

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

EDEN'S GATE 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'S
GATE LLC

**INTERVENOR FARMERS CO-OPERATIVE DITCH COMPANY'S
RESPONSE TO PETITIONER'S OPENING BRIEF**

**Judicial Review from the Idaho Department of Water Resources'
Director's Order on Exceptions**

S. Bryce Farris, ISB No. 5636
SAWTOOTH LAW OFFICES, PLLC
1101 W. River Street, Suite 110
Boise, Idaho 83702
T (208) 629-7447
F (208) 629-7559
E bryce@sawtoothlaw.com

*Attorneys for Intervenor Farmers
Co-Operative Ditch Company*

Albert P. Barker
Michael A. Short
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson Street, Suite 102
P.O. Box 2139
Boise, ID 83701-2139
T (208) 336-0700
F (208) 334-6034
E apb@idahowaters.com
mas@idahowaters.com

Attorneys for Petitioner Eden's Gate LLC

Garrick L. Baxter
Joy M. Vega
Michael C. Orr
Deputy Attorney General
Idaho Department Of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
E garrick.baxter@idwr.idaho.gov
joy.vega@ag.idaho.gov
michael.orr@ag.idaho.gov

*Attorneys for Respondent Idaho Department of
Water Resources*

TABLE OF CONTENTS

I. STATEMENT OF THE CASE1

II. COURSE OF PROCEEDINGS4

III. FACTUAL SUMMARY4

IV. STANDARD OF REVIEW6

V. ARGUMENT6

 A. Eden’s Gate’s Argument that Idaho Code Section 67-6537 is Not Applicable
 is Misplaced.6

 B. The Director Correctly Determined that Applicants Proposed Use of Ground
 Water for Irrigation Purposes was Contrary to the Local Public Interest.8

 C. The Notice of Assignment does not Change the Existence of Surface Water
 Being Available.14

 D. OMM/Eden’s Gate are Voluntarily Withholding Surface Water and thus the
 Final Order Correctly Denied the Irrigation Use.15

VI. CONCLUSION.....17

TABLE OF AUTHORITIES

Statutes

IDAHO CODE § 42-202..... 9

IDAHO CODE § 42-203..... 3, 4, 8, 9

IDAHO CODE § 42-222..... 11

IDAHO CODE § 43-1102..... 11

IDAHO CODE § 67-6537..... 4, 6, 7, 8, 9, 10, 14

Intervenor-Respondent, Farmers Co-Operative Ditch Company (hereinafter referred to as “Ditch Company”), hereby submits this Response to the *Opening Brief* filed by Eden’s Gate LLC on March 2, 2022.

**I.
STATEMENT OF THE CASE**

On January 2, 2020, One More Mile, LLC (“OMM”) filed 14 *Applications for Permit* to appropriate groundwater for domestic and irrigation purposes on 14 separate and different parcels located within the River Bluff Development.¹ The River Bluff Development consists of approximately 28 acres and is located within the boundaries/service area of the Ditch Company (hereinafter “River Bluff Development property” and/or “OMM property”).

At the time OMM filed the Applications and at the time of the hearing for this matter, OMM was a shareholder of the Ditch Company entitled to the use of the Ditch Company’s existing surface water for delivery and use on the River Bluff Development property. At the time OMM filed the Applications, at the time of the hearing for this matter (and currently), the River Bluff Development property is entitled to and reasonably capable of utilizing the existing surface water of the Ditch Company to irrigate the River Bluff Development property. In fact, OMM has consistently utilized the Ditch Company’s existing surface water to irrigate the River Bluff Development property. At the time OMM filed the Applications and at the time of the hearing for this matter, OMM was irrigating the property with the Ditch Company’s existing surface water rights.²

¹ The Applications indicate that the intent was for groundwater to be the “primary” source of irrigation. *See* R. 228, item 3; Ex. 4 (Applications), p. 2, ¶ 12.

