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DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

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

**MEMORANDUM IN SUPPORT OF
NOTICE OF APPEAL AND
PETITION TO REVIEW PRELIMINARY
ORDER**

COMES NOW Eden's Gate LLC, by and through its attorneys of record, Barker Rosholt & Simpson LLP, pursuant to IDAPA 37.01.01.730.02(c) and hereby submits this *Memorandum in Support of Notice of Appeal and Petition to Review Preliminary Order*. This matter involves 14 applications for permits for combined domestic and irrigation rights for 14 land lots. In his *Preliminary Order Partially Approving Applications* ("Preliminary Order"), the hearing officer issued the permits, but limited the rights to domestic use only, and denied the application for irrigation use. The hearing officer argued that the water supply is sufficient, that there will be no injury to existing rights, that the applicant has financial resources and is acting in good faith, and that the application is consistent with the conservation of water resources. The denial of this application's irrigation rights rested on local public interest grounds, based solely on Farmer's Co-Operative Ditch Company's objection to allowing ground water use in its service area. Eden's

MEMORANDUM IN SUPPORT OF NOTICE OF APPEAL AND PETITION TO REVIEW
PRELIMINARY ORDER

Gate LLC requests the Director reverse the hearing officer's denial of its irrigation water right permit applications as it improperly considers land use planning factors and fails to apply the Idaho Department of Water's ("IDWR") appropriations criteria.

FACTUAL AND PROCEDURAL BACKGROUND

On January 2, 2020, One More Mile LLC ("OMM") filed *Applications for Permit to Appropriate Water No. 63-34832 through 63-34838, and 63-34840 through 63-34846* ("Applications") with the Idaho Department of Water Resources ("IDWR"). The Applications are part of a small, rural development program near Fruitland, Idaho, in which OMM applied for both domestic and irrigation ground water rights for 14 separate land parcels consisting of an average of 1.77 acres each (24.8 total acres). *Preliminary Order*, Findings of Fact ¶ 1. On July 28, 2020, OMM sold its interest in the 14 lots and assigned all 14 applications to Eden's Gate LLC ("EG"). *Preliminary Order*, at 1.

OMM owns 64 shares of Farmer's Co-Operative Ditch Company ("FCDC") capital stock, which entitles OMM irrigation of up to 128 acres of land, or two acres per share, and OMM is fully liable for all FCDC assessments on its 64 shares. *Preliminary Order*, Findings of Fact ¶¶ 18-19. FCDC stock is not appurtenant to the land, and by consequence, is not appurtenant to the 14 lots, instead, FCDC stock may be transferred to use on other lands owned by the stockholder within the service area. *Id.*, ¶ 31. Additionally, FCDC has a service area of over 15,000 acres and water rights for about 10,000 acres.

After OMM's transfer to EG, OMM owns 87.2 acres of land within FCDC's service area, all of which is capable of being irrigated. *See Id.*, ¶ 21. On June 1, 2020, OMM and JC Watson Company ("Watson") entered into a *Contract for Purchase and Sale of Water Shares* ("Agreement"). *Id.*, ¶ 23. The Agreement states OMM will transfer 14 of its 64 FCDC shares to

Watson "upon final approval of the ground water rights [Applications] for the 14 lots [Applications' place of use]." *Id.*

Farmer's Co-Operative Ditch Company ("FCDC") protested these applications alleging that the Applications would reduce the amount of water it delivers and because FCDC "desires to avoid having the water it delivers replaced with other water sources, such as ground water or wastewater." *Preliminary Order*, Findings of Fact ¶ 30. On June 15, 2020, the hearing officer conducted an administrative hearing for the protested Applications. *Preliminary Order*, at 1. FCDC objected to OMM's assignment of the Applications to EG on July 28, 2020, to which OMM responded on July 29, 2020. *Id.*, at 2. On May 28, 2021, the hearing officer issued the *Preliminary Order* approving the application for domestic ground water rights for all 14 parcels, but denying the irrigation ground water rights on the basis that the Applications were against local public interest. *Id.*, at 13.

ISSUES ON APPEAL

1. Did the hearing officer improperly create new policy for the Department by relying on the Idaho Land Use Planning Act, Idaho Code § 67-6537, as a factor for local public interest when, on its face, the statute does not apply to this development?
2. Did the hearing officer err by failing to consider that OMM has other, adjacent land where its FCDC shares could be diverted?
3. Did the hearing officer err by failing to recognize that the FCDC shares were not appurtenant to the 24.8 acres identified in the Application?
4. Did the hearing officer improperly grant FCDC veto powers over the Applications under the guise of local public interest?

