

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS
FOR PERMIT NOS. 63-34832 THROUGH
63-34838 AND 63-34840 THROUGH 63-
34846 ALL IN THE NAME OF EDEN’S
GATE LLC

ORDER ON EXCEPTIONS; FINAL
ORDER PARTIALLY APPROVING
APPLICATIONS

BACKGROUND

On January 2, 2020, One More Mile, LLC (“OMM”), filed *Applications for Permit to Appropriate Water Nos. 63-34832 through 63-34838, and 63-34840 through 63-34846* (“Applications”) with the Idaho Department of Water Resources (“Department” or “IDWR”). The Department published notice of the Applications in the Idaho Press-Tribune on January 16 and January 23, 2020. Farmers Co-Operative Ditch Company (“FCDC”) timely protested each of the Applications.

On March 19, 2020, the Department held a pre-hearing conference. OMM and FCDC were unable to resolve the protested issues and requested a hearing to decide the contested cases. On April 6, 2020, the Department’s hearing officer issued the *Order Consolidating Matters for Hearing, Notice of Hearing, and Scheduling Order* (“Consolidation Order”) consolidating the Applications for hearing and establishing a hearing schedule.

An administrative hearing was held on June 15, 2020, at the Department’s Boise office. Attorney Albert Barker represented OMM, and Attorney Bryce Farris represented FCDC.

The hearing officer admitted exhibits offered by OMM and FCDC into the record.¹ Pursuant to IDAPA 37.01.01.602, the hearing officer also took official notice of the Applications and associated Department documents identified in the Consolidation Order, including past orders and decisions, reports, measurements, stream flow records, and well driller reports. Craig Froerer (OMM member), Alan Mills and Matt Wilke (Mills & Co. Realty, Inc.), Lori Graves (SPF Water Engineering, LLC), Tom Johnston (FCDC Board Member), and Rod Nielson (FCDC President) testified at hearing.

After the hearing, on July 28, 2020, OMM filed a *Notice of Assignment of Application* (“Notice of Assignment”) and submitted the appropriate Department *Assignment of Application for Permit* (“Assignment”) form assigning the 14 applications to Eden’s Gate LLC (“EG”). The Assignment conveyed the Applications’ proposed points of diversion and underlying places of use—14 two-acre parcels—from OMM to EG. OMM did not, however, assign any of the 64 shares of FCDC capital stock it owns (which authorize the irrigation of 128 acres, in FCDC’s service area). Exhibit 10; Testimony of Tom Johnston.

¹ The following exhibits were admitted into the record: 1-11, 13-14, 16, 19, 24, 26, 28, 29, 103, 105, 107, 109, 112-118, and 121.

Evidently because of issues raised at hearing and because the Assignment occurred after the hearing, but before issuance of a preliminary order, OMM included legal argument in the Notice of Assignment. OMM argued: (1) the Assignment was not completed for speculative purposes; (2) because the FCDC shares are not appurtenant to the conveyed lands, and EG is not an FCDC shareholder, EG is not subject to FCDC's Articles, Bylaws, or Resolutions; (3) FCDC cannot prevent the conveyance of the parcels without the FCDC shares; and (4) the Assignment is not subject to Idaho Code § 67-6537, because no land use change was proposed under Idaho's Land Use Planning Act.² *Notice of Assignment* at 1–2. Along with the Notice of Assignment and Assignment, OMM filed the *Declaration of Madison Richards* (“EG Declaration”). Madison Richards is an original governor of EG. *EG Declaration* at 1. The EG Declaration states EG's intent to sell the 14 lots with the prospective permits sought by the applications, instead of any FCDC shares or other water rights. *EG Declaration* at 1.

On July 28, 2020, FCDC filed *Protestant Farmers Co-Operative Ditch Company's Response to Notice of Assignment of Applications* (“FCDC Objection to Assignment”). FCDC argued the Assignment is an attempt “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.” *FCDC Objection to Assignment* at 2. FCDC argued the Assignment was a disingenuous attempt to avoid using surface water that is still reasonably available, as evidenced by the fact FCDC surface water was used to irrigate the parcels during the 2020 irrigation season. *Id.*

On July 29, 2020, OMM filed *One More Mile LLC's Response to Farmer's Co-Op's Objection to Notice of Assignment of Application for Permit* (“OMM Response to FCDC Objection”). OMM argued: (1) Idaho Code § 67-6537 is inapplicable here because no land use change is proposed, and expanding the policy of the statute beyond its terms is not supported by the statutory language or legislative intent; and (2) FCDC does not represent an irrigation district, instead “FCDC was created so that its water rights are not appurtenant to the individual land and . . . property could be transferred without company shares and without any involvement by FCDC.” *OMM Response to FCDC Objection* at 3.

