IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

EDEN GATE'S LLC, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources, Respondents. and FARMERS CO-OPERATIVE DITCH COMPANY, Intervenor.	**Case No. CV14-21-10116**
IN THE MATTER OF APPLICATION FOR PERMIT No. 63-34832 THROUGH 63-34838 AND 63-34840 THROUGH 63-34846 ALL IN THE NAME OF EDEN GATE'S LLC	

APPLELLANT'S OPENING BRIEF

Judicial Review from The Idaho Department of Water Resource's Director's Order on Exceptions

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Eden Gate's LLC, by and through its counsel of record, Barker Rosholt & Simpson LLP, hereby submit, *Petitioner's Opening Brief*.

STATEMENT OF THE CASE

I. Nature of the Case.

This petition is for judicial review of the Director's October 14, 2021 *Order on Exceptions; Final Order Partially Approving Applications* ("Final Order"). In this Final Order, the Director has exceeded the authority granted to him under Idaho Code §§ 42-203A and 42-202B(3) by importing, as a broad ranging Idaho Department of Water Resource's "policy," a local land use planning statutory directive to local government agencies. He has even applied this new "policy" in circumstances where the local government is not empowered to act. In doing so, he has trampled on the applicant's constitutional rights.

The Director contends, "[t]he determinative factor in this case is the local public interest of preventing readily available surface water irrigation from being replaced by groundwater irrigation." R. 326. He relies on Idaho Code § 67-6537 for this pronouncement. However, as a matter of fact and law, these Applications do not implicate Idaho Code § 67-6537.

II. Course of Proceedings.

On January 2, 2020, One More Mile LLC ("OMM") filed *Applications for Permit to Appropriate Water No. 63-34832 through 63-34838, and 63-34840 through 63-34846* ("Applications") with the Idaho Department of Water Resources ("IDWR" or "Department"). R. 18-59. Each application, a total of fourteen (14), sought 0.04 cfs for domestic purposes and 0.07 cfs for irrigation use on individual two-acre parcels. *Id.* On January 31, 2020, Farmers Co-

Operative Ditch Company ("Farmers Co-op") filed timely protests to the OMM Applications. R. 118-45.

On March 19, 2020, the Department held a pre-hearing conference. OMM and Farmers Co-op were unable to resolve Farmers Co-op's protests and requested a hearing to decide the contested case. On April 6, 2020, the Department's Hearing Officer issued the *Order Consolidating Matters for Hearing, Notice of Hearing, and Scheduling Order* ("Consolidation Order"). R. 152-56. This brought all 14 applications into a single proceeding. *Id.* Pursuant to the Consolidation Order, the Hearing Officer held a day-long administrative on June 15, 2020, to take testimony on the Applications.

On July 28, 2020, OMM filed a *Notice of Assignment of Applications*, R. 212-14, *Assignment of Applications for Permit*, R. 199-209, and *Declaration of Madison Richards* (the original governor of assignee) (collectively, "Assignment"), R. 210-11, with the Department, assigning the pending Applications to Eden Gate's LLC ("Eden Gate"). The Assignment was based on the transfer of land from OMM to Eden Gate, and the Assignment conveyed the Applications, together with the proposed points of diversion and places of use, from OMM to Eden Gate. R. 199-214.

On July 28, 2020. Farmers Co-op filed *Protestant Farmers Co-Operative Ditch Company's Response to Notice of Assignment of Application*. R. 215-20. On July 29, 2020, OMM filed *One More Mile LLC's Response to Farmer's Co-Op's Objection to Notice of Assignment of Application for Permit*. R. 221-24.

On May 28, 2021, ten months after the hearing, the Hearing Officer issued his *Preliminary Order Partially Approving Applications* ("Preliminary Order") in which the Hearing Officer issued the permits for only domestic use, and denied the Applications for irrigation use.

R. 226-70.

On June 11, 2021, Eden Gate filed its *Notice of Appeal and Petition to Review Preliminary Order*, R. 285-87, and its *Memorandum in Support of Notice of Appeal and Petition to Review Preliminary Order*, R. 271-84, (together, "Eden Gate Exceptions"). On June 24, 2021, Farmers Co-op filed *Protestant Farmers Co-Operative Ditch Company's Response to Notice of Appeal and Petition to Review Preliminary Order* ("Farmers Co-op Exceptions Response"). R. 288-301.

On August 18, 2021, the Director of IDWR ("Director") issued an order giving himself additional time to issue a final order because the Eden Gate Exceptions "raise important legal and policy issues that require careful consideration and extensive legal research and analysis of the record." R. 316. Accordingly, the Director extended his own deadline so he could "conduct an exhaustive evaluation of the issues." *Id.*

On October 14, 2021, the Director issued his Final Order. R. 318-38. On November 10, 2021, Eden Gate filed this timely *Notice of Appeal and Petition for Judicial Review of Agency Action* ("Notice of Appeal") initiating this matter. R. 339-45. On January 6, 2022, Farmers Co-op moved to intervene in this appeal, which the Court granted on January 24, 2022. The Department submitted the *Notice of Lodging the Agency Transcript and Record with the Agency* on January 6, 2022, and the Department settled the agency transcript and record on January 23, 2022.

III. Factual Summary.

The hearing officer made thirty-three (33) findings of fact which were adopted verbatim in the Director's Final Order; these facts are not in dispute. R. 227-30; 327-30. In addition to the facts set forth in the Final Order, there are additional undisputed facts established at the hearing

that are important to note on this appeal. Judicial review of findings of fact is limited to the agency record. Idaho Code § 67-3277. Review is emphatically not conscribed by the findings of fact made by the agency. The record must be reviewed independently of the decision below when this Court acts in its appellate capacity. *See Rangen Inc. v. IDWR*, 160 Idaho 251, 255, 371 P.3d 305, 309 (2016).

The Applications are part of a small, rural, twenty-eight (28) acre development near Fruitland, Idaho ("River Bluff Development"). R. 327 at ¶ 1. Over one hundred years ago, in 1910, the 28 acres of the River Bluff Development were platted and divided into four (4) acre lots that were part of a larger plat called the "Orchard Tract". R. 357; Tr. 26:7-27:4. In 2007, eight Orchard Tract lots were administratively divided into 17 two-acre parcels, including the 28 acres of the River Bluff Development which comprised fourteen separate two-acre lots. R. 330 at ¶ 33; Tr. 101:21, 28:1-3. The 2007 division of lots was done pursuant to a Canyon County ordinance allowing an administrative division for a one-time split of lots. Tr. 102:13-15. The zoning designation of the River Bluff Development was not changed during the division. R. 330 at ¶ 33. This division did not require submission of an irrigation plan. Tr. 105: 3-7. Canyon County did not require the use of surface water on the divided lots as a condition for the division. Tr. 113:9-16. There was no land use change, no application for a land use change, nor any required approvals from Canyon County under the Land Use Planning Act. Tr. 25:6-11, 91:10-19. On July 28, 2020, OMM sold its interest in the 14 lots and assigned all 14 applications to Eden Gate. R. 199-209. OMM did not transfer its water shares to Eden Gate. *Id*.