5. Would One More Mile LLC's application for irrigation water rights conflict with local public interest when considered under the proper IDWR's Appropriation criteria?

ARGUMENT

Idaho Code delineates the situations in which an application for water rights may be rejected:

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

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

The hearing officer found that EG has met its burden for elements (a) through (d). *See Preliminary Order*, at 7-9. Additionally, as to element (f), the hearing officer found that EG's application is "not inconsistent with the conservation of water resources in Idaho." *Id.*, at 14. The primary issue, and the dispositive reason for the hearing officer's partial denial¹ of the Applications is element (e), that EG's proposal for groundwater irrigation will conflict with the local public interest.

¹ *Preliminary Order* approves EG's application for domestic water rights on all 14 parcels of land, stating that "the domestic portion of the Applications, including up to ½ acre of irrigation, is not inconsistent with the local public interest and is approved." *Preliminary Order*, at 13.

I. **The hearing officer improperly relied on I.C. § 67-6537 in creating a new policy and in finding a conflict with local public interest.**

Local public interest is “defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3). Rule 45.01.e of Idaho Department of Water’s Appropriation Rules (“Appropriation Rules”) sets forth the criteria for determining whether an application will conflict with local public interest. IDAPA 37.03.08.045.01.e. Despite citing to Rule 45.01, the hearing officer does not evaluate OMM’s application under IDWR’s Water Appropriation criteria for conflicts with local public interest. Instead, the hearing officer considers the applicability of I.C. § 67-6537, part of the local land use planning code, for the analysis of local public interest.

A. The hearing officer incorrectly applies his own public policy.

The hearing officer argues that I.C. § 67-6537 articulates a public policy for the use of surface water for irrigation where reasonably available. Idaho Code § 67-6537(a). After reviewing that section, the hearing officer found that “Idaho Code § 67-6537 does not mandate that the Department require the use of surface water, if available to a property, when considering an application to appropriate water.” *Id.*, at 11. Nonetheless, the hearing officer maintained that I.C. § 67-6537 expressed an overarching public policy of the State of Idaho to encourage the use of surface water for irrigation, and therefore appropriate as a consideration of local public interest. *Id.*

The hearing officer also concluded that “surface water is not reasonably available to EG to irrigate the proposed places of use.” *Preliminary Order*, at 13 (emphasis added). The hearing officer therefore, articulates a public policy for the use of surface water when *reasonably available*, makes a finding that surface water is *not reasonably available*, and still applies that policy standard

to this matter. It is unclear how the hearing officer's policy on use of surface water is applicable to the Applications.

B. Application of I.C. § 67-6537 in a non-land use change situation usurps legislative power.

I.C. § 67-6537 come from the Idaho Land Use Planning Act ("LUPA"), a set of statutes created by the Idaho Legislature to apply to specific circumstances. I.C. § 67-6537 is narrowly drawn to apply strictly to land use changes under LUPA. When the legislature makes choices, agencies should not expand the lines drawn by the legislature. The land underlying the 14 parcels was platted over a hundred years ago, and were zoned agricultural in 2007, a designation that has changed. *Preliminary Order*, at 33. The present Applications do not concern a land use change. *See Id.*, at 11. Application of LUPA provisions to water appropriations is an improper expansion of Department power, contravenes the narrowly tailored statutes drawn by the Idaho Legislature, and creates new policy.

C. I.C. § 67-6537 does not articulate public policy concerning local public interest.

I.C. § 67-6537 does not state a public policy, it simply states that, "The intent of this section is to *encourage* the use of surface water for irrigation" in the context of land use changes. (emphasis added). LUPA lists thirteen stated purposes which would represent legislative statements of policy, none of which include or reference surface water or irrigation. *See Idaho Code § 67-6502*. A plain reading of I.C. § 67-6537 shows that if any public policy is articulated, it is to encourage the use of surface water for irrigation *when making land use changes*, and when surface water is reasonably available. The hearing officer recognized that the Applications are for water appropriation and *not* land use change, and that surface water is *not* reasonably available to EG to irrigate the 14 parcels. As such, reliance on I.C. § 67-6537 as a wide-sweeping legislative expression of public policy, applicable to water appropriation applications generally, and these

Applications specifically, is without merit.