On May 28, 2021, the hearing officer issued his *Preliminary Order Partially Approving Applications* (“Preliminary Order”). The hearing officer considered the effect of the Assignment on the Applications in the Preliminary Order.

On June 11, 2021, Eden's Gate filed its *Notice of Appeal and Petition to Review Preliminary Order* accompanied by a *Memorandum in Support of Notice of Appeal and Petition to Review Preliminary Order* (“EG Exceptions”).

² Idaho Code § 67-6537 is defined, in relevant part, *infra* at 5.

On June 24, 2021, FCDC filed *Protestant Farmers Co-Operative Ditch Company's Response to Notice of Appeal and Petition to Review Preliminary Order* ("FCDC Exceptions Response").³

The controversies represented in OMM's Notice of Assignment, the FCDC Objection to Assignment, and the OMM Response to FCDC Objection, were included in the parties' exceptions and responses thereto. The effect of the assignment and the substance of these issues will be addressed by the Director in the analysis on exceptions below.

THE EXCEPTIONS

The Applications propose diversion of ground water for domestic and irrigation purposes on 14 separate two-acre parcels located in the River Bluff Development near Fruitland, Idaho. Exhibit 4 at 4. The Preliminary Order partially approved the Applications, denying only the ground water irrigation use proposed in the Applications as not in the local public interest.⁴ *Preliminary Order* at 13.

The hearing officer concluded the main local public interest issue was "whether it is inconsistent with the local public interest to cease using surface water to irrigate the parcels and instead use groundwater as the sole source of irrigation water." *Id.* at 10. In this case, the hearing officer concluded the local public interest of maintaining surface water irrigation outweighed the proposed transition to new ground water irrigation. *Id.* at 12. The hearing officer also concluded approving a change from surface to ground water irrigation may have a negative effect on the viability of FCDC, and FCDC should be able to review and consent to the removal of the use of its surface water. *Id.* at 13.

EG's Exceptions relate solely to the partial denial of using ground water for irrigation on the parcels. *EG Exceptions* at 1-2. EG's Exceptions argue the hearing officer improperly conducted the local public interest inquiry: (1) by misapplying the Idaho Legislature's stated land use change policy as it relates to the use of surface versus ground water; (2) by not applying the proper local public interest standard (as defined by IDAPA 37.03.08.045.01.e.i-iii); and (3) because EG no longer has reasonable access to surface water for irrigation, "it is not in the local public interest to dry up land suitable for rural development." *EG Exceptions* at 12-13.

³ On July 6, 2021, Eden's Gate LLC filed its *Reply in Support of Notice of Appeal and Petition to Review Preliminary Order* ("Eden's Gate Reply"). The Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01) do not allow for replies to responses to exceptions. Eden's Gate Reply is not considered here.

⁴ The Preliminary Order did, however, approve up to one-half ($\frac{1}{2}$) acre of *domestic* groundwater irrigation for each parcel, as consistent with the local public interest. *See* Idaho Code § 42-111(1)(a) (domestic use includes the irrigation of up to one-half acre of land, if the total use is not more than 13,000 gallons per day).

The Local Public Interest

For purposes of water appropriation in Idaho, the 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).

The legislative intent for HB 284, the 2003 bill that enacted the current definition, states:

[IDWR’s] role under the “local public interest” is to ensure that proposed water uses are consistent with securing “the greatest possible benefit from [the public waters] for the public.” Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to 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.

H.B. 284, 57th Legis., 1st Reg. Sess. (Idaho 2003) (Statement of Purpose). Idaho Code § 42-203A “places upon the Director [of the Department] the affirmative duty to assess and protect the public interest.” *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 442, 448 (1985). “The relevant elements [of the local public interest] and their relative weights will vary with local needs, circumstances, and interests.” *Dunn*, 209 Idaho at 339, 707 P.2d at 450. “The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to [the Department’s] sound discretion.” *Id.*⁵

The Director has the authority and discretion to determine: (1) an application’s local public interest factors and their relative impacts, and what the local public interest requires; and (2) the reasonableness of a diversion or use. *See American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 880, 154 P.3d 433, 451 (“[B]etween the absolute right to use a decreed water right and an obligation not to waste it and to protect the public’s interest in this valuable commodity, lies an area for the exercise of discretion by the Director.”)

