. Balance parking needs with multi-modal transportation needs. Minimize the effect of large parking lots with landscape buffers and islands. (Parking Management Plan).
c. Encourage neighborhood service centers that serve adjacent neighborhoods.
d. Encourage or require transit shelters along designated routes.
e. Encourage multi-use development closer to or along transportation corridors.

**Summary of Hailey Comprehensive Plan Transportation Goals and Policies
(1998-2003)**

Maximize transportation opportunities and minimize tax dollars.
<i>Implementation</i>
a. Explore, create and foster cooperative opportunities with other county and regional resources.
b. Explore and support efforts for a public transportation system that provides regional commuter service and connects to a local circulator shuttle. (Public Transportation Plan).
c. Support and enable a cooperative relationship with the Friedman Memorial Airport Authority.
Standards for development should encourage multi-modal transportation.
<i>Implementation.</i>
a. Residential development of 20 units or more, and commercial developments of 20,000 square feet or more should provide a Transportation Management Study and should construct the infrastructure necessary to meet the transportation needs of that development, such as transit shelters, sidewalks and pathways, park and ride parking spaces, etc.
b. Review the number and types of signs needed to direct or inform traffic.
c. Carefully consider the long-term consequences on existing and future development of a waiver of standards that address transportation issues (?).
d. Consider prohibiting off-road vehicles.

MEMORANDUM

TO: Mayor Rick Davis and Hailey City Council Members

FROM: Ned C. Williamson

DATE: September 13, 2010

RE: Rohe Decision

At the last Council meeting, Council Member Haemmerle asked the Mayor and Council to discuss whether the City should intervene in the Rohe application. Following the presentation, the matter was continued to September 13, so the Council could discuss the matter. In this memo, I will outline the pertinent facts and some of my thoughts.

FACTS

In Rohe, the applicant filed a transfer application seeking to change the nature of use, point of diversion and place of use of a relatively small water right with a priority date of March 23, 1883. The application was conditionally approved by IDWR. The controversy in this approval centers on Condition No. 3, which subordinated the 1883 water right to two minimum stream flows which were created in the 1980's.

CONFLICT ISSUE

As a prefatory matter, I want to address the propriety of Council Member Haemmerle's involvement. Council Member Haemmerle was the attorney who represented Rohe in the application. Before the last meeting, Council Member Haemmerle contacted me and asked my opinion on whether he could make a presentation to the council about the Rohe case. He told me that he only wanted an open discussion of the matter and that he would recuse himself from any discussion and decision. I advised Council Member Haemmerle that he was legally able to make such a presentation under the Ethics in Government Act. I have listened to the tape of the presentation and found it to be entirely appropriate and consistent with my advice. Council Member Haemmerle presented the facts of the Rohe application and the options in a neutral fashion. Council Member Haemmerle correctly identified three options: 1) do nothing, 2) support the Rohe decision and 3) oppose the Rohe decision.

POLICY CONSIDERATIONS

From a policy viewpoint, I believe there are two opposing and valid considerations. On one hand, the Rohe decision should promote a minimum stream flow which is arguably good from an ecological, hydrological and economic viewpoint. I have been told that there is close relationship

Mayor Rick Davis
Hailey City Council Members
September 13, 2010
Page 2

between our wells and the river level. Stated differently, if minimum stream flows keep water levels in the river up, then our wells should be in better shape. On the other hand, the Rohe decision will certainly hinder any effort by Hailey to acquire and transfer a water right. If there was a call for curtailment of junior priority ground water rights, Hailey may have to curtail surface irrigation of lawns and parks. If Hailey wished to supplement its rights to avoid curtailment, then the Rohe decision will effectively prevent Hailey from acquiring water rights in the future.

LEGAL BASIS OF ROHE

I will now briefly address the legal basis of the Rohe decision. In reading the briefing and IDWR's order in Rohe and researching the Minimum Stream Flow law, *Idaho Code §§ 42-1501 et seq.*, I note that there is no Idaho appellate decision addressing the impact of the minimum stream flow law on a transfer of a senior water right. IDWR's decision specifically addresses Rohe's legal arguments but did not and could not fully address the arguments because there is a lack of legal guidance under the minimum stream flow law. Despite the fact that there have been numerous transfers in past 28 years, IDWR has just applied the minimum stream flow law. The Rohe decision has a significant impact on the ability to transfer water rights in this valley which in turn will have a significant impact on the value of water rights. For that reason, I believe the issues raised in the Rohe case should be decided by the Idaho appellate courts.