² R. 229, ¶ 22.

The Ditch Company protested the 14 Applications on the basis that OMM is an existing shareholder of the Ditch Company subject to the Articles, Bylaws and Rules and Regulations of the Ditch Company, and as an existing shareholder already has existing surface water available and capable of irrigating the River Bluff Development property. The Ditch Company did not protest the Applications to the extent they sought to divert groundwater for domestic purposes. Rather, the Ditch Company protested the proposed irrigation use with 14 new irrigation wells being the “primary” source of irrigation because there are existing surface rights available, capable, and in fact being used, to irrigate the OMM property and if irrigation was going to be a use under the new Applications, then the groundwater use must be supplemental to the existing surface water.

In order to circumvent the facts that existed at the time OMM filed the Applications and/or the facts that existed at the time of the hearing, OMM entered into a contract with another shareholder of the Ditch Company to sell a portion of OMM’s shares **IF** the Applications were approved. This contract was entered two weeks before the hearing, in response to the Ditch Company’s protest, and as an attempt to demonstrate that shares could be potentially used by another shareholder within the Ditch Company’s service area. However, there is no dispute that the transfer of shares would require the approval of the Ditch Company, had not been approved by the Ditch Company at the time of hearing, and the contract itself was contingent on the approval of the 14 Applications as being the primary source for irrigation purposes.

On June 15, 2020, a hearing was held before the Idaho Department of Water Resources (“Department”) with Nick Miller as the Hearing Officer. Realizing the transfer of shares would still require approval of the Ditch Company, that the transfer of shares would likely not be approved, and the attempt to circumvent the existence of existing surface water rights would fail, OMM then attempted to circumvent the existence of existing surface water rights by transferring

the property and assigning the Applications to another entity but withholding the transfer of shares. Thus, more than a month after the hearing, on July 28, 2020, OMM submitted a *Notice of Assignment of Application* providing “notice” that OMM has deeded the property at issue to Eden’s Gate LLC and assigned all right, title and interest in the pending Applications to Eden’s Gate LLC. The Ditch Company thereafter filed a response.

On May 28, 2021, the Hearing Officer issued a *Preliminary Order Partially Approving Applications* (“*Preliminary Order*”). The *Preliminary Order* approved the 14 Applications for domestic use only and denied the proposed use for irrigation purposes because, *inter alia*, OMM had existing surface water available at the time the Applications were filed and at the time of the hearing, and the use of 14 new irrigation wells on the River Bluff Development property was inconsistent with the local public interest requirements of Idaho Code Section 42-203(A)(5)(e).³

On June 11, 2021, Eden’s Gate, LLC filed a *Notice of Appeal and Petition to Review Preliminary Order*. Eden’s Gate did not challenge or dispute any of the facts presented at hearing or stated in the *Preliminary Order* including that the River Bluff Development property was entitled to existing surface water and said existing surface water was reasonable available for use on the property at the time of the filing of the Applications and at the time of the hearing. Instead,

³ As will be further explained below, the *Preliminary Order* does state that as a result of OMM’s post-hearing assignment to Eden’s Gate and the withholding of shares in an attempt to circumvent the existing use, that: “[s]urface water is not reasonably available to EG to irrigate the proposed places of use.” As a result, the Hearing Officer and Director did not approve the Applications for irrigation uses. In other words, the Hearing Office and Director did not approve the irrigation uses and provide a condition that said uses are “supplemental” to existing surface water rights, which was initially requested by the Ditch Company as part of its protest, because there was no irrigation use for the new Applications to supplement. Whether the surface water existed, or whether the applicants voluntarily and intentionally removed the surface water, did not change the conclusion that allowing the surface water irrigation to be replaced by groundwater was contrary to the local public interest. As a result of the assignment to Eden’s Gate, the end result changed from a supplemental irrigation use condition to no irrigation use being approved as part of the Applications and domestic use was the only approved use.