The burden of coming forward with evidence to evaluate local public interest factors is shared by both the protestant and applicant. The applicant must come forward with evidence as to any factor affecting the local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable, and the protestant must come forward with evidence as to any factor of which the protestant can reasonably be expected to be more cognizant than the applicant. *See* IDAPA 37.03.08.040.04. The applicant bears the ultimate burden of persuasion for all of the elements in Idaho Code § 42-203A(5), including the local public interest element. *Id.*

⁵ While the Department’s Water Appropriation Rules (*see* IDAPA 37.03.08.045.01.e.i-iii) include local public interest criteria, the definition of local public interest was significantly narrowed by the Idaho Legislature in 2003. The Water Appropriation Rules have not been updated to reflect the 2003 legislative amendments. Therefore, the Director will not specifically address the factors at IDAPA 37.03.08.045.e.i-iii. *See also* Robert L. Harris, *Narrowing the Local Public Interest Criterion in Idaho Water Right Transfers*, 39 IDAHO LAW REV. 713 (2003).

The Use of Surface versus Ground Water and the Local Public Interest

EG argues the Preliminary Order improperly created new policy for the Department by relying on Idaho Code § 67-6537 as policy when, on its face, the statute applies to land use changes. *EG Exceptions* at 5. Idaho Code § 67-6537 states, in relevant part:

- (1) 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. Surface water shall be deemed 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.

Idaho Code § 67-6537 is part of Idaho's Land Use Planning Act ("LUPA") and expresses the legislative intent to require the use of surface water, "where reasonably available," as the primary source of irrigation in all applications for land use changes. The hearing officer concluded that, while not binding on water appropriation applications, the legislative intent to use surface water for irrigation in land use changes may be considered as an evaluative factor in the local public interest inquiry. *Preliminary Order* at 11.

EG argues the hearing officer created a per se conflict by including LUPA's stated intent as a local public interest factor. *EG Exceptions* at 8. EG argues the result of the hearing officer's conclusion is that any application for use of ground water that will replace surface water will always conflict with the local public interest. *Id.* EG argues this forced preference for surface water remains even in its case, where surface water is no longer available, or the previously available surface water can be used elsewhere. *Id.*

FCDC, on the other hand, argues IDWR should consider the policy expressed by the Legislature in Idaho Code § 67-6537 when reviewing an application to appropriate water. *FCDC Response* at 4. FCDC argues that regardless of Idaho Code § 67-6537, the general concept of using surface water before ground water for irrigation is already a policy of the Department and EG's arguments related to the policy expressed in LUPA are, therefore, red herrings. *Id.* FCDC argues the Department has consistently used a supplemental condition on

water permits and rights requiring the use of available surface water prior to use of supplemental ground water for irrigation.⁶ *Id.* at 5–6; and *see* Exhibits 114-118.

The Director agrees with the hearing officer and FCDC. While Idaho Code § 67-6537 does not require IDWR to consider LUPA in the water appropriation process, it expressly states the public interest value of encouraging the use of existing surface water and systems before developing new ground water sources. Through Idaho Code § 67-6537, the Legislature articulates the public interest of the state of Idaho to “encourage the use of surface water for irrigation.” When there is a land use change, “surface water [shall be used], where reasonably available, as the primary water source for irrigation.” It is proper to *consider* this statement of public interest value as a relevant and important factor when analyzing the local public interest of approving the use of new ground water sources on lands already served by surface water and delivery systems.

The bases for the legislative statement, and for the Department’s surface water first supplemental condition are:

- Preservation of ground water aquifers and ground water supply;
- Conservation of ground water for uses that typically require better water quality;
- Maintenance of surface water distribution systems as sources of ground water recharge (incidental recharge, carriage); and
- Preservation of the economic viability of surface water delivery entities.

In this case, the subdivided parcels, historically used for irrigated agriculture, are now two-acre residential lots. Whether or not this is a land use change under LUPA is a separate inquiry from whether it is in the local public interest to allow the parcels to be irrigated through existing, readily available, surface water and delivery systems, or through the development of new ground water sources. For the reasons stated above, and in this case, the Director concludes the local public interest is best served by retention and use of surface water on the subdivided parcels. The “effects of such use [of ground water] on the public water resource” would increase use of ground water and possibly diminish the use of surface water contrary to the legislatively defined “interests that the people in the area directly affected by a proposed water use have” Idaho Code § 42-202B(3).

