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	

APPLELLANT'S REPLY BRIEF

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

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Eden's Gate LLC, ("Eden's Gate") by and through its counsel of record, Barker Rosholt & Simpson LLP, hereby submits *Petitioner's Reply Brief.* This Reply Brief replies to the Response briefs filed by Respondent Idaho Department of Water Resources ("IDWR," or the "Department") and Intervenor Farmers Co-operative Ditch Company's ("Farmers").

INTRODUCTION

This appeal involves an important question of water law and administrative law. In processing a water right application, does the Director of IDWR ("Director") have the authority and unfettered discretion to import the legislature's direction to local land use planning entities when making local land use planning decisions into his water right evaluation, and at the same time disregard the conditions of when and how that local land use planning statute is applied to individual projects. The answer is clearly no.

I. Factual Background.

Before examining the legal issues, it should be clear to the Court from the briefing and the Director's October 14, 2021 *Order on Exceptions; Final Order Partially Approving Applications* ("Order"), R. 318-38, that there is no dispute of any operative facts that would require the Court to defer to any fact finder.

The appeal involves 14 applications on 28 acres for domestic use and irrigation use groundwater permits ("Applications"). The property is in the River Bluff Subdivision, west of Parma on the north side of the Boise River in Canyon County. R. 327 at ¶ 1. The area was platted as a subdivision in 1910, over one hundred years ago. R. 357; Tr. 26:7-27:4. The original subdivision divided the property in 4 acre lots.

In 2007, Canyon County authorized an administrative split of the lots into two-acre parcels. Tr. 102:13-15. No one objected. When this administrative split occurred, there was no

land use change, no application for a land use change and no action required by Canyon County under the Local Land Use Planning Act. R. 330 at ¶ 33; Tr. 105: 3-7, 25:6-11, 91:10-19. The County did not invoke Idaho Code § 67-6537 ("Section 67-6537") at that time, nor could it. No party to this appeal contends Section 67-6537 actually requires that Canyon County mandate the use of surface water for the River Bluff Subdivision. Nevertheless, IDWR contends that the Director can impose that requirement when the County cannot.

The other important facts that the Director swept aside, and that IDWR and Farmers would have this Court overlook, is the availability and use of water on the lands within Farmers' boundaries. Farmers has a service area of 15,000 acres, but only 10,000 acres of water rights. Tr. 248:14-18. Thus, over 5,000 acres within Farmer's boundaries lack Farmers' water. Farmers' water rights are not appurtenant to any individual parcel of land. R. 324 at fn. 7 ("FCDC acknowledges its shares are transferable and not appurtenant (they are not water rights) to the lands on which the water is used"); R. 429; Tr. 79:8-19, 192:8-17, 200:20, 24:4-6, 256:23-257:1.

Landowners within Farmers' boundaries are free to sell their land, with or without water shares, and to irrigate other land they own without any transfers. R. 330 at ¶ 31. Tr. 261:11-8, 262:20-263:1. Farmers' shareholders can sell their shares to other shareholders, and, as long as the water can be delivered, the buyer can use the water represented by those shares. Tr. 78:17-79:1. One More Mile entered into a contract with JC Watson, a farmer, to sell 14 of One More Mile's Farmers' shares. R. 329 at ¶ 23; R. 503-04; Tr. 38. Watson owns sufficient farm land that Farmers could deliver the water to Watson and Watson could use Farmers' water. Tr. 204:2-11, 241:23-25, 273:1-7. In other words, there is no dispute that the 14 water shares (allowing irrigation of 28 acres) held by One More Mile could and would be used on other farm ground in Farmers' service area, if the applications were approved. Tr. 39-40, 210:15-19.

The parties all agree that Farmer's "desire" and policy is to "keep its water rights in agricultural production." Resp't Br. at 13 *citing* R. 330 and Tr. 213; *see also* R. 491-96; Tr. 209:18-22, 210:2-8. Yet, if the Director's decision (and Farmers' objection) is upheld, the 14 shares of Farmers' water rights cannot and will not be used for agricultural production.

The other important facts relate to the available groundwater supply, which is abundant. The Director found that the proposed use of ground water under these applications will have no adverse effect on the ground water supply and will not injure other water rights. R. 331-32. The Director made no finding that approving the applications would result in mining the groundwater or that the withdrawal would exceed the natural recharge. There is no dispute that the Boise Basin groundwater supply in this area is not subject to a moratorium or any mitigation requirement. R. 384-91; Tr. 170-74. Neither the Director's Order nor IDWR's Response contends otherwise. IDWR argues on appeal that there will be a "depletion" of the groundwater, as if that is grounds to deny an application. Resp't Br at 42-44. Depletion alone is not enough to deny an application. *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 524, 376 P.3d 722, 728 (2016) ("An application to appropriate water, by its very definition, does not bring new water to a water system, but rather seeks to appropriate unappropriated water"). The point is, there is unappropriated ground water in this local aquifer available for appropriation without injury to anyone. It appears that the Department prefers to lock up the groundwater in this basin west of Middleton so that the water flows out of the State, unavailable for appropriation.

ARGUMENT

The Department exclusively relies on Section 67-6537 as a statement of legislative intent related to water appropriation applications. Resp't. Br. at 7. IDWR argues that Section 67-6537

expresses legislative intent to encourage the use of surface water. Therefore, IDWR claims that the Director has been directed to rely on that legislative "intent" to justify his denial of the Applications, asserting that the Applications conflict with Section 67-6537 and therefore also conflict with the local public interest under Idaho Code § 42-203A(5)(e) ("Section 42-203A(5)(e)"). In other words, IDWR claims that the "intent" behind Section 67-6537 controls what is in the local public interest under Section 42-203A(5)(e) even though the statute itself does not.