D. *Even if I.C. § 67-6537 is applied as a principle of local public interest in this situation, the Applications would not conflict with local public interest.*

The *Preliminary Order* focuses its analysis on whether the Applications might impact the economic viability of FCDC even though no proof was offered that the Application would do so. Presumably², the hearing officer interpreted I.C. § 67-6537(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,” as a dictate that the economic viability of an irrigation delivery entity is a concern of local public interest. The hearing officer then narrows this issue to whether the Applications will “result in overall reduction in the use of FCDC surface water and a consequent reduction in the benefits of that use.” *Preliminary Order*, at 12. There is no proof however, that the Applications will reduce the use of FCDC surface water, especially in light of OMM’s ownership of other lands that its shares may be used upon.

E. *Application of I.C. § 67-6537 as a standard for local public interest to situations not covered by the statute involves creation of new policy by IDWR.*

The hearing officer concludes that, “because OMM did not demonstrate it is in the local public interest to cease using existing surface water on the proposed place of use,” the Applications would be denied for irrigation purposes. *Preliminary Order*, at 13. This conclusion was reached

² I.C. § 67-6537 lists three situations in which surface water will be deemed available, and for which land use changes must require the use of surface water:

- (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.

Idaho Code § 67-6537(1)(a-c). The hearing officer dismissed subsections (a) and (c), concluding “that these general benefits remain consistent with the local public interest.” *Preliminary Order*, at 12.

even though the evidence presented shows there will be no detrimental impact on local water resources. *Preliminary Order*, at 13. Additionally, OMM owns other lands in FCDC service area to which it can divert water, and OMM presented evidence that it would transfer its FCDC shares used on the 14 parcels to another entity in the district; shares which are not appurtenant to those parcels. *See Preliminary Order*, Findings of Fact ¶¶ 23, 31. The hearing officer's conclusion therefore, implies that even when there is no impact on the surface water resources, an application for use of ground water, in lieu of surface water, will always conflict with local public interest, even when the surface water is no longer available on the land, and there are other available lands for delivery of surface water.

Additionally, the Land Use Planning Act sets forth rules for the entire State of Idaho. Idaho water appropriations law, including specifically the concept of local public interest, necessarily relies on a localized investigation to determine appropriateness of water management. The hydrological exigencies of a specific area limit the application of a policy as broad as put forth by the hearing officer here, i.e., that surface water is preferred for irrigation. It is likely, with an eye on the need for specific, localized information, that the Appropriation Rules focus on the impact of an appropriation, rather than the application of general maxims when granting or denying a water right application. The Appropriation Rules were designed, and adopted by the Legislature, to address these specific situations, and it is the policies and criteria contained therein which should be applied to this matter, not a suggestion borrowed from Land Use statutes and then made policy by the hearing officer.

F. *FCDC's consent to OMM's transfer of shares, or to change the lands on which it uses the shares is not relevant to local public interest.*

The hearing officer states that OMM's proposed transfer of shares to Watson, and to change the location of delivery under its shares to other lands is "a determining factor in evaluating this

aspect of local public interest.” *Preliminary Order*, at 13. “In the absence of FCDC’s review and consent. The hearing officer cannot conclude approving the use of ground water as a primary source of irrigation water will not adversely impact the local public interest.” *Id.* With this determination, the hearing officer rests his denial on FCDC’s approval or denial of OMM’s proposal to transfer 14 of its shares, and to use its shares on different land that it owns. Additionally, OMM is authorized to use its shares on any land within the FCDC service area because the shares are not appurtenant to the land. Further, if the transfer of 14 shares, representing 28 acres, is approved, FCDC will end up delivering surfaced water to *more* land within its service area than it would have to the 14 parcels, which comprise only 24.8 acres. FCDC has no reason to block OMM’s proposals, and the hearing officer should not rely on FCDC consent to approve the Applications. Finally, as argued above, FCDC’s viability is not a relevant policy consideration for local public interest, and it is inappropriate for the hearing officer to supplement FCDC’s determinations for those required under a proper consideration of local public interest.

II. EG has met its burden of persuasion that its Application is consistent with local public interest when analyzed under the IDWR factors.

The hearing officer did not analyze the IDWR Appropriation Rules for determining a conflict with local public interest, instead conflating a land use statute with local public interest. Analysis under the Appropriation Rules shows that the Application for ground water irrigation does not conflict with local public interest. The Appropriation Rules include the following factors to determine whether an application conflicts with local public interest:

- i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both

short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;

- ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and
- iii. An application which the Director determines will conflict with the local public interest will be denied unless the Director determines that an overriding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest.

IDAPA 37.03.08.045.01.e (i-iii). The hearing officer further identifies, but does not discuss, legislative factors for the current definition of “local public interest,” such as—all locally important factors affecting the public water resources like: fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality, and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. *See Preliminary Order*, at fn. 4.