The Availability of Surface Water to EG

On exceptions, EG argues that because the FCDC shares are no longer available for use by it (again, due to the conveyance of the underlying parcels from OMM to EG without FCDC shares) the ground water irrigation aspects of the Applications should be approved. *EG*

⁶ A typical Department groundwater supplement condition states: “The right holder shall not divert [ground] 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 assessment, without an approved transfer pursuant to Idaho Code 42-222 or other Department approval.” *See e.g.* Exhibits 114-118.

Exceptions at 8. EG argues that FCDC cannot require a landowner to sell shares along with the private property the shares were previously used on, because the shares are not appurtenant to the underlying land. *Id.*⁷ Further, EG argues there is no evidence approval of the Applications will reduce the use of FCDC’s surface water because OMM owns other land within the FCDC service area where the surface water shares could be used. *Id.* at 14. Finally, EG argues the hearing officer should not have conditioned approval of the Applications on FCDC’s consent under its by-laws because FCDC’s viability is not a relevant local public interest policy factor. *Id.* at 9.

FCDC responded to EG’s *Exceptions* by arguing the post-hearing conveyance of the underlying parcels from OMM to EG, without the FCDC surface water shares, represents a disingenuous maneuver to avoid the conclusion surface water is reasonably available to it. *FCDC Exceptions Response* at 10. FCDC argues that at all relevant times—and until a month after the July 2020 hearing—OMM was capable of, and did receive and use, surface water irrigation through FCDC’s system on the relevant parcels. *Id.* FCDC argues:

[A]n existing [FCDC] 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.

Id. at 8-9. FCDC argues this outcome should be the same whether an existing surface water user discontinues use prior to an application being approved or after. *Id.* at 13 n.16.

FCDC argues EG’s attempted circumvention of its use of FCDC surface water by submitting evidence of a potential sale,⁸ and, post-hearing, selling the underlying parcels to EG (with OMM withholding the FCDC shares) are tactics akin to a landowner intentionally manipulating or destroying a delivery system “by one’s own hand or consent and then use that as a basis for exclusion” from the system. *Id.* at 8. FCDC argues the Department’s supplemental ground water condition specifically prohibits such tactics:

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**

⁷ FCDC acknowledges its shares are transferable and not appurtenant (they are not water rights) to the lands on which the water is used. Exhibit 13 (Deposition of FCDC Board member Tom Johnston).

⁸ Specifically, FCDC argued evidence of the sale of a portion of OMM’s FCDC’s shares to another water user in FCDC’s service area shortly before the hearing was a failed attempt to show that the water could be used elsewhere in FCDC’s service area. *FCDC Exceptions Response* at 3. FCDC argued evidence of the proposed sale should have no bearing on the outcome of this case because the potential sale was based on two uncertain factors: (1) FCDC approval of the sale; and (2) Department approval of the Applications with full ground water irrigation use. *Id.*

annual assessment, without an approved transfer pursuant to Idaho Code § 42-222 or other Department approval.

Id. at 9.

The Director agrees with the hearing officer and FCDC. The benefit of continued use of surface water is a reasonable and valid local public interest factor to consider. The continued viability of a surface water delivery system is also a reasonable local public interest factor when considering whether surface water is available to a transfer applicant. IDWR encourages the continued use of existing surface water delivery systems for the reasons already explained above. EG's intentional actions to discontinue the use of the readily available FCDC surface water and delivery system should be discouraged.

EG argues it no longer has access to surface water. The Director disagrees. Any lack of access by EG to surface water is a result of the intentional conveyance of the parcels from OMM to EG after the hearing, without the previously used FCDC shares. The Director concludes it is not in the local public interest to allow developers to intentionally manipulate access to surface water. It *is* in the local public interest to encourage the continued use of surface water and surface water delivery systems.

As described above, the Director recognizes the public interest value the Idaho Legislature adopts in Idaho Code § 67-6537. The Director also considers the "reasonable availability" inquiry in that statute to be a valuable factor in determining whether a transfer applicant has access to surface water. Idaho Code § 67-6537 states, in pertinent part, "[t]he intent of this section is to encourage the use of surface water for irrigation . . . where reasonably available." For purpose of the local public interest inquiry, 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 right 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).

