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JUN 24 2021
DEPARTMENT OF
WATER RESOURCES

Attorneys for Farmers Co-Operative Ditch Company

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

IN THE MATTER OF APPLICATION FOR
PERMIT NOS.:

63-34840 to 63-34846

63-34832 to 63-34838

IN THE NAME OF EDEN'S GATE LLC

**PROTESTANT FARMERS CO-OPERATIVE
DITCH COMPANY'S RESPONSE TO NOTICE
OF APPEAL AND PETITION TO REVIEW
PRELIMINARY ORDER**

COMES NOW Protestant, Farmers Co-Operative Ditch Company (hereinafter referred to as "Ditch Company"), and hereby responds to the *Notice of Appeal and Petition to Review Preliminary Order* filed by the Applicant, Eden's Gate LLC, on June 11, 2021.

**I.
INTRODUCTION/BACKGROUND**

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

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

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, 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 and was irrigating the property at the time of the hearing and is currently irrigating the property with the Ditch Company’s existing surface water rights.²

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 of the 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.

On June 15, 2020, a hearing was held before the Idaho Department of Water Resources (“Department”) with Nick Miller as the Hearing Officer. At the time of the hearing: 1) the River

² *Preliminary Order*, p. 4, ¶ 22.

Bluff Development property was within the boundary/service area of the Ditch Company; 2) OMM owned 64 shares of the Ditch Company which includes shares to irrigate the River Bluff Development property with the Ditch Company's surface water; 3) OMM has been irrigating the River Bluff Development property with the Ditch Company's surface water and was irrigating sugar beets on a portion of the property during the hearing for the 2020 season; and 4) as a shareholder of the Ditch Company, OMM was subject to the Articles, Bylaws and Rules and Regulations of the Ditch Company.³

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.

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

³ See *Preliminary Order*, pp. 4-5.

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 and the conservation of water resources requirements of Idaho Code Sections 42-203(A)(5)(e) and (f).⁴

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, Eden's Gate criticizes 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

⁴ 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 did not approve the Applications for irrigation uses. In other words, the hearing officer did not approve the irrigation uses and provide a condition that said uses are "supplemental" to existing surface water rights, which is standard policy of the Department and 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 the applicants voluntarily and intentionally removed the surface water, did not change the hearing officer's conclusion that allowing the surface water irrigation to be replaced by groundwater was contrary to the local public interest and conservation of water resources. As a result of the assignment to Eden's Gate, the end result changed from a supplemental irrigation use to no irrigation use being approved.

Officer's statement that the Ditch Company must consent to the transfer of shares and that no such consent had been provided. However, despite Eden's Gate and OMM's maneuvering and disingenuous attempts to circumvent the existence of available surface water, neither Eden's Gate or OMM have met its burden that 14 new groundwater Applications should be approved with irrigation use. The Director should affirm the Hearing Officer and conclude that irrigation should not be an approved use for these proposed Applications.

II. 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 now the Hearing Officer'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 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 the Land Use Planning Act. 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 new ground water rights

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 Land Use Planning Act. *See* Exhibits 114-118.

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

Indeed, Eden's Gate spends much of its *Memorandum* arguing that the Hearing Officer 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 Memorandum*, pp. 5-8. 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." *Preliminary Order*, p. 11 (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.

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

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.

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.”⁷

OMM and 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 provided by the statute are applicable and the intent and policy of the statute are applicable regardless of whether OMM or Eden’s Gate are

⁷ Eden’s Gate makes a self-serving, disingenuous attempt to distinguish an irrigation district from a canal or ditch company as a basis to narrow the effect of any ruling which condones OMM/Eden Gate’s conduct. *Memorandum*, p. 13. However, as recognized by Idaho Code Section 67-6537, by the Department’s existing policy and the Department’s Surface Water Condition such an argument has no merit. Whether an irrigation district, canal company or ditch company, if there is existing surface water available as the primary irrigation source then it should remain the primary source and the voluntary, intentional discontinuance of such source should not be allowed.

proposing “land use changes” within the meaning of the Land Use Planning Act. 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’s attempt 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.