Farmers Co-op is a cooperative ditch company formed in 1902 and created to purchase water rights and issue stock to private landowners for the use of those water rights. R. 329 at ¶ 16. OMM owns 64 shares of Farmers Co-op capital stock, which entitles OMM to irrigate up to

128 acres of land, or two acres per share, and OMM is fully liable for all Farmers Co-op assessments on its 64 shares. *Id.* at ¶¶ 18-19. OMM fully paid up the assessment on all its shares. Tr. 79:2-4. Before the Assignment to Eden Gate, OMM owned 112 acres of land within Farmers Co-op boundaries, and OMM currently owns 87.2 acres in the Farmers Co-op boundaries. R. 329 at ¶ 21.

Farmers Co-op shares are not appurtenant to the land, and as a consequence, are not appurtenant to the 14 lots of the River Bluff Development. Instead, Farmers Co-op shares may be used on any lands owned by the shareholder within the service area. R. 330 at ⁋ 31; *see also* Tr. 78:7-25. For instance, if OMM owned 10 shares (for 20 acres of irrigation) and 40 acres, OMM would be free to irrigate any 20 of its 40 acres, and would be free to use its water on a different 20 acres, or less, in any given year. *See* Tr. 257-261. Additionally, OMM could freely transfer the right to use water represented by those 20 shares to any other landowner within the Farmers Co-op service area, so long as OMM retains ownership of the shares and stays current on assessments. Tr. 263:1-3.

Because Farmers Co-op shares are not appurtenant to the land, the shareholder is therefore free to change where the water is used, is free to allow other landowners to use that water, and shareholders can apply to Farmers Co-op to sell those shares. Farmers Co-op has a service area of over 15,000 acres and water rights for about 10,000 acres. Tr. 248:14-18. This leaves one-third of the total acreage of Farmers Co-op's service area, five-thousand acres, available for shareholders to move their water use without any need to make a change to Farmers Co-op's place of use or boundaries.

Even after OMM's Assignment to Eden Gate, OMM owns 87.2 acres of land within Farmers Co-op's service area, all of which is capable of being irrigated. R. 329 at ⁋ 21. On June

1, 2020, OMM and JC Watson Company ("Watson") entered into a *Contract for Purchase and Sale of Water Shares* ("Agreement"). *Id*. at ⁋ 23; *see also* Tr. 38. The Agreement provides that OMM will transfer 14 of its 64 Farmers Co-op shares to Watson "upon final approval of the groundwater rights [Applications] for the 14 lots [Applications' place of use]." *Id*. Watson is an existing shareholder of Farmers Co-op and owns agricultural lands within Farmers Co-op's place of use where these 14 shares of Farmers Co-op water can be delivered. Tr. 273:1-8. With the sale of shares to Watson, the shares would remain in agricultural hands rather than converting use to residential. Tr. 39-40. As Farmers Co-op recognizes, Watson "[is] very strong in agriculture. Tr. 231:24-25.

Farmers Co-op protested these applications by alleging that the Applications would reduce the amount of water it delivers to its shareholders, and that Farmers Co-op "desires to avoid having the water it delivers replaced with other water sources, such as groundwater or wastewater." R. 330 at ⁋ 30. But that is simply not what this case is about. Farmers Co-op admits that, if the 14 shares were sold to Watson as contemplated by OMM and Watson, *see* R. 503-04, then Farmers Co-op would be able to deliver the water available under those 14 shares to Watson because, "[i]f he were to get the 14 shares, Mr. Watson has a considerable amount of property in our service area of the Farmers' Co-op, and I'm sure it would be deliverable." Tr. 204:8-11; *see also* Tr. 240:1-7. In other words, Farmers Co-op is proposing a false dichotomy. Approving the irrigation component of these applications does <u>not</u> result in "replacing" surface water that Farmers Co-op delivers. Farmers Co-op surface water will still be delivered and is deliverable within Farmers Co-op's service area.

Unlike many other areas of the state where groundwater is in short supply or where the aquifer is in a precipitous decline, the lower Boise River basin is blessed with an abundant

supply of groundwater. There is no suggestion in the record, nor in the Final Order, that groundwater in the local area is in any peril. In fact, the undisputed evidence from the Department's own records show that the groundwater levels are stable and there is no evidence of groundwater declines. Tr. 169:2-12; R. 394-98. Indeed, while there is a moratorium order in the upper Boise River above Star, the reach below Star Bridge is a gaining reach and the whole area below Star, where River Bluff Development is located, is open for appropriation without mitigation. Tr. 171:3-17; R. 384-87. There is no groundwater management area or critical groundwater management area in this stretch of the Boise River. In fact, the Director agrees that the water supply is sufficient to supply these Applications. R. 332-33.

The key factual matters underlying this appeal are not in dispute. There is no land use change under the Idaho Land Use Planning Act ("LUPA"). The Farmers Co-op shares are not appurtenant to the land where OMM and now Eden Gate are proposing for the River Bluff Development. The shares are freely transferable to other properties within Farmers Co-op's service area. The water that is represented by the 14 shares can be delivered to other property within the service area, without Farmers Co-op approval, whenever the shareholder desires to do so, as long as the shareholder remains responsible for the assessments. The proposed transfer of water to Watson would keep the water in agricultural use and would be deliverable to Watson. Plus, OMM owns other land where water under the remainder of its shares is deliverable. No one is proposing to "replace" the Farmers Co-op shares with groundwater. Those shares will still be delivered, just to some other lands within the service area. The 28 acres, which have no appurtenant water rights, will obtain irrigation water from the same wells approved for domestic use. Furthermore, River Bluff Development is in an area of stable groundwater, with no evidence of declines, and where water is available for appropriation without mitigation.

ISSUES PRESENTED

The following issues are raised in Petitioner's petition for judicial review:

1. Whether the Director erred by relying on the Idaho Land Use Planning Act, Idaho Code § 67-6537, to deny the applications for irrigation use, but at the same time expanding the Act beyond the terms and conditions of Idaho Code § 67-6537, and whether in doing so the Director has effectively created a new *de facto* IDWR rule requiring the use of surface water in all circumstances under the local public interest rules, contrary to the legislative direction in Idaho Code § 67-6537 and Idaho Code § 42-202B(3) and contrary to the local public interest rules?
2. Whether the Director in denying the applications for irrigation use has in effect created a new State-wide policy or rule without statutory authority and without engaging in rulemaking.
3. Whether the Director's order denies Petitioner the right to appropriate unappropriated waters in violation of Idaho's Constitution, Article XV § 3.
4. Whether the Director erred by concluding that the local public interest criteria required the use of surface water for irrigation when the groundwater supply in the vicinity of the Petitioner's land is fully capable of supplying water to the lands to be irrigated without injury to any other water rights?
5. Whether the Director erred by concluding that the local public interest required the use of surface water for irrigation to maintain surface water distribution systems when the surface water shareholder continues to have an obligation to pay assessments, when the surface water delivery entity has a service area that is 15,000 acres, but only has the right to irrigate 10,000 acres, leaving 5,000 acres of land within Farmers' Co-op's Service Area susceptible of

additional surface water irrigation, when there are willing buyers for the water shares, and when the water shares are transferable to other water users?