In this case—prior to the Assignment—OMM's FCDC water shares represented reasonably available surface water and access to a capable delivery system to the Application's places of use. Until at least the irrigation season of 2020, the FCDC shares were being actively used on the parcels for agricultural irrigation. Nothing has physically changed to prevent delivery of the surface water to the parcels. FCDC asserts it is willing and ready to continue to provide surface water to the parcels. Despite the Assignment, surface water is still reasonably available to EG and FCDC's system is capable of delivering that water. Surface water is reasonably available to EG and its continued use is in the local public interest.

Rule 45.01 and the Local Public Interest Inquiry

EG argues the hearing officer did not analyze the local public interest properly pursuant to Rule 45.01 of the Water Appropriation Rules because the elements listed in Rule 45.01 were not specifically addressed.⁹ EG argues the hearing officer also identified, but did not address, other local public interests such as 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 in a reasonable time. *EG Exceptions* at 9–10. EG argues the Applications should be approved because: (1) approval of the Applications is good for the local economy as the lots have been approved by Canyon County and the infrastructure is in place for development, which will increase local tax revenues, create jobs, and increase patronage to local businesses; (2) approval would have minimal, if any, impact on local recreation, the local environment, or local wildlife; and (3) approval would allow for more convenience and better water quality for users, and would reduce runoff of silty surface water to the river. *EG Exceptions* at 9–12.

First, while the Department’s Water Appropriation Rules (*see* IDAPA 37.03.08.045.01.e.i-iii) include local public interest criteria, the definition of local public interest was significantly narrowed by the Idaho Legislature in 2003. The Water Appropriation Rules have not been updated to reflect the 2003 legislative amendments. As a result, IDAPA 37.03.08.045.01.e.i-iii is no longer used as the analytical framework of the local public interest inquiry. Regardless, the hearing officer and Director recognize the validity and importance of the local public interests identified by EG. The Director concludes most of these same benefits result from the continued use of reasonably available surface water to irrigate the parcels. The partial denial here is not, and cannot be, determinative of the success or future of the River Bluff Development. Most of the local public interest values identified in the EG Exceptions, and in the record, may be sustained despite the partial denial.

The Director’s Conclusions on Exceptions

The Director has weighed and balanced the local public interest factors identified in the record. The Director concludes the local public interest in maintaining the use of surface water, and the benefits that stem from such use, as described above, outweigh any conflicting local public interests identified in the record. The Director also concludes the continued use of surface water may support many of the local public interests identified in the record.

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. The ground water irrigation portions of the Applications should be denied.

The hearing officer’s preliminary order, and the partial denial of the ground water irrigation uses, is sustained. The hearing officer’s local public interest analysis below has been amended to reflect the Director’s review on exceptions.

⁹ The definition of, and Idaho law related to, the local public interest is described *supra* in subsection 1 of the Exceptions analysis.

FINDINGS OF FACT

1. OMM filed the Applications to divert ground water for domestic and irrigation purposes on 14 separate land parcels located within River Bluff Development near Fruitland in Canyon County. Exhibit 4 at 4. Table 1 summarizes the Applications.

IDWR Application Number	Proposed Priority Date	Domestic Rate (cfs)	Irrigation Rate (cfs)	Total Rate (cfs)	Proposed Acres	Parcel
63-34832	01/02/2020	0.04	0.07	0.11	2.3	11
63-34833	01/02/2020	0.04	0.05	0.09	1.5	12
63-34834	01/02/2020	0.04	0.07	0.11	2.3	13
63-34835	01/02/2020	0.04	0.05	0.09	1.5	14
63-34836	01/02/2020	0.04	0.06	0.10	1.9	15
63-34837	01/02/2020	0.04	0.04	0.08	1.3	16
63-34838	01/02/2020	0.04	0.05	0.09	1.5	17
63-34840	01/02/2020	0.04	0.05	0.09	1.5	4
63-34841	01/02/2020	0.04	0.06	0.10	2.1	5
63-34842	01/02/2020	0.04	0.05	0.09	1.5	6
63-34843	01/02/2020	0.04	0.07	0.11	2.2	7
63-34844	01/02/2020	0.04	0.05	0.09	1.5	8
63-34845	01/02/2020	0.04	0.07	0.11	2.2	9
63-34846	01/02/2020	0.04	0.05	0.09	1.5	10
Total		0.56	0.79	1.35	24.8	

Table 1: Summary of Applications.