Factor one of Appropriation Rule 45.01e looks at the effect on the economy of the local area. The hearing officer determined that the 14 parcels in question do not require any additional approval from Canyon County before they are sold. *Preliminary Order*, at 8. Additionally, EG presented evidence that “the road, power, telephone, and other utility infrastructure is already in place for development of the parcels.” *Id.* Finally, if the Applications are approved, there is a high probability that “the parcels will be sold and the proposed water use will be developed.” *Id.* Such residential use will also increase Canyon County tax revenues. *Preliminary Order*, Findings of Fact ¶ 9. Given the immediate possibility for the sale and development of the 14 parcels, any effect on the economy of the local area will be positive in that it will develop land, create jobs for the construction and development upon the parcels, and contribute to the overall local economy by way of

increased population to patron local businesses. Factor one, and the evidence presented and facts determined by the hearing officer, supports a finding that the Applications are consistent with local public interest.

Factor two of Appropriation Rule 45.01e, along with much of the legislative intent factors cited by the hearing officer, concern the impacts of a project application on local recreation, environment, and wildlife resources. No evidence was produced showing any adverse impact on water use, the environment, or for recreational purposes. The hearing officer also determined that the Applications' proposal for irrigation is "consistent with the Department standards of efficiency for irrigation of small (< 5 acre) parcels." *Preliminary Order*, at 13. As such, the Application will have minimal, if any, impact on local recreation, the local environment, or to local wildlife resources; no one contends otherwise. Additionally, as the Applications are for ground water appropriation, they will not be diverting water from natural or recreational areas, therefore having no impact to any such area. Factor two, and the evidence presented and facts determined by the hearing officer, supports a finding that the Applications are consistent with local public interest.

Finally, EG has presented testimony that ground water irrigation is a more convenient and practical means of developing water on the parcels, and that "the quality of the surface water (silt, seed, and pesticide content), may not be compatible with the desires of the residents or the types of irrigation systems likely to be used." *Preliminary Order*, at 10. One of the legislative intent elements considers water quality, and here, the water quality would be better from ground water wells, rather than from surface water. Additionally, ground water use will reduce runoff of silty surface water to the river,

increasing water quality, and providing environmental benefits. These considerations mitigate in favor of finding the Applications *support* local public interest.

When analyzed through the proper IDWR Appropriation factors, the Applications not only are consistent with local public interest, but present an opportunity to benefit local public interests concerning the local economy, and the efficient and practical development of lands. The hearing officer determined that EG had met its burden for factors (a) through (d) of I.C. § 42-203A(5); when joined with a proper analysis of local public interest, factor (f), the Department has no grounds to deny the Applications request for ground water irrigation rights.

CONCLUSION

This matter involves the narrow issue of: when there is no land use change under LUPA, can IDWR prevent the use of ground water, relying on I.C. § 67-6537 as policy. EG contends that the Applications in this matter do not implicate I.C. § 67-6537 because no land use change is requested. As to OMM's FCDC shares, FCDC cannot require a landowner to sell his shares along with the property the shares were previously used on, because the shares are not appurtenant to the land. Additionally, OMM owns other land in the FCDC service area to which it can divert its shares. FCDC is not damaged, nor has evidence been presented to support that conclusion.

The *Preliminary Order* recognizes that EG does not have reasonable access to surface water for irrigation, and the surface water that is available is unsuitable for the uses intended for the EG's land. Nonetheless, the hearing officer denied EG's Applications for

ground water for irrigation, leaving EG without irrigation water on the 14 parcels. It is not in the local public interest to dry up land suitable for rural development.

Finally, EG's request to approve its irrigation Applications would be a narrow ruling. OMM's shares are not appurtenant to the land, and therefore, this ruling would not implicate or affect irrigation districts where water is appurtenant to the land. Further, EG is not contending that it is never in the local public interest to require use of surface water. There are times it is appropriate, such as in a big city, or when the ground water supply is over-appropriated or not suitable, but it should not be a default position when those factors are absent.

Accordingly, and based on Eden's Garden LLC's *Notice of Appeal and Petition to Review Preliminary Order* and the arguments contained herein, EG requests the Director approve the 14 Applications in their entirety, both domestic and irrigation.

DATED this 11th day of June, 2020.

- original signed -

Albert P. Barker
Attorney for Eden's Gate LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June, 2021, I served a copy of the foregoing **ONE MORE MILE’S Memorandum in Support of Notice of Appeal and Petition to Review Preliminary Order** by the method indicated below, and addressed to the following:

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