6. Whether the Director erred in requiring that the surface water for irrigation must remain with the land when Farmers' Co-op's shares are not appurtenant to the land?
7. Whether the Director erred in denying the applications for irrigation based on Idaho's Land Use Act, Idaho Code § 67-6537, when Idaho Code § 67-6537 does not apply to Petitioner's project?
8. Whether the Director erred by applying a "standard" condition on supplemental groundwater rights to applications for primary groundwater rights for irrigation, when no similar "standard" condition, guidance or rule applies to applications for primary groundwater rights?
9. Whether the Director erred by failing to consider that the water quality of the surface water was not compatible with the desires and needs of the residents and the type of small-scale irrigation systems that would have to be used for surface delivery (e.g., silt, seeds and pesticides), and failing to consider the environmental benefit of reducing runoff of silty surface water to the Snake River in a portion of the river that is water quality limited?
10. Whether the Director erred in determining that Farmers' Co-op's water is available to Eden Gate's when Eden Gate's does not own shares in Farmers Coop and when the water rights are not appurtenant to the land?

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003). The Court reviews the matter "based on the record created before the

agency." *Chisholm v. IDWR*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005).

Generally, a Court is charged with deferring to an agency's decision. *See Mercy Medical Center v. Ada Cty*., 146 Idaho 226, 229, 192 P.3d 1050, 1053 (2008) (Court should not substitute its judgment for that of the agency as to questions of fact so long as the decision is "supported by substantial and competent evidence"); *St. Joseph Reg. Med. Ctr. v. Nez Perce Cty.*, 134 Idaho 486, 5 P.3d 466 (2000) (same). The Court, however, is "free to correct errors of law." *Mercy Medical Center, supra*. An agency's decision must be overturned it if (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure, " (d) "is not supported by substantial evidence in the record as a whole" or (e) "arbitrary, capricious or an abuse of discretion." *Chisholm*, 142 Idaho at 162, 125 P.3d at 518 (citing Idaho Code § 67-5279(3)). An agency action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id*.

ARGUMENT

I. The Director does not have Authority to Enforce LUPA.

The Director's powers are limited to those granted by the Idaho Constitution and the Legislature. That power does not extend to the exercise of LUPA. Instead, the Legislature clearly and unambiguously granted the power to administer LUPA to local governments such as cities and counties. Further, Idaho Code § 67-6537 does not apply to the Applications because the Applications do not concern a "land use change."

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a. Only Cities and Counties are Empowered to Exercise LUPA.

It is a long-standing principle of Idaho law that the powers and authority of an administrative agency are limited and extend only as far as the legislature has authorized. Indeed, the Supreme Court applied this principle to the IDWR in *Beker Industries, Inc. v. Georgetown Irr. Dist.*, 101 Idaho 187, 191, 610 P.2d 546, 550 (1980). As the Court more recently explained:

> State agencies in Idaho have no inherent authority. See *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981); see also Richard Henry Seamon, *Idaho Administrative Law: A Primer for Students and Practitioners*, 51 Idaho L. Rev. 421, 439 (2015). As a general rule, administrative agencies "are tribunals of limited jurisdiction." *Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). Thus, agencies have no authority outside of what the Legislature specifically grants to them. *Idaho Retired Firefighters Assoc. v. Pub. Emp. Ret. Bd.*, 165 Idaho 193, 196, 443 P.3d 207, 210 (2019) (citing *Idaho Power Co.*, 102 Idaho at 750, 639 P.2d at 448).

In re Idaho Workers Comp. Bd., 167 Idaho 13, 20, 467 P.3d 377, 384 (2020) (emphasis added).

The Department's powers are provided in the constitution and the Idaho Code, specifically title 42, and those powers relate to the administration, management, and control of the waters of Idaho. Conversely, LUPA is found in chapter 65, title 67, of the Idaho Code, which provides for "Local Land Use Planning."

LUPA was promulgated to "promote the health, safety and general welfare of the people of the State of Idaho." Idaho Code § 67-6502. LUPA provides that "[e]very city and county shall exercise the powers conferred by this chapter." Idaho Code § 67-6503. The Legislature therefore, clearly and unambiguously empowered local governments, and only local governments, with the power to exercise the provisions of LUPA. LUPA does not authorize the Director to exercise any power conferred by title 67. Hence, the Director has no statutory authority to exercise the provisions of LUPA, nor does the Director have authority to enforce the land use change

preferences of Idaho Code § 67-6537.[1]

When the language of a statute is plain and unambiguous, courts give effect to the statute as written. *In re Adoption of Doe*, 156 Idaho 345, 349, 326 P.3d 347, 351 (2014); *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003) ("[i]f the statute is not ambiguous, this Court does not construe it, but simply follows the law as written"). Additionally, the Court can "presume the legislature was aware of those statutes previously enacted when passing new legislation." *State v. Betterton*, 127 Idaho 562, 563, 903 P.2d 151, 152 (Ct. App. 1995). Thus, the Legislature's decision to grant power to local governments to exercise LUPA, as well as its decision to enact Idaho Code § 67-6537 within the confines of LUPA, were made purposefully and with knowledge of the authority it had delegated to IDWR and the limited scope of IDWR's powers.

The Idaho Supreme Court, when considering this statute, recognized that the legislative directive of LUPA and Idaho Code § 67-6537 is aimed at local governing boards considering the effect of land use changes, "I.C. § 67–6537, which is designed to encourage the use of surface water (as opposed to groundwater) for irrigation purposes, requires local governing boards to consider the effect of a comprehensive plan (or amendment thereto) on source, quantity and quality of groundwater." *Ralph Naylor Farms, LLC v. Latah Cty.*, 144 Idaho 806, 810, 172 P.3d 1081, 1085 (2007) (emphasis added).

In this case, the Legislature's grant of power to local governments to exercise LUPA is plain and unambiguous. The absence of any such power granted to the Department is likewise plain and unambiguous. The Legislature did not provide the Department authority to exercise LUPA and the Department has no authority to enforce LUPA or Idaho Code § 67-6537. The

[1] Farmers Co-op also recognizes that its board has no authority to enforce LUPA. Tr. 215:23-216:5.

Director's attempt to enforce Idaho Code § 67-6537 exceeds his statutory authority.

b. Idaho Code § 67-6537 is Inapplicable to the Applications.