Eden's Gate criticized the Hearing Officer's reliance on the policy stated in Idaho Code Section 67-6537, which is to encourage the use of surface water for irrigation, and/or the Hearing Officer's statement that the Ditch Company must consent to the transfer of shares and that no such consent had been provided.

On October 14, 2021, the Gary Spackman, Director of the Department (hereinafter "Director") issued a *Final Order* agreeing with the Ditch Company and Hearing Officer and affirming the Hearing Officer's *Preliminary Order*. The *Final Order* approves the domestic portions of the Applications but denies the irrigation portions of the Applications. The Director sustained the Hearing Officer's conclusion that the irrigation portions of the Applications are inconsistent with the local public interest requirements of Idaho Code Section 42-203(A)(5)(e) and concluded that the "determinative factor in this case is the local public interest of preventing readily available surface water irrigation from being replaced by ground water irrigation." R. 326.

II. COURSE OF PROCEEDINGS

The Ditch Company agrees with Eden Gate's rendition of the Course of Proceedings advanced in its *Opening Brief*. The Ditch Company also agrees with the course of proceedings set forth in the "Background" portion of the *Final Order*. R. 318-320.

III. FACTUAL SUMMARY

As indicated by Eden's Gate in its *Opening Brief*, the Hearing Officer made thirty-three (33) findings of fact which were adopted verbatim in the Director's *Final Order* and these facts are not in dispute. *See* R. 227-30; 327-30. The Ditch Company hereby incorporates these findings of fact herein.

In addition, the Ditch Company would like to reiterate several of these undisputed facts which included, at the time these Applications were filed by OMM, and at the time of the hearing before the Hearing Officer, OMM was:

1. A shareholder of the Ditch Company (subject to the Articles, Bylaws and Resolutions of the Ditch Company). These Articles, Bylaws and Resolutions include, but are not limited to, provisions in the Bylaws requiring the consent of the Ditch Company to transfer shares (R. 230, ¶ 26), provisions in the Bylaws relating to the subdivision of land and the requirement to install a distribution system (R. 230, ¶ 27), and the rules and regulations of the Ditch Company (R. 229, ¶ 25). The rules and regulations include rules relating to the subdividing of lands and establishing a lateral association to hold shares (R. 230, ¶ 28) and rules specifically requiring a shareholder to use surface water when available prior to the use of groundwater for irrigation purposes (R. 230, ¶ 30);
2. Using the Ditch Company's existing surface water to irrigate the River Bluff Development property. More specifically, OMM was using the Ditch Company's surface water to irrigate sweet potatoes in 2018 and 2019 (R. 229, ¶ 22) and was using the surface water to irrigate sugar beets in 2020 (R. 229, ¶ 22);⁴
3. There was/is a system capable of delivering surface irrigation water to the property and OMM (R. 230, ¶ 32);
4. OMM's conditional contract with J.C. Watson was entered on June 1, 2020, after it had filed the Applications, after the Ditch Company's protest, after the Ditch Company's March 11, 2020 Resolution (R. 230, ¶ 30). The transfer of shares was conditional on approval of the Applications (R. 229, ¶ 23).

⁴ See also, Exhibit 121 (R. 602-603). Photograph of sugar beets.

Given the above facts, and more than one month following the hearing, OMM then transferred of the property and the Applications to Eden's Gate LLC via the *Notice of Assignment* which was filed with the Department on July 28, 2020. R. 212-14.

IV. STANDARD OF REVIEW

The Ditch Company agrees with the applicable standard of review advanced by Eden's Gate in its *Opening Brief*.