Farmers argues that Section 67-6537 sets forth a policy "to encourage the use of surface water." Intervenor Br. at 6. Farmers further contends that the Department has previously implemented the policy to encourage the use of surface water "by requiring the primary surface water be used regardless of whether the new ground water application involves a land use change or not," and that the Director's "conditioning of new ground water rights is not based solely upon the application of Idaho Code Section 67-6537." *Id.* at 6-7.

I. Section 67-6537 only applies to local land use agencies

The Director, IDWR, and Farmers all ignore the fact that the legislature did not pass a broad statement of legislative "intent" and invite all government agencies to a free-for-all to weigh in on how that legislative intent should be carried out under their respective jurisdictions. Instead, the legislature gave very clear direction to a select group of local governing bodies, explaining to them when and how the legislative intent expressed in the statute would be carried out. Crucially, neither the Director nor IDWR were allocated any role in carrying out the "intent" behind Section 67-6537. Not content with the legislature's direction to the local land use agencies, the Director, under the mantel of "broad discretion," has seized for himself the role given by the legislature exclusively to the local land use planning agencies.

II. Section 67-6537 directed that surface water use is encouraged where there are proposed applications under LLUPA.

The Director concluded that "the determinative factor in this case is the local public interest of preventing readily available surface water from being replaced by ground water irrigation," because of "Idaho Code § 67-6537's expressly stated intent to encourage the use of surface water for irrigation." Resp't Br. at 15. The Director and IDWR latched on to the first sentence of Section 67-6537, but consistently fail to consider the reminder of the full, clear, and express language of that statute.

Section 67-6537(1) states: "The intent of this section is to encourage the use of surface water for irrigation. All applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation." Idaho Code § 67-6537(1) (emphasis added). The Director focuses on the first sentence, "The intent of this section is to encourage the use of surface water for irrigation" but ignores the next sentence which explains in clear and plain language that the intent of Section 67-6537 is to require the use of surface water for irrigation when a land use change applicant proposes a land use change.

"The language of a statute should be given its plain, usual and ordinary meaning." Idaho Code § 73-113(1). "In determining the ordinary meaning of the statute, effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." *In Re Decision on Joint Motion to Certify Question of Law to Idaho Supreme Ct. (Dkt. 31, 32, 45)*, 165 Idaho 298, 302, 444 P.3d 870, 874 (2018). The interpretation of a statute is a question of law over which this Court exercises free review. *Idaho Conservation League, Inc. v. Idaho State Dep't of Agric.*, 143 Idaho 366, 368, 146 P.3d 632, 634 (2006).

The Director's construction of Section 67-6537 gives no effect to the words, "All applicants proposing to make land use changes." Instead, the Director concludes that Section 67-

6537 articulates a legislative intent to encourage, and indeed mandate, the use of available surface water, whenever reasonably available. Ignoring Section 67-6537's applicability to land use applicants, the Director's interpretation renders superfluous the words "[a]ll applicants proposing to make land use changes."

Further, Section 67-6537's other subsections clearly show that the statute applies only when an applicant seeks to make a land use change. LLUPA makes no reference to water right applications and, hence, does not expand the scope of Section 67-6537 to cover an application to appropriate water. Subsection (3) provides that "Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired thereunder." Idaho Code § 67-6537(3) (emphasis added). In other words, Section 67-6537 adds nothing to the Director's authority under Title 42. Nor does it limit the right of any applicant to obtain a water right under Section 42-203A(5)(e). Nevertheless, the Director asserts that Section 67-6537 does add to, or enhance, his authority under Title 42 (specifically Idaho Code §§ 42-203A(5)(e) and 42-202B(3)) and he says that Section 67-6537's legislative intent is "determinative" of these applications. R. 326.

The Director concluded that Section 67-6537 gives him broad authority to mandate that existing surface water must be used before developing any ground water sources. R. 323. He cites no other reason to deny the applications. But, because there are no land use changes under LLUPA, nor any land use change applications, the Director is mistaken.

Section 67-6537 does not give the Director the power or legal authority he claims. Therefore, the Order violates constitutional and statutory authority, exceeds the Director's authority, is not supported by substantial evidence, is arbitrary, capricious, an abuse of

discretion, and is not in accordance with law, *see* Idaho Code § 67-5279(3), all to the prejudice of the substantial rights of the water right applicant.

III. Section 67-6537 does not apply because there is no land use change under LLUPA.

Section 67-6537 does not apply to the River Bluff Subdivision because the Applications do not involve a land use change under LLUPA. On appeal, IDWR seemingly recognizes that Section 67-6537 applies only where there has been a land use change. To reconcile this problem, IDWR repeatedly attempts to characterize Eden's Gate's Applications as involving a "land use change." This claim is contrary to the provisions of LLUPA. IDWR makes this claim to shoehorn the water right application proceeding to fit the language of Section 67-6537. In contrast to IDWR's claim before this Court, the Director's Order does not claim that the residential lots constitute a "land use change." Instead, the Director concluded that it does not matter if there is a land use change.[1] R. 323.

IDWR characterizes Eden's Gate's proposed development as one involving a change in the use of the land from agricultural to residential, and alleges this is a change to the "actual use of the land in question."[2] Resp't Br. at 19. Tellingly, IDWR does not contend that Eden's Gate or One More Mile has made an application for a land use change within the meaning of LLUPA (where Section 67-6537 resides). Nor could they. Instead, IDWR contorts and essentially amends section 67-6537 to contend that the legislature's intent applies whenever the "actual use of the land has changed." According to IDWR, that change in wording makes Section 67-6537 relevant to the local public interest. *Id.* But, that is not what LLUPA or Section 67-6537 provides. Section

[1] IDWR claims on appeal that the Director concluded that the "actual use" changed from irrigated agriculture to residential lots. Resp't Br. at 33 *citing* R. 323. The only portion of the Order cited for this proposition is R. 323. But that page of the Order makes no such statement or finding. It is unfortunate that IDWR essentially rewrites the order when attempting to defend the Director's Order.

