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DEPARTMENT OF
WATER RESOURCES

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WATER RESOURCES
WESTERN REGION

Attorneys for Eden's Gate LLC

**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

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

This appeal arises from a Preliminary Order of the hearing officer in the above-captioned matter, wherein the hearing officer denied approval for water appropriation applications to drill and irrigate from fourteen (14) ground water wells on the same number of small parcels of land located in the western portion of Water Basin 63 near the Boise River ("Applications"). On June 11, 2021, Eden's Gate, LLC ("EG") filed its *Notice of Appeal and Petition to Review Preliminary Order*, along with its memorandum in support (together, "*Notice of Appeal*"), appealing, *inter alia*, the denial of their water right applications for ground irrigation water. On June 24, 2021, Farmers Co-operative Ditch Company ("FCDC") filed its response to *Notice of Appeal*. This reply is in response to the FCDC, and in support of EG's *Notice of Appeal*.

A. **Idaho Code § 67-6537 Does Not Establish a Policy Concern for “Local Public Interest” as it Relates to Applications for Water Appropriation.**

FCDC initially protested the Applications by insisting that EG was required to use their pre-existing surface water shares with the FCDC, and was therefore, prohibited from using ground water for irrigation. The hearing officer, in his *Preliminary Order Partially Approving Applications* (“*Preliminary Order*”) on May 28, 2021, issued the permits, but limited the rights to domestic use only, and denied the application for irrigation use. The denial of the Application’s irrigation rights was based solely on FCDC’s objection to allowing ground water use in its service area, and the erroneous conclusion that FCDC’s objection was the determining factor in finding the Applications were inconsistent with “local public interest.”

- 1) *EG’s Applications Do Not Request a Land Use Change so as to Trigger or Implicate the Idaho Land Use Planning Act.*

As discussed more fully in EG’s *Memorandum in Support of Notice of Appeal and Petition to Review Preliminary Order* (“*Appeal Memo*”), the hearing officer relied on a statute, not from Idaho’s water appropriation statutes, but from the Idaho Land Use Planning Act (“LUPA”); specifically, the hearing officer relies on Idaho Code § 67-6537 as a controlling factor in determining “local public interest.”

It is important, for the purposes of this appeal, that the hearing officer determined there is sufficient ground water supply, and the FCDC does not dispute this fact. This is not a situation where the ground water is unavailable or stressed. To the contrary, ground water is abundant. The other critical fact is that the land where the Applications were filed was subdivided over a century ago, and no contemporaneous land use change has been proposed with the Applications—there is no dispute that the Applications do not implicate change in land usage as that term is used LUPA. The FCDC contends that the statute applies to “applicants proposing to make land use changes.”

Idaho Code § 67-6537. The “applicant” under this statute however, envisions a person seeking zoning changes, subdivisions, variances, special use permits or other application under LUPA. Idaho Code § 67-6521(1)(d); *see Arnold v. City of Stanley*, 162 Idaho 115 (2017). There is no dispute that this case does not involve an application under the Land Use Planning Act. Even though there is no change in land use triggering the requirements of Idaho Code § 67-6537 under LUPA, the FCDC and the hearing officer, insist that the LUPA creates a “policy” that applies and absolutely forbids the IDWR from issuing new water rights, even though Idaho Code § 67-6537, and LUPA in general, is not triggered.

FCDC insists that Idaho Code § 67-6537 applies even though the FCDC’s water rights are not appurtenant to the land and there is no change in land use as defined by LUPA, even though Idaho Code § 67-6537 does not apply to actions by the IDWR. The FCDC attempts to take a narrowly crafted statute created by the legislature, applicable to a very specific set of circumstances involving land use changes, and extend that statute to circumstances for which it simply does not apply. FCDC argues that the statute creates a policy that is somehow broader than the statute itself. In other words, FCDC is asking the Department to re-write the statute so that it would be applied in all circumstances as a “local public interest” factor for disapproval of any water appropriation application. This is especially troublesome given the existence of specific policy considerations contained in Idaho’s water appropriation statutes, and IDAPA regulations, specifically promulgated to address what constitutes “local public interest” when approving or denying a water appropriation application. *See* I.C. §42-203A(5); IDAPA 37.03.08.045.01.e.