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

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

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 Department should reject 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 by the Department but rather should be rejected in order to prevent further manipulation by these applicants and future applicants.

B. 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 disingenuous 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 for the 2020 irrigation season.

It was 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,¹⁰ provisions in the Bylaws relating to the subdivision of land and the requirement to install a distribution system¹¹, and the rules and regulations of the Ditch Company¹². The rules and regulations include rules relating to the subdividing of lands and establishing a lateral association to hold shares¹³ and rules specifically requiring a shareholder to use surface water when available prior to the use of groundwater for irrigation purposes.¹⁴ 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, as the Hearing Officer correctly determined, 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.

⁹ *Preliminary Order*, pg. 4, ¶ 24.

¹⁰ *Preliminary Order*, pg. 5, ¶ 26.

¹¹ *Preliminary Order*, pg. 5, ¶ 27.

¹² *Preliminary Order*, pg. 4, ¶ 25.

¹³ *Preliminary Order*, pg. 5, ¶ 29.

¹⁴ *Preliminary Order*, pg. 5, ¶ 30.

C. OMM/Eden's Gate are Voluntarily Withholding Surface Water and thus the Hearing Officer's Preliminary 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. Eden's Gate suggests that the Hearing Officer's statement that "surface water is not reasonably available to EG to irrigate the proposed place of use" is unclear or inconsistent. However, Eden's Gate misses the point again as the Hearing Officer is still determining that surface water is reasonably available, that the Department cannot approve the new Applications with the primary use for irrigation being groundwater, and thus if OMM and Eden's Gate choose to voluntarily withhold shares and remove the existing and available surface water then the Department will only approve the Applications 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)¹⁵ 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 Hearing Officer would 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

¹⁵ See *Preliminary Order*, p. 5, ¶ 30, and Exhibits 28 and 103.

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.¹⁶

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 Hearing Officer denied the irrigation use altogether. This result is clear and consistent with the Hearing Officer's analysis 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 correctly, consistently and clearly applied the Department's policies and conditions to the facts that Eden's Gate presented.

III. CONCLUSION

For the above-stated reasons and for reasons previously set forth at hearing for this matter, the Ditch Company respectfully requests that the Director affirm the Hearing Officer's conclusion that the Application's shall be limited to domestic uses only. At the time the Applications were

¹⁶ It is axiomatic that if the Department's standard process and policy is to condition a new groundwater application for irrigation use within an irrigation district or canal company with the Department's Surface Water Condition, and the Department's Surface Water Condition specifically prevents the right holder from intentionally or voluntarily discontinuing the use of the primary surface water right, that the Department should also not allow an applicant to intentionally or voluntarily discontinue the use of the primary surface water right before the application is approved. In other words, if the terms of the condition are applicable and appropriate after the permit is approved then the terms should also be applicable and appropriate before the permit is approved. The Department should not and cannot allow applicants to avoid using existing surface water by intentionally or voluntarily taking actions or steps to discontinue the use of the primary surface water right regardless of whether the actions or steps were prior to the applications being approved or after the applications are approved.

filed, at the time of hearing and currently there is available surface water for the irrigation of the development. Based upon such availability the Hearing Officer correctly applied the intent and policy to encourage the continued use of surface water. 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 Hearing Officer correctly determined, the Applications should only be approved for domestic purposes, and the Director should uphold the Hearing Officer's *Preliminary Order*.

DATED this 24th day of June, 2021.

SAWTOOTH LAW OFFICES, PLLC

By 

S. Bryce Farris

Attorneys for the Ditch Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June, 2021, I caused a true and correct copy of the foregoing **PROTESTANT FARMERS CO-OPERATIVE DITCH COMPANY'S RESPONSE TO NOTICE OF ASSIGNMENT OF APPLICATIONS** to be served by the method indicated below, and addressed to the following:

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