V. ARGUMENT

A. Eden's Gate's Argument that Idaho Code Section 67-6537 is Not Applicable is Misplaced.

Throughout these proceedings, OMM (and now Eden's Gate) have misunderstood the Ditch Company's, and then the Hearing Officer's, and now the Director's, reliance on Idaho Code Section 67-6537. To be clear, the Ditch Company's position is that OMM and now Eden's Gate are proposing to make a land use change from irrigated agriculture to 14 new residential homes on the property at issue. However, whether or not this amounts to a "land use change" under the Land Use Planning Act (LUPA) does not change the policy set forth to encourage the use of surface water. The "policy" remains relevant regardless of whether the changed use by OMM and Eden's Gate is a "land use change" under LUPA or not. The Department has implemented said policy by requiring the primary surface water be used regardless of whether the new ground water application involves a land use change or not.⁵ In other words, the Department's conditioning of

⁵ The hearing officer took judicial notice of several examples where supplemental irrigation conditions were approved and which included schools and other uses which did not necessarily fall under the LUPA. In other words, the Department has conditioned new applications for irrigation use which fall within the boundaries of an irrigation entity, and which have existing surface water available, regardless of whether there was a new "land use change" being proposed under LUPA. The policy and rationale is the same that the existing surface water should be utilized

new ground water rights is not based solely upon the application of Idaho Code Section 67-6537 but rather on sound policy and reasoning that existing surface water should not be replaced by new groundwater rights.⁶

Eden's Gate spends much of its *Opening Brief* arguing that the Hearing Officer and now Director incorrectly applied Idaho Code Section 67-6537, that the land use planning statute should not mandate or control in a water right application matter, and that the land use planning statute is a state-wide statute that should not govern a local interest factors. *See Eden's Gate Opening Brief*, pp. 10-23. However, Eden's Gate ignores the fact that the Hearing Officer found exactly what Eden's Gate is now arguing: that the land use planning statute "**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). Yet, the Hearing Officer determined the intent of the statute to encourage the use of surface water for irrigation is appropriate to consider when evaluating an application to appropriate groundwater.

Similarly, the Director, agreed with the Hearing Office and the Ditch Company that "[w]hile Idaho Code § 67-6537 does not require IDWR to consider LUPA in the water appropriation process, it expressly states the public interest value of encouraging the use of existing surface water and systems before developing new ground water sources." R. 323. The Director went on to state that "[w]hether or not this a land use change under LUPA is a separate inquiry

as the primary water source for irrigation before new ground water sources are developed. *See* Exhibits 114-118 (R. 586-601).

⁶ The bases for said policy, includes, but is not limited to, preserving aquifers and the existing groundwater supply, maintaining the economic viability of irrigation entities and maintaining the practical viability of irrigation entities (*i.e.*, if landowners or shareholders are able to voluntarily discontinue use then the cooperative nature of such entities, including carriage, flow, and other benefits are adversely impacted). The convenience of a developer simply installing a new irrigation ground water well has been and should continue to be rejected.

from whether it is in the local public interest to allow parcels to be irrigated through, existing, readily available, surface water and delivery systems, or through the development of new ground water sources.” *Id.*

Thus, Eden Gate’s arguments that the Director does not have authority to enforce LUPA, only Cities and Counties are empowered to exercise LUPA or that the Department is not authorized to enforce LUPA in the water appropriation process (and which make up the majority of Eden Gate’s arguments) are misplaced because both the Hearing Officer and Director agree that LUPA is not mandated or required to be enforced. That said, the Hearing Officer and Director are empowered to the basis, rationale, reasoning and policy of Idaho Code Section 67-6537 as part of its analysis under Idaho Code Section 42-202B(3) and public interest value of encouraging the use of existing surface water and systems before developing new ground water sources.

B. The Director Correctly Determined that Applicants Proposed Use of Ground Water for Irrigation Purposes was Contrary to the Local Public Interest.