2) *Idaho Water Appropriations Law and Regulation Properly Provides Policy Considerations for “Local Public Interest.”*

Idaho Code delineates the situations in which an application for water rights may be rejected, relevant to the Application denial is factor (e), “that [the proposed use] will conflict with

the local public interest as defined in section 42-202B, Idaho Code.” I.C. § 42-203A(5). “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.” I.C. § 42-202B(3). Additional factors used to determine or define “local public interest” are provided in the Idaho Department of Water Resources Appropriation Rules (“Appropriation Rules”):

- 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). In the context of these Applications for water appropriation, the appropriate definitions and factors for consideration of “local public interest” are those statutes adopted by the legislature and those rules promulgated by Idaho Department of Water Resources (“IDWR”) specifically within the context of water appropriation. EG has met its burden of persuasion that its Applications are consistent with local public interest when analyzed under the proper IDWR factors. *See Appeal Memo*, pp. 9-12. Specifically, the Applications will not have a negative effect on the economy of the local area and may instead have a positive impact on the local economy, the Applications will not have a negative impact on recreation, nor will the Applications have a negative effect on local fish and wildlife. *See IDAPA 37.03.08.045.01.e (i-ii)*. As such, EG’s Applications for ground irrigation rights should be approved.

Further, FCDC does not even attempt to defend the position of the hearing officer, which defers to FCDC, the right to determine whether or not a particular use of water is in the local public interest; the hearing officer takes FCDC's opposition to the Application as sufficient evidence that the Application are inconsistent with "local public policy." Neither FCDC nor the hearing officer even assert that these Applications are not in the local public interest, as that term is defined by the elements of local public interest, *see* IDAPA37.03.08.045.01.e (i-ii), and under Idaho water appropriation statutes.

B. EG's Transfer of its FCDC Shares is Irrelevant as to its Application for Water Appropriation

FCDC's water rights are not appurtenant to the parcel of land owned by EG, and the rights were not appurtenant to the parcel of land when the land was held by One More Mile, LLC ("OMM"). While water had been used on the land in the past by OMM, OMM has other land in the FCDC's boundaries where it could use its FCDC shares to irrigate that land. FCDC cites conditions that are included in other water rights approved by the Department, but of none of those approvals are apt here. All of those conditions were either agreed to by the applicant or were specifically required as part of a land use change under Idaho Code § 67-6537, or both. Simply put, FCDC's contention that OMM transferred its land and the Applications to EG has no bearing on the operative consideration for the approval of the Applications, i.e., are they consistent with Idaho's water appropriation's doctrine concerning "local public interest."

C. Conclusion

The Hearing Officer's decision grants FCDC virtually unlimited authority over private land use and water rights inconsistent with the requirements of Idaho water appropriations law. By an administrative fiat, the hearing officer has created a new public policy by misapplying land use planning statutes to water appropriation standards. When considered under the proper, water

appropriation framework, the Applications satisfy all requirements for approval and are consistent with the local public interest. Additionally, the hearing officer found that “surface water is not reasonably available to EG to irrigate the proposed places of use.” *Preliminary Order*, at 13 (emphasis added). Without reasonably available irrigation water, approval of EG’s Applications is necessary for the development and use of EG’s land. As such, and for the other arguments made herein and in EG’s *Appeal Memo*, the hearing officer’s *Preliminary Order* should be reversed and the Applications should be approved for the irrigation use as to all fourteen applications for ground water irrigation.

DATED this 1st day of July, 2021.

/s/ Albert P. Barker

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:

Idaho Dept. of Water Resources
322 E Front St
Boise, Idaho 83720-0098

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☒ U.S. Mail
☐ Facsimile
☐ Overnight Mail
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July 1, 2021

Idaho Department of Water Resources
322 E. Front Street, Suite 648
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Re: Eden's Gate LLC

Dear Clerk,

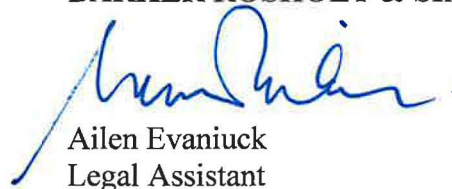
Enclosed please find Eden's Gate LLC Reply in Support of the Notice of Appeal for filing.

Kindly return the conformed copy in the self-address stamped envelope.

Thank you.

Sincerely,

BARKER ROSHOLT & SIMPSON LLP


Ailen Evaniuck
Legal Assistant

Enc. a/s