[2] IDWR makes this same statement repeatedly, and throughout its brief. *See* Resp't Br. at 19, 20, 33, 48. Farmer's makes the same claim. Intervenor Br. at 6. But saying it is so does not make it so under LLUPA.

67-6537 does not use the words "actual use." IDWR cannot amend Section 67-6537 to fit its desired result in this case.

IDWR also infers that there is a land use change because the land is zoned agriculture and because the River Bluff Subdivision envisions the construction of homes on the 14 lots. Resp't Br. at 12, 19. Don't be misled. That suggestion is simply wrong. Canyon County zoning rules allow one single family dwelling per lot or parcel in an area zoned agricultural. *See* Canyon County Ordinance § 07-10-27. Single-family residences are a permitted use on agricultural lands and no zoning change is required. Tr. 114:24-115:1 (this property "stays agricultural"). One home per lot is all that is proposed here, and IDWR does not claim otherwise.

LLUPA unambiguously provides that the "applicant" under Section 67-6537 is a person seeking "applications for zoning changes, subdivisions, variances, special use permits or other such applications required or authorized pursuant to this this chapter." Idaho Code § 67-6519(1) (emphasis added); *see also Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 961, 188 P. 3d 900, 903 (2008). Water right applications are not encompassed by LLUPA, they fall under Title 42. Eden's Gate and One More Mile simply are not "applicants" required to use surface water under Section 67-6537. Tr. 114:16-115:1. IDWR denies none of this and fails to respond.

The plain language of the statute shows that the legislature crafted Section 67-6537 to apply narrowly to land use change applications made to local governing boards and local land use agencies. Neither a land use change under LLUPA, nor an application for land use change, is present in this matter. If the legislature intended Section 67-6537 to apply in situations other than land use change applications before local land use agencies, the legislature could easily have done so. It did not.

A. Section 67-6537 is not a "related statute" to Section 42-203A(5)(e)

Nevertheless, the Department next contends that it is "appropriate for the Director to look to "related statute[s]" for legislative "guidance" as to where the public interest lies." Resp't Br. at 19, *citing Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985). IDWR's reliance on *Shokal* is misplaced. In *Shokal*, the Court found that the legislature provided guidance as to where the local public interest lies within Idaho Code § 42-1501, which was passed in the same legislative session as the amendments to Sections 42-203A(5)(e) and 42-202B(3). Idaho Code § 42-1501 is embedded in Title 42 and provides that:

> The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality. The preservation of the water of the streams of this state for such purposes when made pursuant to this act is necessary and desirable for all the inhabitants of this state, <u>is in the public interest</u> and is hereby declared to be a beneficial use of such water.

Idaho Code § 42-1501 (emphasis added).

Shokal found Idaho Code § 42-1501 to be a "related statute" to Section 42-203A(5)(e) which could be used to help determine what factors should be considered when evaluating the local public interest. In finding that Idaho Code § 42-1501 was a "related statute," the Court noted that "[n]ot only is the term 'public interest' common to both §§ 42–1501 and 42–203A, and the two sections common to the same title 42 (Irrigation and Drainage—Water Rights and Reclamation), but also the legislature approved the term 'public interest' in both sections on the *same day*…." *Id.* at 338, 707 P.2d at 449 (emphasis in original).

In contrast, Idaho Code § 67-6537 does not use the term "public interest." It was not passed in the same legislative session as the local public interest statute. Nor was Section 42-203A(5)(e) or Idaho Code § 42-202B(3) ever amended to conform to incorporate Section 67-

6537 into the local public interest criteria. Further, Section 67-6537 it is not found in the same Title 42 as the local public interest statutes.

IDWR would expand *Shokal* beyond its holding to authorize the Director to rely on any statute that delegates authority to any other agencies when evaluating the local public interest under Section 42-203A(5)(e). The Director and IDWR's reliance on Section 67-6537 as a "related statute" guiding "where the local public interest lies" terribly misreads *Shokal*. Section 67-6537 does not use the phrase to the "public interest." IDWR's argument that "Section 67-6537 provides clear legislative guidance as to where the local public interest lies in this case" because Section 67-6537 comes from the Local Land Use Planning Act is absurd. Resp't Br. at 21 (emphasis added). By that standard, any duty delegated to any local governmental entity would grant additional authority to the Director by default. IDWR is further mistaken because the Court in *Shokal* noted the importance of Idaho Code §§ 42-1501 and 42-203A(5) coming from the same Title 42, related to water rights and appropriation. 109 Idaho at 338, 707 P.2d at 449. Section 67-6537 is in Title 67 (State Government and State Affairs), not Title 42 (irrigation and water rights). Clearly, the legislature was not considering Section 67-6537 at the same time that it amended the local public interest statute.[3] The Department's reliance on *Shokal* is therefore misplaced because Section 67-6537 is simply not "related" to Section 42-203A(5), or Idaho Code § 42-202B(3), under *Shoka*l.

The Court's analysis in *Shokal* illustrates the type of related statutes which can properly be relied on in defining the local public interest: contemporaneous enactments dealing with the same subject matter, statutes expressly mentioning the local public interest, and other statutes included in Title 42. The Director and IDWR cite and rely on no such statutes. Section 67-6537

[3] Section 67-6537 was amended to add the provisions the Director relies upon in 2005. Sess. Laws Ch. 338 (2005). This was two years after the amendments to the local public interest definition in 2003. Not contemporaneously.

simply does not fit the bill as a "related" statute to guide the Director's analysis of a water appropriation application.