Eden’s Gate argues that the Director’s *Final Order* denies Eden’s Gate the right to appropriate unappropriated waters in violation of Idaho’s Constitution but at the same time Eden’s Gate acknowledges that the right to appropriation is not unfettered and appropriation of such water shall only be perfected by means of application, permit and license under Title 42. There is no dispute that Idaho Code Section 42-203A(5) provides criteria which must be considered, whether protested or not, by the Director. The Hearing Officer and Director correctly applied the criteria, including criterion (e) which provides that the Director must consider whether the application “will conflict with the local public interest as defined in section 42-202B, Idaho Code.” There is no dispute that the Director has the right to consider such factors in determining whether to approve a new application to appropriate waters of the State, such as the 14 new applications filed by OMM and which are pending in this matter. *Eden Gate’s Opening Brief*, p. 16. It is also not disputed

that the applicant, in this case OMM and now Eden's Gate, bears the ultimate burden of persuasion for all elements/criteria in Idaho Code Section 42-203A(5), including the local public interest element. *Id.* Here, the Director, after applying the local public interest factors, and weighing the factors/evidence, correctly determined that OMM and now Eden's Gate did not meet this burden and the irrigation portions of the applications must be denied.

Eden's Gate also suggests that the Director incorrectly applied the local public interest element and references the 2003 amendments to Idaho Code Section 42-202B(3). However, the Director specifically acknowledges the amendments from 2003 and the Director's analysis included such factors as securing the greatest possible benefit from the public waters, the public water resources and the relative weights of the local needs, circumstances and interests. R. 321. More specifically, the Director correctly determined that it is proper to consider the public interest value of encouraging the continued use of existing surface water before developing new ground water sources. R. 323. The Director correctly weighed the various factors, including the bases for the legislative intent behind Idaho Code Section 67-6537, as well as the Department's surface water first condition, to determine the effects of the proposed use of ground water on the public water resource in the area affected by the proposed water use would be contrary to the local public interest element of Idaho Code Section 42-203A(5). *Id.*

It is this policy or intent of the statute which the Department has followed, regardless of whether a "land use change" is being proposed in order to condition new ground water application by requiring the continued use of existing surface water rights as the primary source. It is consistent with this policy and intent that if a new application for groundwater falls within an irrigation district or canal company (or has some other existing surface water right) that the Department conditions the new application to utilize the existing surface water as the primary

source, whether apportioned benefits in an irrigation district or a shareholder of a ditch company, and to “encourage the use of surface water for irrigation.”

Eden’s Gate suggest that because the shares of the Ditch Company may not be appurtenant to the land that these policies are not applicable. However, a close reading of Idaho Code Section 67-6537 reveals that the statute, policy and intent is that there is no requirement that the water be appurtenant to the land but rather that the surface water is “reasonably available” or “**can be made**” appurtenant to the land. Idaho Code Section 67-6537 specifically provides that surface water is “reasonably available” if:

- a) A surface water right is, or **reasonably can be made**, appurtenant to the land;
- b) The **land is entitled to distribution of surface water** from an irrigation district, **canal company**, ditch users association, or other irrigation delivery entity, **and the entity’s distribution system is capable of delivering the water to the land;**
or
- c) An irrigation district, **canal company**, or other irrigation delivery entity **has sufficient available surface water rights to apportion or allocate to the land and has a distribution system capable of delivering the water to the land.**

Any of the above three situations may be applicable based upon the use of the word “or” in the statute. In this case, all three of the examples are applicable and the intent and policy of the statute are applicable regardless of whether OMM or Eden’s Gate are proposing “land use changes” within the meaning of the LUPA. A surface water right (*i.e.*, the Ditch Company shares) are or can reasonably be made available and appurtenant to the land, the land is entitled to receive surface water and the Ditch Company’s system is capable of delivering surface water to the land (indeed, the property was receiving irrigation water before, during and after the hearing).