RES JUDICATA AND COLLATERAL ESTOPPEL

Even though I feel the issues in Rohe should be resolved, I do not necessarily believe that Hailey should intervene in the Rohe case for several reasons. First, Hailey may not need to acquire further irrigation rights through a transfer. It has been suggested by SPF that dedication of Indian Creek water (2.62 cfs) and a water right in the Hiawatha canal (2.86 cfs) to summer time irrigation, along with aggressive water conservation, may nearly meet the peak summer irrigation demand. If true, then Hailey may not need any supplemental water.

Second, Idaho law should not bind Hailey to any decision in Rohe. Idaho recognizes the legal doctrines called *res judicata* and collateral estoppel which in certain instances would prevent a party from relitigating a decision. Collateral estoppel and *res judicata* apply to administrative hearings. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 844-45, 70 P.3d 669, 682-83 (2003). "*Res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Under the principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim." *Baird Oil Co., Inc. v. Idaho State Tax Com'n*, 144 Idaho 229, 231, 159 P.3d 866, 868 (2007).

Mayor Rick Davis
Hailey City Council Members
September 13, 2010
Page 3

To prevail on a claim of collateral estoppel, a party must satisfy a five-factor test: (1) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue; (2) the issue decided in the prior litigation must be identical to the issue presented in the subsequent action; (3) the issue sought to be precluded was actually decided by prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was the party or in privity with a party in the prior litigation. *State v. Reutzell*, 130 Idaho 88, 936 P.2d 1330 (Ct.App. 1997); *State v. Gusman*, 125 Idaho 805, 874 P.2d 1112 (1994).

In this case, there is an administrative decision and that decision may be subject to *res judicata* or collateral estoppel. But, under either claim preclusion (*res judicata*) or issue preclusion (collateral estoppel), I do not believe Hailey would be precluded from litigating the minimum stream flow issue if Hailey wished to acquire and transfer a water right upstream. Since Hailey is not a party and has not been joined in the Rohe case, Hailey should not be precluded from raising the issues which were raised in Rohe. My opinion is bolstered by an Idaho Supreme Court decision which held:

Except for that limited class of actions which are strictly in rem, a decree is not, and cannot be made, conclusive, as to the parties who are strangers to it. The same principle applies to decrees rendered in proceedings to adjudicate rights to the use of water, they not being strictly in rem. The contention that one's rights can be affected by a decree to which he was a stranger is repugnant to a fundamental principle of our jurisprudence that no one will be judged until he has had a hearing. The operation of this principle cannot be defeated by the mere fact that it will put other parties to some added trouble or expense.

State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 741, 947 P.2d 409, 414 (1997).

Notwithstanding my opinion, I fully recognize that the Rohe decision will be used as precedence in future transfer applications. Stated differently, if Hailey wanted to oppose the Rohe decision and felt a future acquisition and transfer of down stream water to Hailey was likely, it may be useful to attempt to intervene now.

Please contact me if you have any questions. Thank you.

Heather Dawson

From: Heather Dawson
Sent: Thursday, August 26, 2010 11:59 AM
To: 'Jerry Kavka'
Cc: Mary Cone; Carol Brown (carol.brown@haileycityhall.org); 'Don Keirn'; Fritz Haemmerle; 'Martha Burke'; Rick Davis
Subject: RE: City Support of Rohe Decision

Hello Mr. Kavka –

After Mr. Haemmerle's presentation to the City Council earlier this week, Mayor Davis scheduled this matter as a council discussion item on September 13, 2010. We will include these comments as part of the council packet/public record prior to that September 13 meeting.

Thank you for your interest and participation in these important issues.