B. Section 42-203A(5) does not tacitly approve consideration of Section 67-6537.

The Department argues that because Section 42-203A(5) does not explicitly exclude consideration of land use laws, the legislature tacitly approves such considerations. *See* Resp't Br. at 24. Therefore, IDWR contends that Section 67-6537 applies, "even in the absence of a formal land use change," because Section 42-203A(5)(e) "requires the Director to address and resolve the local public interest." *Id.* IDWR notes that Section 42-203A(5)(e) does not contain any express land use change exceptions. It then points to the 2003 Session Laws which do prohibit the Director from using the local public interest analysis to establish minimum stream flows. Sess. Laws Ch. 298 p. 809, 811 (2003).[4]

The Department contends that, because the legislature "is aware of the potential for the "local public interest" analysis to touch upon matters over which other agencies have primary authority and knows how to exclude such matters from analysis," the Director is free to consider anything not explicitly excluded in Section 42-203A(5)(e). Resp't Br. at 24. In this novel interpretation, IDWR has the law backwards. An administrative agency, and the Director, only have the authority specifically granted by the legislature. *In re Idaho Workers Comp. Bd.*, 167 Idaho 13, 20, 467 P.3d 377, 384 (2020); *Beker Industries, Inc. v. Georgetown Irr. District*, 101 Idaho 187, 191, 610 P.2d 546, 550 (1980). The legislature does not have to list any exemptions.

There is no need for a land use change exception in Section 42-203A(5)(e) as suggested by IDWR, because Section 67-6537 is very clear on its face that it only applies to local land use

[4] IDWR cites only p. 811 for 2003 Session laws for this proposition. But p. 811 refers to the amendment to the transfer statute, Idaho Code § 42-222, not the appropriations statute, Idaho Code § 42-203A(5)(e).

agencies and only in the narrow circumstances of land use change applications. The legislature could not have provided the type of exception that IDWR demands here. The current version of Section 67-6537 did not exist when the local public interest statute was amended in 2003. The 2003 legislature could not have excepted from the scope of the Section 42-203A(5)(e) a statute that had yet to be passed.

The Department contends that the prohibition on establishing minimum stream flow through a local public interest evaluation passed with the 2003 Session laws shows that the legislature is "aware of the potential for the 'local public interest' analysis to touch upon matters over which other agencies have primary authority." Resp't Br. at 24. Even if the legislature might be aware of the possibility that the Director would seek to appropriate authority granted to other local agencies, nothing requires the legislature to exclude every conceivable administrative over-reach when it passes affirmative legislation. But, the prohibition on using the local public interest evaluation to establish minimum stream flows and instead requiring such stream flows to be established under Chapter 15, Title 42 is not a "matter over which other agencies have primary authority." That process is directly overseen by the Department. [5]

Nothing in the language of Section 42-203A(5)(e) or 42-202B(3) supports the Director's ability to import a local land use planning statute in the local public interest evaluation. The Department's attempt to read into Section 42-203A(5)(e) a *carte blanche* discretion to consider anything not expressly excluded in Section 42-203A(5)(e) fails.

[5] The IDWR appeal brief inexplicably misstates the role of IDWR and the Water Board with respect to minimum stream flows. Resp't Br. at 24, fn 12. The Water Board does not "establish" minimum stream flows as IDWR states. The Water Board applies for and holds minimum stream flows. The Director processes the applications and either approves, conditions, or denies the applications by the Water Board. Idaho Code § 42-1503. Hence, the minimum stream flow exception that IDWR purports to rely upon is not a matter committed solely to another agency with primary authority.

IV. The Director committed clear legal error and abused his discretion by using Section 67-6537 to establish policy which effectively controls and is determinative of the local public interest analysis.

By seizing authority delegated to local land use agencies, the Director exceeded his delegated authority and abused his discretion by magically transforming a power reserved to local governments into an IDWR policy that governs all water right applications before the Director. This is doubly true because the legislature specifically limited the Director's discretion when evaluating the local public interest when it amended Section 42-203A(5)(e) and added Idaho Code § 42-202B(3) in 2003.

A. The Director's enforcement of Section 67-6537 exceeds his authority and is an abuse of discretion.

IDWR argues that the Director did not "enforce Idaho Code § 67-6537," because the Director did not "state or imply that he was enforcing or acting under LLUPA." Resp't Br. at 22. This sleight-of-hand argument ignores the plain meaning of "enforce," which is: "To give force or effect to (a law, etc.); to compel obedience to." ENFORCE, Black's Law Dictionary (11th ed. 2019).

Here, the Director has clearly given force and effect to Section 67-6537 by denying the Applications. The Director has enforced Section 67-6537's "legislative intent" as he defined it. Further, the Director does not just "consider" the legislative intent of Section, instead he gives full force and compels obedience to additional provisions of Section 67-6537 by analyzing "reasonably available water." The Director is not just "guided" by his incorrect interpretation of Section 67-6537's legislative intent, nor is he just "considering" that intent—the Director is enforcing Section 67-6537. The Director evaluated the Applications under the entirety of Section 67-6537, but went further and enforced its dictates beyond what a local land use planning agency could do.

Moreover, it is clear from the Order that the Director reads Section 67-6537 to control and determine the outcome of the Applications. Other than what he views as the legislative intent of Section 67-6537, the Director articulated no reason to deny these particular Applications.

B. Section 67-6537 is expressly limited so as to not impair any private rights under Title 42.

The Department cites Section 67-6537(3) for the proposition that "nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code," and therefore the Director's duty to evaluate the local public interest is without bounds, asserting that Section 67-7537 "expressly avoids imposing any limitations on that authority." Resp't Br. at 25. IDWR reads that language exclusively for the benefit of the Director. The Department cherry-picks from the statute. Section 67-6537(3) states, in full, "Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired thereunder." (emphasis added). IDWR forgets that private parties have rights under the Constitution and Title 42 to acquire water rights. *See e.g.* Idaho Code § 42-101; Idaho Const. art XV, § 3. Those rights are also protected by the same language in Section 67-6537(3).