Notwithstanding the Department's lack of authority to enforce LUPA, the plain language of Idaho Code § 67-6537 shows that it is inapplicable to the Applications. Idaho Code § 67-6537 was enacted in 2005 with the intent to "encourage the use of surface water for irrigation." Idaho Code § 67-6537(1). This statute was meant to give local governments the power to address concerns that landowners were selling appurtenant water rights before selling property for development, and was intended to keep surface water rights from being sold separately before annexation to a municipality. *Surface Water for Irrigation: Minutes for H.B. 281a Before the H. Comm. on Res. & Conservation*, 59th Legis., 1st Reg. Sess. (March 9, 2005) (statement of Rep. Mike Moyle, Member, H. Comm. on Res. & Conservation).

The legislature also made it crystal clear when Idaho Code § 67-6537 applies and when it does not. It only applies to those persons seeking to make land use changes with local governing boards, "[a]ll applicants proposing to make land use changes shall be required to use surface water, where reasonably available." Idaho Code § 67-6537(1) (emphasis added). The River Bluff Development property has been zoned the same for over 100 years, and Eden Gate's development of homes on those properties does not constitute a "land use change."

Below, Farmers Co-op attempted to argue that Idaho Code § 67-6537 applied because OMM was an "applicant" for a water right and the use of the land would change when developed. If Farmers Co-op makes this claim again, it is inconsistent with the clear and unambiguous provisions of LUPA. The "applicant" under Idaho Code § 67-6537 refers to a person seeking "applications for zoning changes, subdivisions, variances, special use permits or other such applications required under this chapter …" [LUPA]. Idaho Code § 67-6519(1);

Highlands Development Corp. v. City of Boise, 145 Idaho 958, 961, 188 P. 3d 900, 903 (2008) (itemizing the types of permits authorized under LUPA, which does not include water right permits). Neither the Director nor Farmers Co-op contend that these water right Applications constitute a land use change within the meaning of Idaho Code § 67-6537. Idaho Code § 67-6537 is simply not implicated.

Additionally, Idaho Code § 67-6537 requires that, "[a]ll applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation." (emphasis added). In discussing the availability of surface water to Eden Gate, the Director determined that surface water was reasonably available to Eden Gate. *See* R. 325. For the following reasons, the Director's rationale is wrong.

The Director states that, even though Eden Gate does not actually have access to surface water, "[a]ny lack of access by Eden Gate to surface water is a result of the intentional conveyance of the parcels from OMM to Eden Gate after the hearing, without the previously used Farmers Co-op shares." R. 325. The Director asserts that "it is not in the local public interest to allow developers to intentionally manipulate access to surface water," and that water is therefore reasonably available to Eden Gate. *Id.* This rationale fails. First, Farmers Co-op allows the sale of water shares separate from land and the Farmers Co-op board has repeatedly recognized that right.[2] *See* R. 480-88 (Farmers Co-op Bylaws Art. 6); Tr. 202. Clearly, Eden Gate does not have access to surface water, as it owns no shares. Also, OMM's Assignment to Eden Gate is not relevant to the issue of "reasonably available surface water;" Idaho Code § 67-6537 does not ask why surface water is available, only whether it is.

[2] The only transfer of shares that have been denied by Farmers Co-op occurred when water was not deliverable or the assessment and fees had not been paid. Tr. 222:2-9. Neither is the case here.

The Director then argues that because the Farmers Co-op delivery system is still present on Eden Gate's land and nothing physical prevents the delivery of surface water to Eden Gate's parcels, then surface water is reasonably available to Eden Gate. R. 325. This is wrong. The consequence of the Director's position is that an application for groundwater can be denied solely because surface water belonging to a third-party may be "available" nearby, thus denying the applicant's access to unappropriated waters and forcing the applicant to purchase shares in that ditch company. The Director recognizes that Eden Gate does not have access to surface water rights, but incorrectly maintains that Eden Gate should be required to obtain Farmers Co-op shares to gain access to irrigation water.

Principally, whether a land use change has occurred or whether surface water is reasonably "available" is an inquiry only relevant under LUPA and only when considered by local governments; these issues are not applicable or proper considerations for a water appropriation application. Even so, no land change use occurred, not is surface water reasonably available to Eden Gate, so Idaho Code § 67-6537 is not triggered. The Department's application of Idaho Code § 67-6537 to the Applications is arbitrary and capricious, is in excess of the Department's authority, and is not supported by the facts.

II. The Director Erred by Relying on LUPA and the Department's Supplemental Conditions in Denying the Applications.

The Director is empowered to control and administer the waters of the state, but appropriation of such waters "shall be perfected only by means of the application, permit and license procedure as provided in this title [42]. Idaho Code § 42-201(1) (emphasis added). Idaho Code therefore, is the sole means for water appropriation applications and it clearly delineates the factors by which an application for water rights must be evaluated:

> In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho… the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Idaho Code § 42-203A(5). The applicant bears the burden of proof for elements (a) through (d) and (f), while both parties bear the burden of coming forth with evidence about any factor that will affect element (e), the local public interest, with the applicant bearing the ultimate burden of persuasion for all of the elements of Idaho Code § 42-203A(5). *See also* IDAPA 37.03.08.040.04.

The Director found that OMM met its burden for elements (a) through (d). *See* R. 331-35. Additionally, as to element (f), the Hearing Officer found that Eden Gate's application is "not inconsistent with the conservation of water resources in Idaho." R. 335. Thus, the only issue, and the only reason for the Director's partial denial[3] of the Applications is element (e), that the Applications supposedly conflict with the local public interest.

The Director claims that Idaho Code § 67-6537 articulates a state-wide "policy" binding on the Department requiring the use of surface water, whenever reasonably available. He then reads the "policy" to have a far broader application than articulated by the Legislature in Idaho Code § 67-6537. The Director cites no authority for this "policy" or its applicability to a water right application anywhere in title 42, or in IDWR's rules, regulations, or guidance. Nor does he

[3] The Preliminary Order approves, and the Final Order confirms, Eden's application for domestic water rights on all 14 parcels of land, stating that "the domestic portion of the Applications, including up to ½ acre of irrigation, is not inconsistent with the local public interest and is approved." R. 238, 336.

cite any authority authorizing him to extend this "policy" beyond the scope of the statutory directive for land use changes. The Director's reliance on Idaho Code § 67-6537 as a policy of state-wide application is misguided, exceeds the authority granted to him by the legislature, and is an improper criteria for evaluating the local public interest factor of a water right application.

a. IDWR is not Authorized to Enforce LUPA in the Water Appropriation Process.

Farmers Co-op protested the Applications, alleging non-compliance with Idaho Code § 67-6537. R. 115-45. In *Protestant Farmers Co-Operative Ditch Company's Response to Notice of Assignment of Application*, Farmers Co-op argued that Idaho Code § 67-6537 establishes the "policy of this State" in all circumstances to "encourage the use of surface water for irrigation." R. 216-17. Farmers Co-op maintains that Idaho Code § 67-6537 establishes a binding policy on IDWR.