Heather Dawson
Hailey City Administrator

From: Jerry Kavka [mailto:gerald_kavka@msn.com]
Sent: Wednesday, August 25, 2010 7:00 PM
To: 'Carol Brown'
Cc: 'gary.spackman@idwr.idaho.gov'; 'robin.crotty@haileycityhall.org'; 'governor@gov.idaho.gov'
Subject: City Support of Rohe Decision

Dear Carol,

<http://www.mtexpress.com/index2.php?ID=2005132910>

Being a fly fisherman who not only wants to see the Big Wood River protected to preserve a valuable resource but also for economic reasons, it distresses me that the City of Hailey would fight the Rohe Decision as suggested by Mr. Haemmerle and reported in the above linked article. It seems to me that this would be of far more benefit to the owners of large homes and expansive landscapes in places like Gimlet and developers of recreational facilities than it would be to the City of Hailey. If City of Hailey officials want to really protect the flows of the Big Wood River and to insure that there is enough water for the City of Hailey and others, they should urge the IDWR and State of Idaho to do the following:

First- Place a moratorium on the construction of ponds for aesthetic beneficial use on recreational facilities and in residential areas.

Second- Require after field review by the Idaho Department of Resources (IDWR) that all existing ponds be made to comply with the permitted beneficial use.

Third- Enforce the Rohe Decision protecting minimum stream flows on the Big Wood River.

Fourth- Insure that all water rights are accurately measured so that water managers will know that they distributed only the permitted amount of water to holders.

Fifth- Strictly enforce the one-half acre/13000 gallon rule pertaining to the use of groundwater for domestic use.

Sixth- Place a moratorium on all upstream transfers of downstream water rights for the purpose of consumptive uses such as aesthetics, recreation, and the irrigating of expansive landscapes.

Seventh- Propose legislation that requires existing large distribution canals to be modified by a date certain in the future in ways that prevent seepage and transpiration losses.

Eighth- Make sure that water saved by the above measures goes in large part to protecting minimum stream flows not to new or expanded water rights except for municipal beneficial use.

Ninth- Put some teeth into the laws that punish the violators of state water statutes.

Maybe if the above were implemented we would not have to worry about minimum stream flows and there would be plenty of water for both consumptive and non-consumptive uses of the precious resource. Also, it might be helpful to use some of the resources like Indian Creek and the spill water that routinely runs out of the Hiawatha Canal in the southern Hailey subdivisions and across from Friedman Airport.

Regards,

Gerald L kavka



THE BOARD OF BLAINE COUNTY COMMISSIONERS

206 FIRST AVENUE SOUTH, SUITE 300

HAILEY, IDAHO 83333

PHONE: (208) 788-5500 FAX: (208) 788-5569

www.blainecounty.org bcc@co.blaine.id.us

Lawrence Schoen, Chairman * Angenie McCleary, Vice-Chairman * Tom Bowman, Commissioner

Idaho Water Resource Board
Mr. Terry Uhling, Chairman
322 East Front Street
Boise, Idaho 83720

August 2, 2010

Re: Minimum stream flow rights

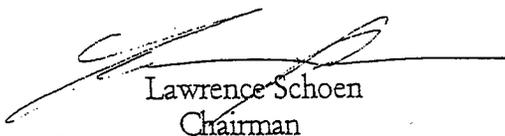
Dear Mr. Uhling and Board,

The Board of Blaine County Commissioners wishes to acknowledge and to thank you for your work defending the Big Wood River Minimum Stream Flow water rights, which you hold, in a recent application for water rights transfer (#73969). As you know, it was this Board which, in the 1980s, sought the establishment of these rights.

Minimum stream flows manifest important principles in Blaine County, reflected both in our county Comprehensive Plan and Local Public Interest Water Policy (adopted 1998). Minimum stream flows provide and symbolize what Blaine County residents and visitors strongly value: healthy fish and wildlife habitat in riparian corridors, high-quality recreation and aesthetics and good water quality. As such, the Board of Blaine County Commissioners supports minimum stream flow rights generally and Big Wood River MSFs 37-7919 & 37-8307 totalling 189cfs, in particular.

While the Board of Blaine County Commissioners did not comment to the Department on that recent transfer, we know you did and in a manner which represented our interests. Commissioner Schoen's recent letter to Interim Director Spackman (May 19, 2010) noted the potential relationship between minimum stream flows and the anticipated impacts of conjunctive administration in our basin. We do not have a full understanding of the many aspects of this relationship, however. As a Board representing the diverse interests of an entire community, we would welcome such opportunities as may arise to expand our understanding, inform the public and actively and beneficially address these important issues.