2. The irrigation place of use for each application is the total acreage of the parcel less 0.5 acres for buildings and other hardscape. Exhibit 11 at 6.
3. OMM requested the use of ground water as the sole source of water for irrigation of the proposed places of use and proposes to cease use of surface water. Exhibit 4 at 2.
4. The Applications propose construction of a single, six-inch diameter well, 200 feet (ft) in depth, per parcel. The proposed water bearing zone for each well is 40 to 200 ft below ground surface (bgs). Exhibit 4 at 1–2.
5. OMM hired Adamson Pump & Drilling to construct a domestic well (“Test Well”) on Lot 8, Block 1 of the Orchard Tract.¹⁰ The Test Well is completed to a depth of 154 ft bgs and is screened from 144 ft to 154 ft. The static water level of the well was 45 ft bgs with water first encountered at 35 ft bgs. The pump test conducted by the well driller yielded a discharge of 50+ gallons per minute (gpm) with 75 ft of drawdown. Exhibit 7.

¹⁰ This location is referred to as Parcel 16 on Application for Permit to Appropriate Water No. 63-34837.

6. Yield from the Test Well is 50+ gpm or 0.11+ cfs, which is greater than the largest total diversion rate proposed under any one of the Applications.
7. There are 37 wells within a half-mile radius of the Applications' proposed points of diversion. Of the 37 wells, 36 were permitted for domestic use, and one was for irrigation use. The well depths range from 27 ft bgs to 208 ft bgs. The static water levels range from 3 ft bgs to 99 ft bgs. The yields range from 15 gpm¹¹ to 100 gpm. Exhibit 8.
8. Hydrographs for four wells in the lower Boise River drainage show stable water levels with no indication of ground water declines. The nearest of these four wells is approximately five miles from the Applications' points of diversion. Exhibit 9.
9. Developing residential use increases Canyon County tax revenues. Testimony of Alan Mills.
10. Road, phone, power, and utility infrastructure is already constructed to allow for residential development of the Applications' proposed points of diversion and places of use. Testimony of Alan Mills.
11. As of June 15, 2020, eight of the 14 parcels proposed for residential development under the Applications were for sale. There are no additional Canyon County approvals necessary to list the remaining parcels for sale. Testimony of Matt Wilke.
12. As of June 15, 2020, one of the parcels was pending sale contingent upon the outcome of the Applications. Testimony of Matt Wilke.
13. OMM intended for the buyer of each parcel to bear the costs of drilling the wells proposed by the Applications. The cost to install a pressurized irrigation system, if required, would initially be borne by the developer, but ultimately passed on to the buyer. Testimony of Alan Mills. Similarly, EG's intent is to "sell the lots with their respective permits." *EG Declaration* at 1. It is reasonable to conclude EG also intends for the cost of well construction and permit development to ultimately be borne by the buyers.
14. The Applications state the points of diversion and places of use are owned by OMM. Exhibit 4 at 2. As of June 15, 2020, the points of diversion and property underlying the places of use were owned by OMM. Testimony of Craig Froerer. On July 28, 2020, the Department received notice the Applications' points of diversion and the property underlying the places of use were owned by EG. *EG Declaration* at 1. A deed included with the Assignment shows the property was conveyed to EG on July 22, 2020, approximately one month after the hearing.

¹¹ Exhibit 8 contains a record of a well for Grant Peterson (Map No. 27) reporting 0 gpm production. Department records suggest this is a typographical error as the well construction report for the well lists a pump test rate of 20 gpm.