The Hearing Officer, on the other hand, described the role of Idaho Code § 67-6537 as:

> [O]perative only when there is a "land use change", not a water right change, even if the proposed water right change is a change in the character of the use of water on the land. Idaho Code § 67-6537 is a directive to local governments that are responsible for local land use planning and are considering a change in the use of land. As a result, Idaho Code § 67-6537 does not mandate that the Department require the use of surface water, if available to a property, when considering an application to appropriate water.

R. 236 (emphasis added). Despite finding that the Applications do not concern a "land use change," that Idaho Code § 67-6537 is a directive to local governments, not IDWR, and that Idaho Code § 67-6537 is not a mandate on IDWR, the Hearing Officer found that the "policy" requiring the use of available surface water rather than groundwater for irrigation was the sole reason for denying an application for a water right under the local public interest criterion.

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The Hearing Officer identified three factors on which benefits can be derived from the use of available surface water rather than groundwater:[4] (1) the conservation of groundwater; (2) maintenance of surface water distribution systems for groundwater recharge; and, (3) the economic viability of surface water delivery entities. R. 236-37. The Hearing Officer went even further and concluded that "[i]n the absence of Farmers Co-op's review and consent the Hearing officer cannot conclude approving the use of groundwater as a primary source of irrigation water will not adversely impact the local public interest in maintaining the use of surface water and the viability of Farmers Co-op." [5] R. 238. In other words, the Hearing Officer deferred the local public interest evaluation to the desires of an irrigation entity. The Hearing Officer relied exclusively on alleged, hypothetical, future impacts the Applications might have on Farmers Co-op's distribution systems and economic viability.

The Director's Final Order also concedes that Idaho Code § 67-6537 "does not require IDWR to consider LUPA in the water appropriation process." R. 323 (emphasis added). Nonetheless, the Director concludes that Idaho Code § 67-6537 establishes a wide-ranging policy for "the public interest of the state of Idaho." *Id.* The Director identifies specific impacts that should be considered when favoring the use of surface water. The Director then concludes that IDWR has a current policy for the use of surface water prior to the use of supplemental groundwater, and that "the effects of such use of groundwater on the public water resource would increase use of groundwater and possibly diminish the use of surface water contrary to the

[4] The Hearing Officer's analysis illustrates that the policy encouraging the use of available surface water is not what is significant for a water appropriation application's consideration of the local public interest. Rather, it is the benefits, or effects of the appropriation on the local public interest which should be analyzed, i.e., water conservation, water recharge, and water quality.

[5] The Hearing Officer also concluded that OMM "did not demonstrate it is in the local public interest to cease using surface water on the proposed place of use." R. 238 (emphasis added). This conclusion is at odds with the dictate of Idaho Code § 42-203A(5) which requires the applicant show that "a proposed used" is not in conflict with the local public interest; there is no requirement that the applicant show a dis-use is in the local public interest.

legislatively defined interests that the people in the area directly affected by a proposed water use have." R. 323 (cleaned up).

The Director's reasoning is flawed. The Director identifies the policy preferring the use of surface water as a factor of the local public interest because, not using surface water is not in the local public interest; this is circular. Additionally, as discussed below, the "legislatively defined interests that the people in the area directly affected by a proposed water use have," R. 323, specifically excludes consideration of land use planning conventions, focuses on "local" issues, not state-wide policies, and clearly is meant to focus on specific factors directly affecting the local public water resource, i.e., water conservation, water recharge, and water quality, not some general maxim that surface water must be preferred in all circumstances.

b. Idaho Code § 67-6537 is an Inappropriate Factor to Evaluate the Local Public Interest.

Local public interest is "defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3) (emphasis added). Idaho's definition of "local public interest" was added to statute in 2003 and was meant to clarify "the scope of the "local public interest" review in water right applications." H.B. 284, 57th Legis., 1st Reg. Sess. (Idaho 2003) (Statement of Purpose) ("HB 284 Statement of Purpose"). Specifically, the local public interest "should be construed to ensure the greatest possible benefit from the public waters is achieved." *Id.* Local public interest:

> should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time.

Id. The statement of purpose illustrates the type of direct impacts on the public water resource which may be considered in the local public interest.

Before amending the statutory language for "local public interest," two main issues arose concerning protests and litigation around the local public interest. First, "some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues." HB 284 Statement of Purpose. As explained by Clive Strong, Deputy Attorney General, Chief of the Division of Natural Resources, and author of the proposed legislation, the amendment clarified that "local public interest" is defined as "the affairs of the people in the area directly affected by the proposed use." *See Water Rights, Application: Minutes for H.B. 284 Before the S. Comm on Res. and Envr.*, 57th Legis., 1st Reg. Sess. (April 2, 2003) (statement of Clive Strong) (emphasis added). Thus, the amendment clarified that the "local public interest" is only meant to consider the impacts on people living directly in the area affected by a proposed use.

Second, the amendment was meant to clarify the types of impact and to narrow the factors by which the IDWR should consider the "local public interest:"

> For example, the effect of a new manufacturing plant on water quality, resident fish and wildlife and the availability of water for other beneficial uses is appropriately considered under the local public interest criteria. On the other hand, the effect of the manufacturing plant on the air quality is not within the local public interest criteria because it is not an effect of the diversion of water but rather a secondary effect of the proposed plant. While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the EPHA.

HB 284 Statement of Purpose. The amendments provide "side boards" to the Director's discretion to consider any impact of a proposed use, whether it was related to water or not. *Water Rights, Application: Minutes for H.B. 284 Before the S. Comm on Res. and Envr.*, 57th Legis., 1st Reg. Sess. (April 2, 2003) (statement of Clive Strong).

The legislative side boards require that "if the issue is a matter of local public interest, you have to show that the element of public interest is related to the public water resource." *Id.* (emphasis added). The amendments recognize that "it is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in other agencies." HB 284 Statement of Purpose *citing Shokal v. Dunn*, 109 Idaho 330, 340, 707 P.2d 441, 451 (1985). Eden Gate's proposed use has no negative effect whatsoever on the properly-evaluated local public interest,[6] and Farmers Co-op's "resistance to the application is just the sort of protest the Legislature sought to forestall" by the 2003 amendments. *See North Snake Groundwater Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 525, fn.1, 376 P.3d 722, 729 fn. 1 (2016).

Thus, the legislative history of Idaho Code § 42-202B(3) shows that the Legislature intended the local public interest to continue to include historical criteria related directly to the public water resource, like fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, and water quality, while eliminating consideration of secondary impacts and those delegated to other state and local agencies.

Recognizing that Idaho Code § 67-6537 does not directly apply, as IDWR must, the Director nevertheless effectively decides to use that statute to deny these Applications under the guise of "policy." This sleight of hand should not be countenanced. The Supreme Court has held that "[a] government agency may not do indirectly what it is prevented from doing directly." *Syringa Networks, LLC v. Idaho Dept. of Admin.*, 155 Idaho 55, 61, 305 P.3d 499, 505 (2013) *appeal after remand*, 159 Idaho 813, 367 P.3d 208 (2016); *O'Bryant v. City of Idaho Falls*, 78

[6] *See* Section IV, *infra*.