Respectfully,


Lawrence Schoen
Chairman


Angenie McCleary
Vice-Chairman


Tom Bowman
Commissioner

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 73969 IN THE) FINAL ORDER AND
NAME OF ROBERT ROHE) ORDER DENYING
EXCEPTIONS

This matter is before the Director of the Department of Water Resources ("Director") on exceptions to the order denying petition for reconsideration of the amended preliminary order of the Department. The Petitioner, Robert Rohe, seeks removal of Condition of Approval 3 in transfer no. 73969. The Director finds, concludes, and orders as follows:

FINDINGS OF FACT

I. Procedural Background

1. On August 2, 2007, Robert Rohe ("Petitioner") filed transfer application no. 73969 ("transfer"), seeking to change the nature of use, point of diversion and place of use for water right no. 37-21956.
2. The Department of Water Resources ("Department") approved the transfer as a preliminary order on August 7, 2009, pursuant to Idaho Code § 67-5243 and Rule 730 of the Department's Rules of Procedure (IDAPA 37.02.01.730).
3. On August 21, 2009, the Department received a petition for reconsideration of the preliminary order pursuant to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a) from the Petitioner.
4. The Department granted the petition for reconsideration in part and issued a preliminary order amending the approval of the transfer on September 4, 2009.
5. The Department received a second petition for reconsideration of the preliminary order amending the approval of the transfer on September 16, 2009.
6. The Department denied the second petition on September 18, 2009.
7. On October 9, 2009, the Petitioner filed a Brief in Support of Exceptions to Order Denying Petition for Reconsideration ("exceptions"), seeking review by the Director.

8. Petitioner challenges only the inclusion of Condition of Approval 3 ("Condition No. 3") in the transfer approval and does not challenge any other provision in the transfer approval. Petitioner seeks removal of Condition No. 3.

9. Condition No. 3 provides:

To prevent injury to water rights 37-7919 and 37-8307 held by the Water Resource Board for minimum stream flow on the Big Wood River the 0.02 cfs allowed for irrigation use from ground water authorized by transfer 73969 shall be subject to curtailment 3 days after flows at the Hailey gauge drop below 189 cfs or curtailed by priority, whichever occurs first. The Director retains jurisdiction to modify the condition of use authorized by transfer 73969 to prevent injury to other users as may be required based on future studies or the addition of gauges on the Big Wood River.

10. Petitioner claims the inclusion of Condition No. 3 is unlawful because it violates the enabling legislation for minimum stream flows, is arbitrary and capricious, results in an equal protection violation and gives rise to a takings claim.

II. Director's Findings

11. The Idaho Water Resource Board ("Board") holds two minimum stream flow ("MSF") water rights in the reach of the Big Wood River from Warm Springs Creek downstream approximately 18 miles to the District 45 Canal diversion. These are water rights 37-7919 and 37-8307.

12. Water right 37-21956 has historically been diverted into the Hiawatha Canal within this MSF reach. The proposed new point of diversion is upstream from the historical point of diversion.¹

13. The movement of the point of diversion for water right 37-21956 upstream on the Big Wood River will decrease the flow in the river between the site of the original diversion and the site of the new diversion. The reduction of flow in this reach injures MSF rights if flows drop below those protected by the MSF rights (189cfs).

14. However, there are ways to mitigate the injury to the Board's MSF water rights. River gauges do not exist at every diversion up and down the river. Currently a gauge at Hailey allows monitoring of the river. River flows elsewhere up and down the river may be projected or estimated using diversion records of the watermaster of flows diverted from the river and

¹ The application proposes to change the point of diversion from a surface water source to a ground water source. Generally, the Department does not approve changes in source from surface water to ground water. However, where there is a direct and immediate hydrological connection between the surface water source and the new ground water source, the Department has approved a change from surface water to ground water. The change from surface water to ground water is not an issue in this matter.

measurements or estimates of tributaries flowing into the river. To positively determine the flow of the Big Wood River at the proposed site of the Rohe diversion, the applicant could be required to install and maintain a river gauge at that site. This however is likely over burdensome. Reasonably, a statistical analysis to predict the flow at the proposed Rohe site is best but if not acceptable to the applicant then the transfer should be denied.