A central right recognized in Title 42 is the "right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state." Idaho Code § 42-103. The Director relied on, and enforced, Section 67-6537's legislative intent when denying the Applications and restricting Eden's Gate's right to use unappropriated waters. But, by its very terms, Section 67-6537 cannot be construed to impair the Plaintiff's rights to appropriate water, and it was an abuse of discretion for the Director to do so.

Adopting the Director's interpretation of Section 67-6537 will impermissibly amend provisions of title 42. For example, if the Director has its way, Section 42-202B(3) would now read: "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, and as the interest of encouraging the use of surface water when readily available. Further, Section 42-203A(5) would now have an additional subsection for consideration, subsection (f): that in an application for groundwater, surface water cannot be readily available.[6] The Director's interpretation of Section 67-6537 impermissibly amends Section 42-202B(3) or Section 42-203A(5) and violates the plain language of section 67-6537(3).

C. The 2003 Amendments limit the Director's discretion.

Any review of the Director's discretion to evaluate the local public interest criteria must begin with the Director's admission that "the definition of local public interest was significantly narrowed by the Idaho legislature in 2003." R. 321, 326. This is consistent with the determination of the district court in *North Snake*. 160 Idaho at 524, 376 P.3d at 728 *citing Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 164 n. 3, 125 P.3d 515, 520 n. 3 (2005) ("section 42–202B(3) was amended in 2003 for the specific purpose of narrowing the scope of an evaluation of local public interest").

Therefore, it is appropriate to examine the legislative history of the 2003 Amendments to ascertain the meaning, scope, and definition of the "local public interest," as well as the limits of the Director's discretion to evaluate the local public interest. Why was it narrowed and to what extent? Eden's Gate discussed this history at length in its Opening Brief. The Department does not disagree with any of the legislative history cited. Instead, it asks this Court to ignore the legislative intent behind narrowing the Director's authority.

The Department argues that this Court cannot consider the legislative history of the 2003 Amendments because "the Idaho Supreme Court has rejected the argument that the legislative

[6] Idaho Code § 42-202B(3) and Section 42-203A(5) are not the only sections of title 42 which would be amended by the Director's interpretation of Section 67-6537, though they are used as obvious examples here.

history of Idaho Code § 42-202B(3) displaces the language of the statute." Resp't Br. at 27 *citing* *North Snake*, 160 Idaho at 525, 376 P.3d at 729. Ironically, here, IDWR is making the same argument that Rangen made in *North Snake*, i.e., that the determination of the public interest "is committed to Water Resources' sound discretion" and should be automatically affirmed. 160 Idaho at 525, 376 P.3d 728.

In *North Snake*, Rangen sought to uphold the Director's broad discretion to evaluate the local public interest. *Id.* "Rangen appears to argue that this non-binding Statement of Purpose supersedes the language of the statute." *Id.* (emphasis added). Conversely, here, Eden's Gate does not seek to supersede or displace the language of the statute to broaden the Director's discretion. Instead, Eden's Gate offers the legislative history to illuminate how the legislature actually narrowed the scope of local public interest evaluation. *Chisholm*, 142 Idaho at 164 n. 3, 125 P.3d at 520 n. 3 ("In 2003, the legislature narrowed the definition of local public interest considerably"). Moreover, in *North Snake*, the Court cited to the legislative history in the Statement of Purpose to confirm that the legislature intended to limit the scope of the Director's discretion. *North Snake*, 160 Idaho at 525 fn. 1, 376 P.3d at 729 fn. 1.

North Snake, *Chisolm*, and the Director all recognized that the 2003 Amendments significantly narrow the definition of the local public interest. Eden's Gate's discussion on the legislative history of the 2003 Amendments properly focuses on the legislative intent behind the narrowing of the local public interest evaluation as a means of clarifying the limits of the Director's discretion and the meaning of the "local public interest." It is inexplicable that IDWR would try to conceal from this Court what the Department and its attorney told the legislature about why the amendments to the local public interest criteria were proposed, especially since

IDWR now argues that what they told the legislature in 2003 is not what the amendments to the statute were intended to accomplish.

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. *See generally* Appellant's Br. 19-22. Additionally, the legislature's 2003 Amendments provided "side boards" to the Director's discretion to prevent the consideration of 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).

Further, those 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 2003 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." H.B. 284, 57th Legis., 1st Reg. Sess. (Idaho 2003) (Statement of Purpose) *citing Shokal*, 109 Idaho at 340, 707 P.2d at 451.

Nothing in the Director's Order, or in IDWR's brief, asserts that the local public interest relating to "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, or water quality" would be adversely affected by these applications. Accordingly, the Director's decision to deny the applications on local public interest grounds was based on grounds that are not contemplated in the statutory definition, exceeds his authority, and is an abuse of discretion. *North Snake*, 160 Idaho at 525, 376 P.3d at 729 ("Director exceeded his

authority by evaluating the local public interest based on factors not contemplated in the statutory definition").

V. The Director's Order Conflicts with the Full Economic Development of Groundwater Resources in Violation of the Ground Water Act and the Constitution

The Director's claim that the local public interest provisions allow him to make the sweeping conclusion that he can block groundwater development whenever he deems surface water to be available also conflicts with the Ground Water Act, the Constitution, and the Conjunctive Management Rules. The Ground Water Act is intended to support "full economic development of underground water resources." Idaho Code § 42-226. The Supreme Court has held that the Constitution enunciates a "policy of optimum development of water resources in the public interest." *Baker v. Ore-Idaho Foods, Inc*., 95 Idaho 575, 583, 513 P.2d 627, 635 (1973) (emphasis added); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 802, 252 P.3d 71, 83 (2011). *Baker* and *Clear Springs* make it beyond question that "full economic development" of groundwater is consistent with and equated to this constitutionally directed policy of "optimum development" for the benefit of all citizens. *Clear Springs* 150 Idaho at 802, 252 P.3d at 83 *quoting Baker*, 95 Idaho at 584, 513 P.2d at 636. As a consequence, the Conjunctive Management Rules recognize that administration of both surface water and groundwater must be undertaken consistent with the full economic development of groundwater and the optimum development of water resources in the State. *See* IDAPA 37.03.11.020.03.