Idaho 313, 325, 303 P.2d 672,678 (1956) (what cannot be done by the City of Idaho Falls because of constitutional limitations cannot be accomplished indirectly).

In *Syringa*, the state attempted to circumvent the statutory bidding requirements by adopting a two-step process. Here, the Director has effectively tried the same two-step process. He recognizes he has no power to enforce Idaho Code § 67-6537 directly, so he takes a second step and enforces the statutory requirements of Idaho Code § 67-6537 indirectly and broadens the statute's application to circumstances not contemplated by the Legislature, all in the name of "policy" shoe-horned into the local public interest evaluation, even after the Legislature has restricted the Department's role in how local public interest is to be evaluated.

1. Idaho Code § 67-6537 is not a Proper Factor in the Local Public Interest Criterion Evaluation.

The purpose of Idaho Code § 67-6537 is to give local governments the power to influence residential development practices as they pertain to the use of surface rather than groundwater in annexation and zoning decisions. Nothing in the legislative history, or the statute, indicates that its purpose relates to the "public water resource," or related items such as: fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality. Simply put, Idaho Code § 67-6537 does not articulate policy relevant to the local public interest criteria, or "public water resource," for water appropriation applications. Instead, Idaho Code § 67-6537 relates to a policy for land use and development and creates an onus on local governing boards considering land use changes; it does not create a policy of broad applicability nor a policy applicable to water appropriation applications. If surface water must be used rather than groundwater here, that is a matter for the county to take action on. It is significant therefore, that Farmers Co-op has not challenged the River Bluff project before Canyon County.

Additionally, applying Idaho Code § 67-6537's surface water priority policy to an analysis of the local public interest is not supported by a plain reading of Idaho Code § 42-202B(3). Idaho Code § 42-202B(3)'s focus is on the impacts of water appropriation on the public water resource, and it defines the "local public interest" as the interest in "the effects of such use [water appropriation] on the public water resource." (emphasis added). Idaho Code § 67-6537(1) merely states a preference to use one form of water over another when irrigating.

While it is possible in other factual circumstances, not present here, that the use of groundwater rather than surface water may have an impact on the public water resource, e.g., reduction of the aquifer, impacts to gaining reaches of local surface water and subsequent impacts on fish and wildlife, recreation, aesthetics, etc., that actual effect is the proper scope of consideration for the local public interest. That is, the operative question for the local public interest is, "what impacts on the public water resource will occur with this proposed use." The question is not, as the Director contends, "whether surface water must be used when groundwater is available for use without injury to other users and without impact to the public water resource." The land use policy preferring surface water use over groundwater use is simply a direction for which type of water to use. It does not, by itself, make any factual conclusion about whether there is any impact or effect on the use of the public water resource from a water right application.

2. The Legislature Intended the Local Public Interest Evaluation to Exclude Consideration of Factors Vested in Other Agencies.

The amendments to the local public interest statutes, Idaho Code § 42-202B(3), clearly indicate that the legislative definition of "local public interest" was meant to add sideboards, or limitations, to the type of criteria which IDWR can consider for the local public interest. That statue was amended specifically to curtail situations in which the Department was considering

criteria which were secondary to the public water resource and which are better evaluated by other state or local agencies. The Legislature did not want secondary criteria to be included in IDWR's local public interest analysis; instead, the Legislature wanted IDWR to focus on the "public water resource" itself.

Idaho Code § 67-6537 relates to the preference of use of surface water in land use changes, a secondary concern from those primary concerns of the "public water resource." Additionally, the Statement of Purpose for Idaho Code § 42-202B(3) states, "it is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in other agencies." Here, land use change and LUPA's surface water priority policy are concerns directly vested to local governing bodies and land use planning boards. The Department's reliance on Idaho Code § 67-6537 as a "policy" of water appropriation exceeds its authority by considering secondary criteria which is better evaluated by other agencies, specifically the local governments with the authority and expertise to consider land use changes and who have been delegated that responsibility by the Legislature. This is the precise situation in which the Legislature intended to limit the Department's discretion when considering local public interest criteria when they amended Idaho Code § 42-202B(3).

Moreover, the Director's application of land use planning criteria to a water right application is not entitled to any deference because it is inconsistent with the statutory definition of "local public interest" in that the Director addresses concerns which the Legislature has vested in other state agencies, specifically, city and county governing boards.

> Any interpretation of "local public interest" that is inconsistent with the statutory definition of that term cannot be reasonable. Further, because the definition of the term "local public interest" is expressly provided by statute, the Director lacks the authority to supply his own interpretation. *See J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 860, 820 P.2d 1206, 1217 (1991) ("when an agency

> construction clearly ignores the statute which it professes to interpret, then the Court need not pay heed to the statutory construction.").

North Snake Groundwater Dist. v. Idaho Dep't of Water Res., 160 Idaho 518, 525, 376 P.3d 722, 729 (2016).

The *North Snake* decision by the District Court and the Supreme Court is very instructive, with respect to the Director's attempt to expand the local public interest evaluation here. *See North Snake*, 160 Idaho 518, 376 P.3d 722; *Memorandum Decision and Order* (Case No. CV-2015-083, Gooding County Dist. Ct., Fifth Jud. Dist., Aug. 7, 2015). In *North Snake*, the Director denied the district's application for a water right, in part on local public interest grounds. The Director asserted that approving the application would set an unacceptable precedent in other proceedings. He stated that the application would supply no new water to Rangen and that the Districts should not be able to exercise their power of eminent domain. The District Court reversed and the Supreme Court affirmed.

The District Court held that the local public interest criteria are statutorily limited, that the Director's rationales were not statutorily authorized bases for denial, that the legislature narrowed the local public interest statute, and that the Director was punishing the Districts for exercising their constitutional right to appropriate water, first in time. *See Memorandum Decision and Order* (Case No. CV-2015-083, Gooding County Dist. Ct., Fifth Jud. Dist., Aug. 7, 2015) at 9-14. The Supreme Court agreed that the "Director exceeded his authority by evaluating the local public interest based on factors not contemplated in the statutory definition. *North Snake*, 160 Idaho at 525, 376 P.3d at 729. The Supreme Court also observed that Rangen's resistance to the application was just the sort of protest the 2003 amendments were designed to forestall. *Id.* at 525, fn.1, 376 P.3d at 729, fn.1.

Here, the Director relies on concerns about hypothetical future impacts to Farmers Co-op from other hypothetical future applications. He expanded the scope of Idaho Code § 67-6537 to include exercising statutory authority that was not delegated to him. And, as in *North Snake*, he seeks to prevent the applicant from exercising its constitutional right to appropriate unappropriated water under the priority doctrine. Just as in *North Snake*, Farmers Co-op's protest is the sort of protest the amendments to the local public interest statute are intended to preclude.

c. The Director Improperly Relies on the Department's Supplemental Groundwater Condition as a Factor to Evaluate the Local Public Interest and these Applications.