15. Existing gauge site records suggest that a statistical analysis can be used to predict the flow at the new point of diversion. The Hailey gauge is located near Hailey below the Hiawatha Canal diversion and the Rohe site and currently is the only permanent gauge on the Big Wood River within the MSF rights reach described above.

16. The Department has analyzed available data and finds that on average at the site of the Rohe diversion the flow in the Big Wood River drops below 189 cfs three days after the gauge at Hailey drops below 189 cfs.

17. To allow for approval of the transfer, the Department used the statistical analysis as the basis for Condition No. 3. Condition No. 3 provides that the transfer may be approved, but the right is subject to curtailment 3 days after flows at the Hailey gauge drop below 189 cfs or is curtailed by priority, whichever occurs first.

CONCLUSIONS OF LAW

1. Pursuant to Idaho Code § 42-222, the Department can approve a change in a point of diversion of a water right only if "no other water rights are injured thereby," This code section does not distinguish between minimum stream flow rights and other types of water rights.

2. Junior water right holders have a vested right in the continuance of the conditions that existed on the stream at the time they made their appropriation. *Bennett v. Nourse*, 22 Idaho 249, 253, 125 P. 1038, 1039 (1912); *Crockett v. Jones*, 42 Idaho 652, 659, 249 P. 483, 485 (1926). Changes by a senior water right holder cannot occur unless the changes can be made without injury to the junior water right holders. *Id.*

3. The Director is statutorily required to examine all the evidence of whether a proposed transfer will injure other water rights. *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001). The applicant bears the burden of providing the Department with sufficient information to show non-injury to other water rights. *Id.*

4. The authority to establish a minimum stream flow water right is found in Idaho Code § 42-1501 *et seq.* Idaho Code § 42-1503 provides, in relevant part:

42-1503.APPLICATION TO APPROPRIATE -- PROCESS -- JUDICIAL REVIEW. Whenever the board desires to appropriate a minimum stream flow of the unappropriated waters of any stream, it shall submit an application to the

director. Such application shall be made upon forms to be furnished by the director

Approval of any such application must be based upon a finding that such appropriation of minimum stream flow:

(a) will not interfere with any vested water right, permit, or water right application with priority of right date earlier than the date of receipt in the office of the director of a complete application for appropriation of minimum stream flow filed under the provisions of this act;

5. Petitioner suggests that when the legislature authorized the creation of minimum stream flow water rights, the legislature also intended to restrict how the Department evaluates the impact of a transfer on existing MSF water rights. Brief in Support of Exceptions to Order Denying Petition for Reconsideration ("Brief"), at 4-5. Petitioner reads Idaho Code § 42-1503(a) and the rest of Idaho Code § 42-1501 *et seq.* as overriding the requirement that the Department consider injury to all water rights pursuant to Idaho Code § 42-222. However, the Petitioner's interpretation of this section is not consistent with the plain reading of the statute. Idaho Code § 42-1501 *et seq.* provides for the *establishment* of minimum stream flow water rights. Idaho Code § 42-1503 makes it clear that the Department cannot approve an application to *establish* a MSF water right if it will "interfere with any vested water right, permit or application... ." However, this is not the question before the Department in this proceeding. The issue in this proceeding is whether the Department must assess and address the injury that a change in a point of diversion by an existing water right would cause to an *existing* MSF water right. Nothing in Idaho Code § 42-1501 *et seq.* provides an alternative injury standard for considering the impact a transfer would have on a MSF water right. It simply does not address whether the Department should consider injury to a MSF water right caused by a transfer *after* the MSF water right is established.

6. Petitioner is essentially arguing that in passing Idaho Code § 42-1501 *et seq.*, the legislature impliedly repealed Idaho Code § 42-222 as it applies to MSF rights. The ability to transfer a water right has significant implications for other water rights. If the legislature had intended to change the traditional transfer standard, it would have expressed a clear intent in the act to not have Idaho Code § 42-222 apply to transfers of MSF water rights. The type of repeal by implication suggested by the Petitioner in this case is disfavored. *Tetzlaff v. Brooks*, 130 Idaho 903, 904, 950 P.2d 1242, 1243 (1997). Courts will not declare a statute repealed by implication if there is any other reasonable construction of the statutes. *Id.* "Only when new legislation is irreconcilable with and repugnant to a pre-existing statute may we find an implied repeal." *Id.* quoting *Doe v. Durtschi*, 110 Idaho 466, 478, 716 P.2d 1238, 1250 (1986). Idaho Code § 42-1501 *et seq.* is not irreconcilable with or repugnant to Idaho Code § 42-222. They do two different things. The first authorizes the Department to license minimum stream flow water rights. The second governs the injury analysis when a transfer of an existing water right is proposed.