Idaho's Constitution, legislature, and courts have clearly enunciated the policy for full economic development of underground water resources and specifically recognize that this full economic development is in the public interest. *Clear Springs, supra*. This policy directly applies to the public water resource and is a public interest factor the Director should have considered when evaluating the local public interest here. He did not.

Instead, the Director has seized for himself a power to reject groundwater applications in a manner that directly conflicts with the "full economic development" of groundwater resources in violation of Idaho Code § 42-226, *Baker, Clear Springs*, and Article XV of the Idaho Constitution. Rather than allowing full economic development of an underutilized groundwater resource, the Director has chosen to deny these Applications, because, according to IDWR, the application will "deplete" the aquifer. Resp't Br. at 42-44. Despite its hyperbole about "depletion," IDWR offers no evidence of aquifer mining or withdrawals in excess of natural recharge. *Compare Clear Springs, supra; Baker, supra.* The Department additionally claims the Director can set aside or preserve the groundwater for other, more favored future uses. R. 323. This tactic violates the prior appropriation doctrine, and penalizes Eden's Gate for being first in time to appropriate this unappropriated water. *North Snake,* 160 Idaho at 524, 376 P.3d at 728.

Without any evidence of aquifer mining, the Order violates the statutory and constitutional principles of optimum development, full economic development of the groundwater resource and violates the priority doctrine.

VI. The Director has created a new rule or policy of broad application which requires formal rulemaking procedures, and which has usurped legislative powers.

IDWR's use of Section 67-6537 to establish a broad policy to require the use of surface water when anyone applies for a groundwater right creates a policy regarding primary use of surface water for irrigation, which is a rule of broad application. There is no dispute that IDWR has no statute or rule requiring surface water to be used when reasonably available. Tr. 190:16-23. On appeal, IDWR contends that the Order "did not create or apply a rule, policy, or maxim of general applicability." Resp't Br. at 30. This claim is disingenuous. The Department, and the Director's position, rely on Section 67-6537 to establish a legislative policy to encourage the use

of surface water for irrigation whenever surface water is available. Nothing in the Order says that this policy applies only to the River Bluff Subdivision.

IDWR contends that "Idaho Code § 67-6537(1)'s legislative intent to encourage the use of surface water for irrigation" is a relevant and important factor for analyzing the local public interest. Resp't Br. at 29. The Director went further and imported the standards for when surface water is "reasonably available" from Section 67-6537. R. 325. He also makes a pronouncement about what "developers" in general can or cannot do to acquire access to surface water. *Id*. The Director concludes his local public interest analysis by announcing: "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. If that is not a pronouncement of a broad policy, nothing is.

In all of these ways, the Order created a new policy of broad application, and the Department should have engaged in formal rulemaking procedures.

The recent Idaho Supreme Court decision in *Pizzuto v. Idaho Dep't of Correction* is instructive. *Pizzuto v. Idaho Dep't of Correction*, No. 48857, 2022 WL 775584 (Idaho Mar. 15, 2022). When forming a new rule or policy, the Department is "acting in a quasi-legislative capacity, [and] the APA imposes certain requirements on agencies, including public notice and comment procedures, *see* I.C. §§ 67-5220 to -5222, and submission of rules to the legislature for review. *See* I.C. § 67-529." *Id.* at 2. "It is reasonable to conclude that when a statute requires an agency to produce something that fits the APA's definition of a rule, the legislature has required rulemaking." *Id.* at 3. The feature of general applicability is "the most salient characteristic distinguishing quasi-legislative rulemaking from a purely executive or quasi-judicial agency action." *Id.*

General applicability has two meanings: (1) it means that rules apply uniformly to the public; or, (2) the rule must be applied uniformly by the agency. *Id.* Here, the Director has created a rule or policy—to require the use of surface water for irrigation when available[7] — which fits both definitions for general applicability. First, this policy will apply uniformly to the public. Specifically, it will apply to all groundwater appropriation applications when there is reasonably available surface water. *See Eller v. Idaho State Police*, 165 Idaho 147, 160, 443 P.3d 161, 174 (2019) (rules apply comprehensively to the class of persons or course of conduct covered by the rule). Second, the rule will be applied uniformly by the agency. The Department and Farmers both contend that the policy the Director announced in his Order is a critical factor for the local public interest evaluation in all cases. As such, this new rule will apply uniformly because all future groundwater appropriation applications will be considered in light of the Department's new policy. In either event, the Director has created and applied a policy or rule of general applicability. This new policy, and the Director's Order relying on that policy, is void for failure to comply with the formal rulemaking requirements of Idaho's Administrative Procedures Act.

Under this new rule, whenever an application is made for groundwater, every applicant is faced with a new hurdle to overcome, imposed by the Director. By reading into sections 42-202B(3) or 42-203A(5)(e) a new condition that groundwater applications will be denied if surface water is reasonably available, the Director has changed the landscape and created *ex nihilo* a new regulatory burden for prospective groundwater applicants. Such a sweeping change to Idaho's appropriation laws should be conducted by elected officials, not by the Director.

[7] This is not the policy created by Section 67-6537. The legislative intent there is to encourage the use of surface water for irrigation in land use change applications. By ignoring the "land use change application" condition, the Director has created a new policy. Further, Section 67-6537's "intent" has never been applied as a local public interest criteria—further proof that the Director's policy is a "new" one.

VII. The Applications do not conflict with the local public interest.

Other than the Director's reliance on the general rule discovered in the "legislative intent" of Section 67-6537, purportedly giving him the authority to require the use of surface water in lieu of groundwater when surface water is available, the Director made no findings or conclusions specific to the interests of the people in the area directly affected by the proposed water use that would justify denial of the applications.