15. The Applications' places of use are within the FCDC service area ("FCDC Service Area"). *See* water right nos. 63-138C, 63-188, 63-189, 63-190, 63-191, 63-296, 63-4851, 63-4852, 65-66, and 65-67.
16. FCDC, a cooperative ditch company, originated in 1902 when settlers purchased water rights and created the company to issue stock to private landowners for the use of those water rights. Exhibit 13 at 7.
17. Article V, Section 3 of *Farmers Coop Amended By-Laws* dictates that FCDC issue shares of the capital stock. These shares entitle the shareholder to "the perpetual and equitable right to the [FCDC's] available water supply, water rights and irrigation system" Exhibit 16 at 5.
18. OMM is the holder of 64 shares of FCDC capital stock. Exhibit 10.
19. The 64 shares of FCDC capital stock entitle OMM to irrigate up to 128 acres of land. Testimony of Tom Johnston.
20. OMM retained ownership of the 64 FCDC shares when it conveyed the Applications' points of diversion and property underlying the places of use to EG. *Notice of Assignment* at 1.
21. As of June 15, 2020, OMM owned 112 acres of land within the FCDC Service Area. OMM has historically diverted water from the FCDC delivery system to irrigate 89 of the 112 acres owned by OMM. OMM does not own any additional land within the FCDC Service Area. Testimony of Craig Froerer.
22. In 2018 and 2019, OMM used water from the FCDC delivery system to drip-irrigate sweet potatoes on the Applications' proposed places of use. In 2020, OMM used water from the FCDC delivery system to irrigate sugar beets on a portion of the Applications' proposed places of use. Testimony of Craig Froerer.
23. On June 1, 2020, OMM and JC Watson Company ("Watson") entered into a *Contract for Purchase and Sale of Water Shares* ("Agreement"). The Agreement states OMM will transfer 14 of its 64 FCDC shares to Watson "upon final approval of the [Applications for the] ground water rights for the 14 lots [Applications' place of use]." Exhibit 29 at 1.
24. As a FCDC shareholder, OMM is subject to the FCDC Amended By-Laws. Testimony of Craig Froerer.
25. Article II, Section 2, paragraph d. of the FCDC Amended By-Laws states the FCDC board of directors can adopt rules and regulations for the conduct and business affairs of FCDC. Exhibit 16 at 2.

26. Article VI of FCDC Amended By-Laws states the transfer of FCDC shares is subject to the approval of the FCDC board of directors. Exhibit 16 at 5. Testimony of Tom Johnston.

27. Article VII, Section 5 of the FCDC Amended By-Laws states:

If any shareholder shall divide . . . any portion of his land and who shall sell shares in the Company to persons acquiring any such lands then such shareholder dividing said land shall provide for a ditch distribution system, easements and weirs for the division and distribution of water to the property so divided. Any division or system described above must be approved by the Board of Directors. All costs of ditch, weirs, and any other equipment or irrigation devices necessitated by such land division shall be paid entirely by the shareholders selling or subdividing such land.

Exhibit 16 at 6.

28. A resolution adopted August 13, 2003, by FCDC states that any shareholder who subdivides land into three or more parcels shall transfer ownership of the associated FCDC shares to one designated person or entity. Exhibit 16 at 6.

29. The main purpose of the August 13, 2003, resolution is “to keep [FCDC] water rights in agricultural production and the stock certificates as whole as possible . . .” Exhibit 16 at 6 and Exhibit 105 at 31.

30. FCDC desires to avoid having the water it delivers replaced with other water sources, such as ground water or wastewater. Testimony of Tom Johnston. On March 11, 2020, FCDC adopted a resolution stating “all shareholders must use surface water deliveries from the Ditch Company [FCDC] pursuant to the shareholders existing shares, prior to any use of ground water for irrigation purposes. . . .” Exhibit 28. Exhibit 103.

31. FCDC shares are not appurtenant to the land they are associated with and can be transferred for use on other lands within the FCDC Service Area. Testimony of Tom Johnston.

32. As of June 15, 2020, OMM was a shareholder entitled to and capable of receiving water from FCDC to the Applications’ proposed places of use. Testimony Craig Froerer.

33. On November 29, 2007, Canyon County’s Development Services Department authorized the division of eight Orchard Tract lots into 17 parcels. Exhibits 3 and 112. The Applications’ places of use are 14 of the 17 parcels. The parcels were zoned agricultural, and the zoning designation was not changed during the division. Testimony of Alan Mills.

EVALUATION CRITERIA / ANALYSIS

Governing Statutes and Rules

Idaho Code § 42-203A(5) states in pertinent part:

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.

Rule 45 of the Department's Water Appropriation Rules (IDAPA 37.03.08) further interprets the review criteria established in Idaho Code § 42-203A(5).

Rule 50.01 of the Department's Water Appropriation Rules (IDAPA 37.03.08) states that the Director may issue permits with conditions to ensure compliance to meet the criteria of Idaho Code § 42-203A.