7. While Petitioner is correct that the result of Idaho Code § 42-1501 *et seq.* might be to preclude subsequent (i.e. future) diversionary appropriations, it requires a significant leap in logic to say that by intending to preclude future appropriations, the legislature also intended

for the Department to disregard the impact a transfer would have on an MSF water right that was validly created under Idaho Code § 42-1501 *et seq.* Moreover, Petitioner attempts to draw support for his position from the distinctions between Idaho Code § 42-203A and Idaho Code § 42-1503. Brief, at 6. Petitioner suggests it is significant that the standard for establishing a water right set forth in Idaho Code § 42-203A is different from establishing a water right under Idaho Code § 42-1503. However, this argument further underscores the shortcomings in the Petitioner's position. Both Idaho Code § 42-203A and Idaho Code § 42-1503 address how to establish a water right. The issue in this proceeding is whether the Department should assess and evaluate injury to a vested MSF water right in a transfer proceeding.

8. Absent express language to the contrary, the Department must look to the injury standards in Idaho Code § 42-222. This code section requires the Department to consider injury to other water rights when evaluating a transfer and does not distinguish between MSF water rights and other water rights. As such, the Department must evaluate injury that a transfer would cause to the MSF water rights the same way the Department would evaluate injury to any other water right.

9. Petitioner also points to conditions in the Board's MSF water rights that state the rights are "subject to all prior water rights" and "shall recognize and allow the continued beneficial diversion of water under any prior existing water right established by diversion and application to beneficial use... ." Brief, at 8. The petitioner argues that these conditions show that the Department intended for the Board's MSF water rights to not be considered in transfer proceeding for senior water rights.

10. The records from the Board's MSF water rights show the language quoted by the petitioner was intended to address a different concern. As outlined in the Memorandum Decision and Order on 37-7919, issued by A. Kenneth Dunn on October 17, 1986, when the approval for 37-7919 first issued, there was a concern that the Board's MSF water rights would be able to make a call against senior unrecorded water rights. Memorandum Decision and Order, at 3-4, a copy of which is attached to the Affidavit of Fritz X. Haemmerle. The Department of Fish and Game argued that the MSF rights should take precedent over the undecreed rights until they are fully adjudicated. *Id.* The Department disagreed and included the conditions cited by petitioner to make clear that MSF rights did not get delivered before the senior undecreed water rights. *Id.* In fact, additional language in the order supports the contention the Department was evaluating these water rights with respect to their existing diversion methods and that the conditions were not intended to prevent an inquiry into injury to MSF water rights when senior water rights want to change their historic diversion methods. In the Memorandum Decision and Order approving water right no. 37-7919, the Department included a conclusion of law that states, "The proposed minimum stream flow should not be allowed to alter *historic* delivery practices to valid beneficial use rights in Water District No. 37, Big Wood River." Memorandum Decision and Order on 37-7919, at 5 (emphasis added). Thus, if anything, the Department's orders in 37-7919 undermine Petitioner's argument and support the position that the language cited by Petitioner was to protect the historic delivery practice of the water right users but was not intended to prevent the Department from considering injury when a senior water right user proposes to alter their historic delivery practice.

11. Petitioner also implies the Department is changing its policy with regards to evaluating injury to MSF water rights. Brief, at 8. Petitioner attaches a number of orders Petitioner claims support his position. A reading of the orders shows the issue present in this proceeding was never raised in the orders cited by Petitioner. They are orders creating the Board's MSF water rights. They do not address whether the Department should assess and evaluate injury to a vested MSF water right in a transfer proceeding.