IDWR contends on appeal that approval of the groundwater applications will "possibly diminish" or "replace" the use of surface water supplied by Farmers. Resp't Br. at 33. The Director made this claim in his Order, as well. R. 323. Note the language used by the Director– "possibly." *Id.* This conclusion is the keystone of the Order's rationale used to support imposing the surface water only policy. But this claim is not supported by substantial competent evidence found anywhere in the record. The facts are not in dispute. The water previously available for use on the 14 lots is not appurtenant to those lots. R. 324 at fn. 7, 429. In the Farmers' system, water represented by the shares can be moved around from parcel to parcel, as long as it is deliverable. R. 330 at ¶ 31; Tr. 78:7-25. One More Mile entered into an agreement with JC Watson to transfer the 14 shares to Watson. R. 329 at ¶ 23; *see also* Tr. 38. Farmers admits that they can deliver the water represented by these shares to JC Watson. Tr. 273:1-8.

The 14 shares will still be used. The owner of those shares will still be assessed. No evidence in the record shows that reduction in use of Farmers' water will actually occur, or that if it did, there would be any damage to Farmers' water delivery capabilities, or to any of its water users. There is no evidence that these 14 shares are needed for carriage water anywhere in Farmers' delivery system. There is no evidence that moving the shares to JC Watson would have

any effect on groundwater recharge. None of the Director's speculative hypotheticals, *see* R. 323, have any implications for these particular Applications.

The Director does not address the undisputed testimony or facts. Nor does IDWR on appeal. In fact, the Director does not explain anywhere why this application would "possibly" result in diminishment of the use of surface water. He just makes the naked conclusion. He makes no finding of actual injury to Farmers, nor could he. The Supreme Court has equated remote possibilities with "speculation." *See McCann v McCann*, 152 Idaho 809, 820, 275 P.3d 824, 835 (2012); *Franklin Building Supply Co. v. Hymas*, 157 Idaho 632, 635, 339 P.3d 357, 360 (2014) ("mere possibility" that purchases were unauthorized was "conclusory and speculative"); *see also Parke v. Bell*, 97 Idaho 67, 71, 539 P.2d 995, 998 (1975) (inasmuch as proof of damage to owner of benefited land was conjectural and speculative, that owner was not entitled to damages). A mere "possibility" is not grounds for rejecting an application, particularly when, as here, the evidence is that the surface water represented by these 14 shares will continue to be used by One More Mile or JC Watson within Farmers' boundaries.

The Court reviews the record independently. An agency's findings must be affirmed unless the findings are not supported by substantial evidence on the record as a whole, or the findings are arbitrary, capricious or an abuse of discretion. *Erickson v. Idaho Board of Licensure of Professional Engineers and Professional Land Surveyor*, 165 Idaho 644, 647-48, 450 P.3d 292, 295-96 (2019). Thus, in *Peckman v. Idaho State Board of Dentistry*, the Supreme Court reversed an agency determination because of lack of evidence to support the agency's finding. 154 Idaho 846, 303 P.3d 205 (2013). Here, the situation is even worse. The director made no actual findings of impact. He simply concluded there was a mere possibility that the increased use of groundwater would diminish the use of surface water. R323. But not a single finding of

fact supports the claim that the Applications would actually, or even likely, cause any impact to Farmers' surface water use or delivery system.

"If the record is insufficient to support the agency's decisions, we can reverse the decision or remand the case for further proceedings." *Hardy v. Higginson*, 123 Idaho 485, 488, 849 P.2d 946, 949 (1993). Other than the Director's new policy and the speculation of possible diminishment in the use of surface water, the Director has not considered the actual impacts of the Applications on the public water resource. *See id.* at 491, 849 P.2d at 952 (remanding IDWR permit condition meant to protect a natural sculpin pools because there was no evidence submitted addressing the effect of a diversion above the sculpin pool on the sculpin, outside a general conclusion that the sculpin are sensitive to water changes); *Greenfield Vill. Apartments, L.P. v. Ada Cty.*, 130 Idaho 207, 210, 938 P.2d 1245, 1248 (1997) (remanding county tax assessor valuation decision because county did not consider the actual and functional use of the property as required by statute). Because there is no evidence addressing the actual impacts of the Applications on the public water resource, the Director's decision is not based on substantial and competent evidence and should be reversed.

The Department next argues that there is "substantial evidence in the record supporting the Director's determination that approving the irrigation portion of the Applications would increase the use of ground water." Resp't Br. at 33. The Department however, does not provide any reason or justification why an increased use of groundwater conflicts with the local public interest. All water appropriation applications will result in an increased water use, that increased use cannot, by itself, constitute a conflict with the local public interest. *North Snake*, 160 Idaho at 524, 376 P.3d at 728 ("An application to appropriate water, by its very definition, does not bring new water to a water system, but rather seeks to appropriate unappropriated water"). Indeed, the

Court held that the Director overstepped his bounds when using the local public interest criteria to reject an application on the grounds that it would result in additional use of water. *Id.*

Next, the Department argues that the Director determined the continued use of surface water may support the local public interest because the property could still be developed using surface water. Rep't Br. at 34-35. IDWR believes that development is in the local public interest. *Id.* But apparently, only the type of development that the Director approves matters. The Department references the increase to local tax revenues from the River Bluff Development.[8] That tax revenue however, is contingent on the completion of the River Bluff Development, which has stalled because of the denial of the Applications. The Department argues that "the success of the River Bluff Development does not depend on the approval of the "irrigation" portion of the Applications. Resp't Br. at 34. While much of the necessary infrastructure for the development is in place, the development is still without water. Eden's Gate owns no water shares. Without water shares, whether Farmers' surface water is capable of delivery to the development is irrelevant.