Further stretching the local public interest criterion, the Director, referring to the Department's supplemental groundwater condition, states that, "[t]he continued viability of a surface water delivery system is also a reasonable local public interest factor when considering whether surface water is available to a transfer applicant." R. 325 (emphasis added). Neither the Director nor Farmers Co-op point to any fact in the record which proves or even suggests that granting Eden Gate's Applications would harm Farmers Co-op's surface water delivery system.[7] In fact, OMM continues to pay assessments to Farmers Co-op for its shares, OMM is able to transfer those shares, there is a willing buyer for the 14 shares, and there are other lands in the Farmers Co-op area susceptible of service by Farmers Co-op. R. 329 at ¶¶ 23, 26, 31, 32. The viability of Farmers Co-op's delivery systems would not be negatively impacted by approving Eden Gate's Applications.

The Director relies on the Department's supplemental groundwater condition to assert (again, without any actual evidence) that OMM's sale of land to Eden Gate without the Farmers Co-op shares is somehow "intentionally manipulating or destroying a delivery system." R. 324.

[7] Rod Nielsen's testimony demonstrates that Farmers Co-op's concern with the Applications is not related to any potential harm to its delivery systems caused by approval of the Applications. Rather, Farmers Co-op is concerned about future developments. Tr. 267:24-268:7.

This line of attack fails. First, there is no existing, appurtenant primary surface water right. Second, Eden Gate does not hold water shares in Farmers Co-op. Third, the Applications are not for a supplemental right, but rather a primary groundwater right. Fourth, the Farmers Co-op shares are not appurtenant to the land. Finally, OMM has not destroyed a delivery system nor reduced its Farmers Co-op shares; OMM has the capability and intention of applying those shares to other lands in the Farmers Co-op distribution area.

As a consequence, the Director erred by relying on the LUPA and the Department's supplemental condition to deny the Applications. The Director has no authority to enforce Idaho Code § 67-6537, and it does not bind the Director. Nor is Idaho Code § 67-6537 an appropriate criteria of the local public interest. The Director's discretion to consider local public interest is limited by statute. Idaho Code § 67-6537 is a dictate which is properly considered and administered by local governing boards, not by the Department. Additionally, the Applications do not seek supplemental rights and the Director's reliance on the Department's supplemental conditions is unfounded. For these reasons, the Director's reliance on Idaho Code § 67-6537 and the Department's supplemental conditions is arbitrary, capricious, exceeds the authority of the agency, and is not based in fact.

III. The Director Erred by Not Applying the Proper Local Public Interest Criteria and by Creating a New Criteria Requiring the Use of Surface Water.

The Director fails to analyze any factor of the local public interest other than the use of surface water versus groundwater. The Director defends this by stating that, "the definition of local public interest was significantly narrowed by the Idaho Legislature in 2003," and therefore, "the Director will not specifically address the factors at IDAPA 37.03.08.045.01.e.i-iii." R. 321 at fn. 5. The Director however, also cites the HB 284 Statement of Purpose, in which the Legislature focused on factors affecting the public water resources like: fish and wildlife habitat,

aquatic life, recreation, aesthetic beauty, transportation, navigation, and water quality." HB 284 Statement of Purpose. But, the legislative history of Idaho Code § 42-203A(5) shows that the narrowing of the "local public interest" was meant to put sideboards and limit the Director's power to review of secondary criteria vested in other agencies or exercise statutory authority no delegated to him. *See North Snake*, 160 Idaho at 524-25, 376 P.3d at 728-29.

IDAPA 37.08.045.01.e.iii includes, "[c]ompliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions, as a factor of the local public interest. Given the legislative history of Idaho Code § 42-203A(5), it is undisputed that IDAPA 37.08.045.01.e.iii is a vestige of the prior local public interest statute and is not an appropriate consideration for the local public interest today. Thus, it is inappropriate for the Director to consider "compliance with planning and zoning ordinances." The Director also recognizes that the 2003 legislative amendments to Idaho Code § 42-203A(5) significantly narrowed the definition of local public in this manner. R. 321 at fn. 5. While acknowledging this reduction in his authority as a general matter, the Director ignores that limitation here and proceeds to analyze the local public interest using a criterion specifically excluded by those amendments—a planning and zoning ordinance.

Idaho Code § 67-6537 is clearly a "planning and zoning ordinance." The factors directly affecting the "public water resources," i.e., factors affecting the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, and water quality, remain as proper criteria for consideration. The Director should have analyzed the impact of Eden Gate's Applications on those factors, and those factors alone.

Review of the proper, legislatively directed "local public interest" factors shows that Eden Gate's Applications comply with the local public interest. First, Eden Gate's Application is

in the local public interest because it will not have adverse impacts on the public water resource. As everyone concedes, the water use will not deplete the groundwater resource. And, because Eden Gate's applications are not for diversion and use of surface water, factors like transportation, recreation, aesthetic beauty, navigation, aquatic life, and fish and wildlife habitat are not implicated. No evidence was introduced showing any adverse impact on water use, the environment, or recreational purposes. The Applications will have no impact on local recreation, the local environment, or to local wildlife resources; no one contends otherwise. Additionally, as the Applications are for groundwater appropriation, they will not be diverting water from natural or recreational areas, therefore having no impact on any such area. Moreover, Eden Gate's Application is for 0.03 cfs per acre for irrigation and is consistent with the Department's standards for conservation of water resources. R. 335. As such, Eden Gate's Applications will not negatively impact the public water resources and the Applications within the local public interest.

The Director cursorily mentions the benefit of groundwater recharge from surface water distribution systems. R. 323. But, because surface water will continue to be used in Farmers Co-op's service area, this benefit will remain even after the Applications are approved. The Director does not identify how Eden Gate's use of groundwater would specifically negatively impact Farmers Co-op's surface water distribution systems, or groundwater recharge. Nor does the Director indicate how moving the use of 14 acres to another location would affect groundwater levels. In fact, numerous other Farmers Co-op shareholders use the same headgate previously used by OMM, and another farmer uses the same system OMM used. Tr. 22:18-23:1. Eden Gate's future non-use of Farmers Co-op water will not therefore, have any adverse impact on the surface water distribution system because that distribution system will continue to remain in use,

providing Farmers Co-op users with surface water. Hence, there will be no impact on groundwater recharge or the distribution system, and neither Farmers Co-op nor the Director has pointed to any evidence of adverse effect in the record.

Another "public water resource" factor considers water quality, and here, the water quality would be better from groundwater wells, rather than from surface water because the water quality of the available surface water is not compatible with the desires and needs of future residents at the River Bluff Development. Eden Gate has presented testimony that groundwater irrigation is a more convenient, practical, and clean means of developing water on the parcels, and that "the quality of the surface water (silt, seed, and pesticide content), may not be compatible with the desires of the residents or the types of irrigation systems likely to be used." R. 235. This evidence is not disputed.