Moreover, even if the owner of the land is no longer a shareholder based upon OMM and Eden Gate's attempts to circumvent the situation, the Ditch Company "has sufficient available surface water rights" to allocate to the land and has a distribution system capable of delivering water to the land. In other words, Eden's Gate cannot simply avoid implementation of the primary surface water right condition when there is sufficient available surface water from the Ditch Company and the Ditch Company's system is capable of delivering water to the land.⁷

The Department and this Court should not allow an applicant to circumvent these policies at the applicant's own hand or own doing. What's next, OMM or Eden's Gate will quit paying the assessments or intentionally destroy the distribution system capable of delivering surface water to the land? Interestingly, such a maneuver has been addressed in the context of the exclusion from an irrigation district. While this matter does not involve an irrigation district, this maneuvering is analogous to a landowner's attempt to exclude from an irrigation district by purposefully or intentionally rendering the delivery system incapable of delivering water, and which has been rejected by Idaho statute. *See* IDAHO CODE § 43-1102(4) (providing grounds for exclusion may not include the rendering of a delivery system incapable by the petitioner's "knowledge or consent"). In other words, a landowner may not manipulate and destroy a delivery system by one's own hand or consent and then use that as a basis for exclusion. Similarly, an existing shareholder, entitled to receive water through a system capable of delivering water to the land should not be

⁷ The Ditch Company would also note that whether existing shares, or an existing surface water right, are appurtenant or not should not change the analysis or policy that encourages the continued use of surface water before seeking to appropriate new ground water sources. Each situation can be analyzed under specific circumstances but it is also possible to remove an appurtenant water right via a transfer application under Idaho Code § 42-222 or some other nefarious means to discontinue use or ownership of shares. The Legislature's list of situations for determining whether the surface water is reasonably available such as entitled to distribution or can be made appurtenant demonstrates the intent to apply to appurtenant or non-appurtenant rights so long as the surface water is reasonably available which is not in dispute in this case.

allowed to circumvent and manipulate the ownership of the land, or take other intentional actions to withhold the transfer of shares, simply to avoid the sound policies of the Department to encourage the continued use of surface water.

In fact, the Department's condition for new groundwater rights being supplemental to existing surface water rights also contemplates a right holder attempting to intentionally discontinuing use of the primary surface water right and such condition prohibits such actions. A recent condition used by the Department concerning a supplemental groundwater right provides the following:

The primary irrigation water for the place of use authorized under this right is surface water. The right holder shall make full beneficial use of said primary surface water rights available to the right holder for irrigation of lands within the authorized place of use for this right. The right holder may divert water under this right to irrigate land with appurtenant primary surface water rights when the primary surface water supply is not reasonably sufficient to irrigate the place of use for this water right or is not available due to drought, curtailment by priority, or the seasonal startup and shutoff or maintenance schedule for the irrigation delivery entity. The right holder shall not divert water for irrigation purposes under this right if use of the primary surface water rights **is intentionally discontinued or reduced (for example abandoned, forfeited, sold, disallowed by court decree, or leased to the Water Supply Bank) or is not deliverable due to non-payment of annual assessments, without an approved transfer pursuant to Idaho Code § 42-222 or other Department approval.**

This condition or some variation has been included on new applications for groundwater within the boundaries of irrigation districts and canal companies (hereinafter sometimes referred to as the "Department's Surface Water Condition").⁸ As indicated, the Department's Surface Water Condition prohibits the right holder from intentionally discontinuing the use of the existing surface water which is available. This is to prevent the very scheme OMM and Eden's Gate have

⁸ See generally Exhibits 114-118 (R. 586-601) for a small sample of new applications which include some variation of the Department's Surface Water Condition.

attempted to employ by contracting to sell the shares and/or assigning the property and Applications without transferring the shares.

The facts remain the same that the lands, whether owned by OMM or Eden's Gate, are entitled to the use of an existing surface water right, the land is entitled to distribution of surface water from the Ditch Company, and the Ditch Company's distribution system is capable of delivering water to the land. The Hearing Office and Director correctly rejected the Applicant's attempt to circumvent these facts by now transferring the land and applications to another entity simply to avoid the use of "reasonably available" surface water. This type of manipulation should not be encouraged but rather should be rejected in order to prevent further manipulation by these applicants and future applicants.