12. Petitioner also argues that even if the Department has authority to consider injury to the Board's MSF water rights, the inclusion of Condition No. 3 is arbitrary and capricious. Brief, at 10. In support of this argument, the Petitioner provides an affidavit from Charles E. Brockway, Ph.D., P.E. Dr. Brockway argues there is no scientific way to calculate injury to the Board's MSF water rights and because of gauging error, "there is no way to measure the diminishment or actual injury, if any, of a transfer of 0.03 cfs of water, using the Hailey Gauge as a surrogate." Affidavit of Charles E. Brockway, Ph.D., P.E., ¶ 6.

13. It is significant that Dr. Brockway does not suggest that there is no injury to the Board's MSF water rights. Dr. Brockway states the Hailey Gauge cannot be used to measure injury to the Board's MSF water right. This is different from saying that the transfer would not injure the Board's water right. Dr. Brockway acknowledges that the consumptive diversion rate of the right being transferred is up to 0.03 cfs. Aff. Brockway ¶¶ 4,6. It is logical and reasonable to assume that if 0.03 cfs is consumed from the MSF reach, in a location where previously no such consumption existed, then the stream is depleted by that same amount. If the proposed depletions are allowed to occur at a time when flows in the river are insufficient to meet the established MSF, then the MSF water rights are injured and all water rights junior to the MSF water rights will bear the burden of a potentially earlier curtailment date to make the MSF water rights whole. While the depletion in flow is small, it is still real and determinable.² Moreover, simply because the injury to a water source is small, doesn't mean the injury should not be mitigated for. The significance of this is much greater when one considers that the Department has pending transfers proposing similar transfers along the Big Wood River. The collective impact of many small transfers will have a negative impact on the Board's MSF water rights.

14. Moreover, the Department does not propose using the Hailey Gauge as a "surrogate" for the measurement of depletions to the Big Wood River. Measurement of the depletion will occur at the point of diversion where the transfer approval requires a measuring device be installed. Instead, the Hailey Gauge is being used as a means of determining the timing of injury to the MSF water rights and as part of a strategy to mitigate the injury Rohe's depletions will cause.

15. Even for the purposes of determining timing of injury, the Department recognizes that uncertainty exists in the recorded measurements of the Hailey Gauge. However, in the

² This is consistent with the Department's previous statements on this issue. See Final Order, In the Matter of Application for Transfer No. 5174 in the name of Dennis M. Baker and No. 5175 in the name of Huf-N-Puf Trust, at 1 ("Even if the maximum instantaneous depletion would not exceed 0.02 cfs and could not be measured using conventional methods, the hearing officer correctly concluded that such depletion would be 'real'").

absence of systematic error, the uncertainty associated with the gauge is evenly distributed about the recorded measurement, with an equal amount of actual stream flow rates greater than and less than the recorded measurement value. As such, the mean of the error will approach zero. Gauging error is not a reason for not using the Hailey Gauge to determine the timing of injury and as part of a strategy to mitigate the injury that Rohe's depletions will cause.

16. More sophisticated means of determining when flows in the Big Wood River near the Rohe point of diversion fall below 189 cfs may exist. For example, as pointed out in the preliminary order, the applicant could be required to install and maintain a river gauge near the point of diversion to determine when the flows in the Big Wood River at the Rohe point of diversion fall below 189 cfs. However, this is likely overly burdensome. The methodology proposed by the Department to mitigate injury is a reasonable alternative that relies on existing data and information readily at hand. If the applicant believes the proposed mitigation is not appropriate, then the applicant must come forward with an acceptable alternative or the application must be denied.

17. Petitioner cites *Anderson v. Spalding*, 137 Idaho 509, 50 P.3d 1004 (2002), in support of his claim that inclusion of Condition No. 3 in the approved transfer results in an equal protection violation. *Anderson* holds that selective or discriminatory enforcement of a statute may amount to an equal protection violation under either the Idaho or United States Constitutions, if the challenger shows a deliberate plan of discrimination based upon some improper motive like race, sex, religion, or some other arbitrary classification. *Anderson*, 137 Idaho at 514, 50 P.3d at 1009. To establish an arbitrary classification for one individual, the challenger must show that there is a deliberate and intentional plan to discriminate against the challenger and that there is no rational basis for the different treatment. *Id.*; see also *Terrazas v. Blaine County ex rel. Bd. of Com'rs*, 147 Idaho 193, 205, 207 P.3d 169, 181 (2009).