Farmers Co-op surface water carries a high sediment load which deposits significant amounts of silt into the ditches on Eden Gate's land. Tr. 21:1-8. Practically, the high silt content will cause the smaller irrigation pipes used on smaller properties to easily plug with sediment. Tr. 42:9-17, 30:14-17. There are valid concerns regarding the overall condition and quality of Farmers Co-op water which are alleviated by use of groundwater, "you don't have the pesticides, herbicides, and weeds and so forth that come with the canal water." Tr. 97:3-5. Because "the [surface] water is pretty dirty out there," use of groundwater will provide clean water quality that would not obstruct irrigation valves and pipes. Tr.142:18-143:1. Finally, there are environmental benefits to local water quality under Eden Gate's proposed use. Groundwater use will reduce runoff of silty surface water to the Snake River, increasing water quality, and providing environmental benefits to the surrounding areas. Tr. 143:13-20. The water quality factor clearly

shows that the only impacts of the Applications' proposed use on the public water resource is positive and is in compliance with the local public interest.

When analyzed through the proper public water resource factors, the Applications are consistent with local public interest. The Director determined that Eden Gate had met its burden for factors (a) through (d), and (f) of Idaho Code § 42-203A(5); the above analysis of local public interest, factor (e), shows that the Department has no basis to deny the Applications request for groundwater irrigation rights under Idaho Code § 42-203A(5). As such, the Applications should be granted in full.

IV. The Director's Use of Idaho Code § 67-6537 to Create New Departmental Policy Exceeds the Authority of the Department.

a. The Director's Reliance on LUPA Improperly Expands the Act Beyond the Terms and Conditions of Idaho Code § 67-6537.

LUPA contains a series of statutes created by the Idaho Legislature that apply to specifically defined circumstances. Idaho Code § 67-6537 is narrowly drawn to apply strictly to land use changes. When the legislature makes choices, agencies have no power to expand the lines drawn by the legislature. The present Applications do not concern a land use change. R. 328 at ¶ 11. Application of LUPA provisions to water appropriations is an improper expansion of Department power, contravenes the narrowly tailored statutes drawn by the Idaho Legislature, and creates new policy.

Idaho Code § 67-6537 does not state a public policy for broad application, it simply states that, "[t]he intent of this section is to encourage the use of surface water for irrigation" in the context of land use changes. (emphasis added). A plain reading of Idaho Code § 67-6537 shows that if any public policy is articulated, it is to encourage the use of surface water for irrigation when making land use changes, and when surface water is reasonably available. Because the

Applications are for water appropriation and not land use change, reliance on Idaho Code § 67-6537 as a wide-sweeping legislative expression of public policy, applicable to all water appropriation applications generally wherever they may occur, and these Applications specifically, is without merit.

b. The Director's Reliance on LUPA Creates a New IDWR Rule Requiring the Use of Surface Water in All Circumstances Which is Contrary to Legislative Direction and Which Exceeds the Director's Statutory Authority.

The Director's conclusion implies that even when there is no impact on the surface water resources, an application for use of groundwater, in lieu of surface water, always conflicts with local public interest, even when the surface water is no longer available on the land, and there are other available lands for delivery of surface water.

LUPA established state-wide rules for local government throughout the entire state. Idaho water appropriations law, including specifically the concept of local public interest, necessarily relies on a localized investigation to determine appropriateness of water use. Hence, the requirement that the local public interest is defined as the interests of the people in the area "directly affected by a proposed water use." Idaho Code § 42-202B(3). The hydrological exigencies of a specific, local area preclude the application of a policy as broad as the Director imagines, i.e., that surface water must always be used for irrigation. The Appropriation Rules require specific, localized information and focus on the impact of an appropriation, rather than the application of general maxims when granting or denying a water right application. The local public interest provisions of the Appropriation statutes were designed, and adopted by the Legislature, to address specific, local conditions, and it is the policies and criteria contained therein which must be applied to this matter, not a suggestion borrowed from Land Use statutes and then made policy by the Hearing Officer and Director.

Moreover, the Director's proposed expansion of Idaho Code § 67-6537 from a local government, land use change purpose to a broad, state-wide policy applicable to water appropriation applications exceeds the Director's authority. An agency created policy with such broad coverage and impact would be an agency rule and must be subject to agency rulemaking procedures. *See Asarco Inc. v. State*, 138 Idaho 719, 723-25, 69 P.3d 139, 143-45 (2003). Because the Director's application of Idaho Code § 67-6537 to water appropriation applications amounts to an agency rule, the Director exceeded his authority by applying that rule without out proper rulemaking procedures.

V. The Director's Order Denies Eden Gate's the Right to Appropriate Unappropriated Waters in Violation of Idaho's Constitution.

The Idaho Constitution protects the right to appropriate the unappropriated waters of Idaho, "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Idaho Const. art. XV, § 3. The Director is empowered to control and administer the waters of the state, but appropriation of such waters "shall be perfected only by means of the application, permit and license procedure as provided in this title [42]." Idaho Code § 42-201(1).

In *North Snake Groundwater District v. IDWR*, the Supreme Court upheld the District Court's determination that the Director's interpretation of the local public interest rules, IDAPA 37.03.08.045.01.c, was overbroad and therefore conflicted with the applicants' constitutional right to divert unappropriated public waters. 160 Idaho 518, 376 P.3d 722. The same result applies here. There is absolutely no question that the groundwater in the area of River Bluff Development contains sufficient unappropriated waters to satisfy these Applications.

Here, the Director improperly denied the Applications by reference and reliance on Idaho Code § 67-6537. As a consequence of the Director's arbitrary and capricious denial, Eden Gate has been deprived of its right to appropriate the unappropriated waters of Idaho in violation of Idaho's Constitution.

CONCLUSION

For the reasons set forth above, this Court should reverse the Director's Final Order. The Director's Final Order denying the irrigation component of the Applications is based solely on his mistaken belief that Idaho Code § 67-6537 establishes a state-wide policy that can be applied to water appropriation applications, and that gives him the power to deny these applications on that basis. It does not. Therefore, there is no basis for denying the Applications. Remand would be futile. Based on the undisputed facts in the case, this Court should reverse and instruct the Director to issue permits for all 14 Applications, in full, to include irrigation rights.

DATED this 2nd day of March, 2022.

/s/ Albert P. Barker
Albert P. Barker
Attorney for Eden Gate's LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2022, I served a copy of the foregoing **EDEN'S GATE LLC** *Appellant's Opening Brief* by the method indicated below, and addressed to the following:

Idaho Dept. of Water Resources 322 E Front St Boise, Idaho 83720-0098	_____Hand Delivery _____U.S. Mail _____Facsimile _x___ iCourt _____ Email:
S. Bryce Farris Sawtooth Law Offices, PLLC 1101 W River St., Suite 110 Boise, ID 83702	_____Hand Delivery _____U.S. Mail _____Facsimile _x___ iCourt _____ Email:

/s/ Albert P. Barker
Albert P. Barker