Eden's Gate questions the Director's *Final Order*, and its conclusion as to the local public interest element, by contending such factors as the water quality of the existing surface water delivered by the Ditch Company should be considered. However, the quality of the surface water delivered does not outweigh the deference, weight and considerations of the Director. While the realtor for OMM bemoaned the quality of the surface water delivered by the Ditch Company, the facts and record demonstrate that OMM irrigated the property with a pressurized system in 2018 (Tr. 20:12-21) and in 2019 the quality of water was sufficient to irrigate the property with a drip system that included filters (Tr. 148:1-22). Thus, the concerns about the quality of water are non-factors and/or are outweighed by the other factor considered by the Hearing Officer and Director, and does not prevent the continued use of the existing surface water. Indeed, the surface water was being used prior to and at the time of the hearing for crops such as sugar beets, there was no evidence of any issues with the delivery system and OMM, now Eden's Gate, could install a gravity system for the continued use or a pressurized system with additional filters or other devices.

In other words, this property being divided, whether under LUPA or not, is no different than any other property owner in the local area that must continue to use its existing surface water as the primary source for irrigation. The convenience of this one landowner/developer does not outweigh the other factors and bases expressed by the Legislature in enacting Idaho Code § 67-6537 and employed by the Department to continue the use of existing surface irrigation water rights on the land rather than the development of new ground water sources.

C. The Notice of Assignment does not Change the Existence of Surface Water Being Available.

In an obvious attempt to elevate form over substance, to circumvent the Articles, Bylaws and Resolutions of the Ditch Company, and avoid use of existing surface water rights, OMM has deeded the property at issue to Eden's Gate without attempting to transfer any shares to the "new" owner. In other words, OMM and Eden's Gate are attempting post-hearing to manufacture an after-the-fact situation in which the applicant is no longer a shareholder of the Ditch Company and thus should not be required to utilize existing surface water rights. This maneuver should be rejected because the surface water remains reasonably available and the Ditch Company's distribution system remains capable of delivering surface water to the land. Indeed, OMM's maneuver occurred at the same time it was using the Ditch Company's water on the property at issue for irrigation purposes. The testimony at the hearing was clear that the property at issue is capable of receiving irrigation water from the Ditch Company and the property is in fact using the water of the Ditch Company in the two seasons prior to the filing of the Applications (2018 and 2019)) for the 2020 irrigation season while the hearing occurred.

It was also undisputed at the hearing that OMM remains subject to Articles, Bylaws and Rules and Resolutions of the Ditch Company,⁹ including, but not limited to, provisions in the Bylaws requiring the consent of the Ditch Company to transfer shares (R. 230, ¶ 26), provisions in the Bylaws relating to the subdivision of land and the requirement to install a distribution system (R. 230, ¶ 27), and the rules and regulations of the Ditch Company (R. 229, ¶ 25). The rules and regulations include rules relating to the subdividing of lands and establishing a lateral association to hold shares (R. 230, ¶ 28) and rules specifically requiring a shareholder to use surface water when available prior to the use of groundwater for irrigation purposes (R. 230, ¶ 30). This final resolution, adopted by the Board of the Ditch Company on March 11, 2020, summarizes the Ditch Company's position as to new groundwater applications for irrigation use such as those filed by OMM. The contrived scheme of OMM and Eden's Gate attempts to avoid the application of said Articles, Bylaws and Rules and Regulations of the Ditch Company but the Ditch Company's role and interest are factors to be considered. Again, at the time the Applications were filed and at the time of the hearing, the Applicant, OMM, was an existing shareholder entitled to use surface water and was using surface water on the property in question. There is no question that OMM had reasonably available surface water at the time of the Applications and at the time of hearing.

D. OMM/Eden's Gate are Voluntarily Withholding Surface Water and thus the Final Order Correctly Denied the Irrigation Use.