A. The Applications do not conflict with the local public interest because there are sufficient groundwater supplies.

Eden's Gate's proposed water use will not deplete the groundwater resources because it is undisputed that "the aquifer can supply a sufficient quantity of water for the proposed used," and because the proposed use "will not reduce the quantity of water for the proposed projects." Appellants Br. at 29. The Department contends that these elements are "not part of the local public interest analysis required by subsection (5)(e) of Idaho Code § 42-203A" because they are separate requirements under subsections (5)(a) and (5)(b). Resp't Br. at 42-43. How is it then that

[8] Tax revenues are not an appropriate factor to consider in the local public interest evaluation as tax revenue has no direct bearing on the public water resource.

the Department can contend that saving groundwater for other uses is part of the local public interest calculus when the Department cannot consider whether there is a sufficient supply of water available to the local people directly affected by the proposed water use? How does the Department know when to save groundwater for future users? If the answer is "always" then IDWR's position is a rule of general applicability, and not a question of impacts to the local community. If it involves impacts to the local community, one has to have information about the water supply available to that local community to make that determination.

The Department contends that consideration of the impacts of a proposed use on water rights, subsection (5)(a), and the water supply itself, subsection (5)(b), would "render the local public interest criterion superfluous." Resp't Br. at 43. But Idaho Code § 42-202B(3) requires the local public interest to focus on the local use of the public water resource. What is the "public water resource" if it does not include the quantity of water under existing water rights, and the water supply itself? Nonetheless, it is possible to read these subsections in harmony. Subsections (5)(a) and (5)(b) address aspects of the state's regulatory interest in the public water resource, and subsection (5)(e) considers the local interest in the public water resource. Without a doubt, there can be overlap between these considerations, but it is indefensible to suggest that the local public interest evaluation should not consider the impacts of a proposed use on local water rights and water supply.

The record shows that the Applications will not deplete the aquifer, nor will it impair the water rights of others. R. 332-33. The Department asserts that "ground water supplies can rapidly decline if not carefully allocated and managed." Resp't Br. at 43. But, the careful allocation and management of those supplies is the exact purpose of the appropriation application process. Neither IDWR nor the Director ever claim that these Applications will result in rapid

groundwater decline. The fact that there may be some time in the future where groundwater becomes unavailable is not a relevant consideration for an application seeking appropriation of unappropriated water now. The Department's position would amount to an absolute bar on all appropriations because at some point, water supplies will dwindle with increased use.

B. The local public interest would be supported by the increase in water quality from the Applications.

The record clearly identifies that the local public interest is served by access to the better water quality of groundwater. Tr.142:18-143:1, 143:13-20. IDWR argues on appeal that this fact is irrelevant because it is a "purely private interest." Resp't Br. at 45. There is no doubt or dispute in the record that the water users seeking this application will be better served by a system that is designed for small lot users rather than larger plots. IDWR simply does not care whether there is an advantage to these lot owners. But, the water users of the water to be supplied under these Applications are clearly people who would be directly affected by the proposed water use on the public water resource within the meaning of Idaho Code § 42-202B(3). Nothing in the rules or the statutes precludes the Director from considering the benefit to the parties seeking an appropriation when he evaluates the local public interest.

VIII. The Department has not previously required the use of surface water in applications for groundwater.

Farmers argues that the Department has previously implemented a policy encouraging the use of surface water and requiring that "primary surface water be used regardless of whether the new ground water application involves a land use change or not." Intervenor Br. at 6 (emphasis added). Farmers supports their position by referencing three *Stipulations to Resolve Protest*. R. 586-601. These stipulations do not establish an IDWR policy requiring the use of available surface water.

Each of the stipulations cited by Farmers were made between an applicant and a protestant in order to resolve a protest and were not based on a Department statute or regulation. Tr. 189-92, 190:16-17 ("But there's no Department statute or regulation requiring surface water use"). The stipulations represent the protestant's conditional withdrawal of its protest. That is, the stipulations represent an agreement between the parties but do not represent an established policy of the Department. A stipulation between parties may employ any variety of policy or rationale. Those policies do not become policies of the Department by virtue of a protestant's conditional withdrawal.

Farmers contends "that existing surface water should not be replaced by new groundwater rights," and the bases for that policy is "preserving aquifers and the existing groundwater supply, maintaining the economic viability of irrigation entities and maintaining the practical viability of irrigation entities." Intervenor Br. at 7, fn. 6. Farmers is thus framing the issue as a general policy of the Department. However, that would require rule making, which has not been done. There is no IDWR rule, guidance memo, or statute requiring IDWR to insist on using surface water. Significantly, even Farmers cannot identify any facts in the record of this case that will show there is any remote concern over the aquifer west of Middleton, or the viability of Farmers, beyond mere speculation of what might happen in with future applications.

The Department simply does not have an extant policy requiring the use of surface water, nor does it have one restricting new groundwater rights when surface water is "reasonably available." The Department itself does not point to any existing policy encouraging the use of surface water, and instead relies only on Section 67-6537. For these reasons, Farmers' position—that the Department has previously implemented a policy encouraging the use of surface water and requiring that primary surface water be used regardless of whether the new ground water

application involves a land use change or not—is unsubstantiated and not supported by fact or law.

CONCLUSION

By usurping the powers delegated to the local governmental agencies in Section 67-6537, the Director has essentially rendered Section 67-6537's delegation of authority to the planning agencies superfluous. The Director makes the decision to impose restrictions relating to use of surface water beyond the statutory directive. This means that the legislature's directive to the planning agencies is meaningless since no matter what they do the Director will step in and add his own restrictions relying on his expansive reading of Section 67-6537.

For the reasons set forth above, this Court should reverse the Director's Order denying the Applications, and on remand direct the Department to issue groundwater irrigation permits for all fourteen (14) of the Applications.

DATED this 19th day of April, 2022.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2022, I served a copy of the foregoing **EDEN'S GATE LLC** *Appellant's Reply Brief to Respondent Idaho Department of Water Resources* 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:
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