18. Petitioner complains that the Department has not previously considered the impact transfers along the Big Wood River would have on the Board's water rights in other similar transfer proceedings. Petitioner suggests that the Department lacks a rational basis for considering the impact this transfer would have on the Board's MSF water right now. Brief, at 13. Contrary to the Petitioner's suggestion, the Department has a rational basis for its actions. Quite simply, the issue was not raised in the other transfer proceedings. The issue is now being raised in transfers in the Big Wood River Basin.

19. Water administration in the state of Idaho is becoming more sophisticated and water right transfers are coming under greater scrutiny, including those in the Big Wood River Basin. There is a Ground Water Management Area and a moratorium prohibiting new consumptive water rights in the Big Wood River Basin, so new water users are forced to look to transfers of existing water rights to meet new water uses. This has led to an increase in the number of transfer applications in the Big Wood River Basin. The increased competition for resources has apparently led the Board to become more active in protection of its MSF water rights. Recently, the Board protested a number of other similar transfers because of the impacts the transfers would have on the Board's MSF water rights. The protests in the other transfers brought this issue to the Department's attention. Even though the Board did not file a protest in this matter, once the issue of the potential of injury to the Board's MSF water rights was brought

to the Department's attention, the Department was compelled to consider the potential injury pursuant to Idaho Code § 42-222. The Department's actions in this case were in response to the issue coming to the Department's attention. As such the Department has a rational basis for its actions. Its actions are not based upon a deliberate or intentional plan to discriminate against the Petitioner.

20. Finally, Petitioner claims that requiring mitigation of the injury would result in a shifting of the priority date of the water right. Petitioner alleges that this would result in a diminution in value of the water right and would constitute a taking without just compensation. Brief, at 13.

21. No water user has a vested right to move their water right if doing so would injure other water rights. *Bennett v. Nourse*, 22 Idaho 249, 253, 125 P. 1038, 1039 (1912); *Crockett v. Jones*, 42 Idaho 652, 659, 249 P. 483, 485 (1926). If Idaho Code § 42-222 provides the same protections against injury to the Board's MSF water right as it provides to other water rights, then mitigation that redresses the injury is not a taking of private property. It is the cost of changing a water right when that change injures other preexisting water rights. Of course, if the Petitioner decides the mitigation would make the transfer unacceptable, Petitioner can withdraw the transfer application and the water right can continue to be exercised at its historic point of diversion without change.

22. The Director concludes that the inclusion of Condition No. 3 is necessary in order to approve the transfer. Condition No. 3 mitigates the injury to the Board's MSF water rights 37-7919 and 37-8307. Approving the transfer without Condition No. 3 will result in injury to the Board's MSF water rights in violation of Idaho Code § 42-222.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED as follows:

1. That Petitioner's exceptions are DENIED.
2. That transfer no. 73969 is APPROVED with the inclusion of the previous Condition No. 3, which reads verbatim as follows:

To prevent injury to water rights 37-7919 and 37-8307 held by the Water Resource Board for minimum stream flow on the Big Wood River the 0.02 cfs allowed for irrigation use from ground water authorized by transfer 73969 shall be subject to curtailment 3 days after flows at the Hailey gauge drop below 189 cfs or curtailed by priority, whichever occurs first. The Director retains jurisdiction to modify the condition of

use authorized by transfer 73969 to prevent injury to other users as may be required based on future studies or the addition of gauges on the Big Wood River.

DATED this 12th day of May 2010.



Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

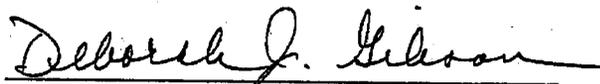
I HEREBY CERTIFY that on this 12th day of May, 2010, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid, and properly addressed to the following:

Document(s) Served: Final Order and Explanatory Information to Accompany a Final Order.

Fritz X. Haemmerle
Haemmerle & Haemmerle
P.O. Box 1800
Hailey, ID 83333

Shasta Kilminster-Hadley
OFFICE OF ATTORNEY GENERAL
NATURAL Resources Division
P.O. Box 83720
Boise, ID 83720-0010

Idaho Water Resource Board
322 East Front St.
Boise, ID 83720-0098



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