OMM's transfer of the property to Eden's Gate and intentional withholding the shares after the fact does not and should not change the fact that surface water has been and continues to be reasonably available. If OMM and Eden's Gate choose to voluntarily withhold shares and remove the existing and available surface water then the Department should only approve the Applications

⁹ R. 229, ¶ 24.

for domestic purposes. In other words, while OMM was the applicant and an existing shareholder of the Ditch Company, the Ditch Company's position has been (and as confirmed in its Resolution dated March 11, 2020)¹⁰ that the Applications may be approved for irrigation use so long as there is the Department's Surface Water Condition providing that the groundwater use is supplemental to the existing surface water rights. Had OMM not assigned the Applications to Eden's Gate, and had OMM not voluntarily and intentionally withheld the reasonably available surface water, then the Department could have likely approved the Applications for both domestic and irrigation purposes but would have included the Department's Surface Water Condition to ensure that the primary surface water right remained the primary source for irrigation use and the new groundwater rights were supplemental. Again, the Department's Surface Water Condition includes provisions which prevent the right holder from voluntarily or intentionally discontinuing use of the primary surface water right and this should not change because the applicant voluntarily and intentionally discontinues use prior to the Applications being approved.

Since OMM and Eden's Gate came up with a contrived scheme to withhold the primary surface water right which is reasonably available and being used on the property prior to the issuance of the *Preliminary Order*, the Department correctly denied the irrigation use altogether. This result is clear and consistent with the analysis of the Hearing Officer and Director that the intent and policy is to encourage the continued use of surface water and to condition new groundwater applications to require the continued use of surface water as the primary source. If Eden's Gate voluntarily and intentionally withholds the surface water or discontinues its use then the Department should not reward such actions but rather should not approve (as the *Preliminary Order* does) the proposed irrigation use from groundwater. The Hearing Officer and Director

¹⁰ See R. 230, ¶ 30, and Exhibits 28 (R. 500-502) and 103 (R. 505-507).

correctly, consistently and clearly applied the Department's policies and conditions to the facts that Eden's Gate presented.

VI. CONCLUSION

For the above-stated reasons and for reasons previously set forth at hearing and on review with the Director, the Ditch Company respectfully requests that the Court affirm the Director's *Final Order* that the Application's shall be limited to domestic uses only. At the time the Applications were filed, at the time of hearing and currently there is available surface water for the irrigation of the development. Based upon such availability the Director (and hearing officer) correctly applied the intent and policy to encourage the continued use of surface water as opposed to the development of new ground water sources. The local public interest of such continued use of surface water outweighs any convenience or other arguments raised by the applications. Furthermore, if OMM and/or Eden's Gate want to intentionally and voluntarily discontinue the use of available surface water by withholding shares of the Ditch Company then such actions should not be rewarded. Instead, as the Director correctly determined that the Applications should only be approved for domestic purposes, and the Court should uphold the Director's *Final Order* in its entirety.

DATED this 29th day of March, 2022.

Sawtooth Law Offices, PLLC

By /s/ S. Bryce Farris
S. Bryce Farris
Attorneys for Intervenor
Farmers Co-Operative Ditch Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March, 2022, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720
gary.spackman@idwr.idaho.gov

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email / CM/ECF

Garrick L. Baxter
Joy M. Vega
Michael C. Orr
Deputy Attorney General
Idaho Department Of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
garrick.baxter@idwr.idaho.gov
joy.vega@ag.idaho.gov
michael.orr@ag.idaho.gov

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Email / CM/ECF

Albert P. Barker
Michael A. Short
Barker Rosholt & Simpson LLP
P.O. Box 2139
Boise, ID 83701-2139
apb@idahowaters.com
mas@idahowaters.com

- U.S. Mail, Postage Prepaid
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- Overnight Mail
- Facsimile
- Email / CM/ECF

/s/ S. Bryce Farris

S. Bryce Farris