The applicant bears the burden of proof for elements (a) through (d) in Idaho Code § 42-203A(5). *See* IDAPA 37.03.08.040.04. All parties bear the burden of coming forward with evidence about any factor affecting local public interest of which they are knowledgeable. *Id.* The applicant bears the ultimate burden of persuasion for all of the elements in Idaho Code § 42-203A(5), including the local public interest element. *Id.*

Reduction to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth:

- a. Criteria for determining whether the proposed use [of water] will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:
 - i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code . . . [.]

IDAPA 37.03.08.045.01.a.

FCDC stipulated that injury to existing water users is not at issue. The applicant still has the burden to come forward with evidence demonstrating the proposals meet this criterion. IDAPA 37.03.08.040.04. OMM provided a diagram depicting nearby wells and summarized their depths, static water levels, and yields. FCDC provided no evidence to refute the evidence submitted by OMM. Of the 37 wells within a half-mile radius of the Applications' proposed points of diversion, all but one of these wells is for domestic use. These wells are relatively shallow, with the deepest well depth being 208 ft. These wells are also relatively productive, with all but three of the wells reported as capable of producing in excess of the Department's standard 0.04 cfs (18 gpm) duty of water for domestic use. The quantity of water proposed from all 14 Applications combined is 1.35 cfs, with only 0.56 cfs being for year-round domestic use. Given the relatively high yields at shallow depths, it is not likely the proposed use will reduce the quantity of water under existing ground water rights or uses in the area nor force existing users to an unreasonable expense to continue their ground water use.

The Applications' development of ground water use in the proposed project location will not reduce the quantity of water available to existing water users or force existing water users to an unreasonable effort or expense to continue their ground water uses. The Assignment did not change this outcome and the burden is met.

Sufficiency of Water Supply

Rule 45.01.b of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria for determining whether the water supply is sufficient for a proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible . . ." IDAPA 37.03.08.45.01.b.

Rule 45.01.b requires the Department to evaluate whether the aquifer can supply the proposed rate and volume of diversion. FCDC stipulated that sufficiency of the ground water supply is not at issue. The applicant still has the burden to come forward with evidence demonstrating the proposals meet this criterion. IDAPA 37.03.08.040.04. OMM provided the well log for the Test Well constructed in Parcel 16. The Test Well yielded over 50 gpm, which is over 0.11 cfs. The maximum amount of water proposed under any one of the Applications is 0.11 cfs. The Applications each propose to construct and use an individual well to supply only one parcel. The 14 proposed wells will be constructed in close proximity to the Test Well—within a single forty-acre tract. Therefore, the Test Well is likely representative of what can be developed for each parcel. It is likely wells can be constructed to supply the quantities proposed in the Applications.

OMM has met its burden of establishing that the aquifer can supply a sufficient quantity of water for the proposed projects. The Assignment did not change this outcome and the burden is met.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth criteria for determining whether an application is filed in good faith and not for speculative purposes. FCDC stipulated that good faith and speculation are not at issue. The Applicant still has the burden to come forward with evidence for evaluation of this criteria. IDAPA 37.03.08.040.04.b.i. An applicant must have "legal access to the property necessary to construct and operate the proposed project." IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that it is "in the process of obtaining other permits needed to construct and operate the project" and that "there are no obvious impediments that prevent the successful completion of the project." IDAPA 37.03.08.045.01.c.ii-iii.

When the Applications were filed, OMM owned the 14 parcels proposed as the Applications' points of diversion and places of use. The land proposed for the places of use was first platted in 1910 and later administratively modified in 2007 to create the 14 parcels proposed for development in the Applications. Exhibits 2, 3, and 112. The parcels are currently zoned for agricultural use, and there is no proposal to rezone them. No additional Canyon County approvals are necessary to sell the parcels to prospective home builders.

OMM purchased the parcels where the points of diversion and places of use are proposed with the intent to sell them to prospective home builders. During the hearing, Matt Wilke testified that one of the parcels is already pending purchase contingent upon the outcome of the Applications. Alan Mills testified that the road, power, telephone, and other utility infrastructure is already in place for development of the parcels. Given the development of the other utilities and that one of the parcels was already pending sale when the hearing occurred, there is a high probability that if the Applications are approved, the parcels will be sold and the proposed water use will be developed.

IDAPA 37.03.08.035.02.d requires the assignment of interest in the Applications to include evidence that the Applications were not filed for speculative purposes. In the Declaration, EG asserted it does not intend to hold the permits, if approved, for speculative purposes; it intends to sell the parcels and assign the permits to the new parcel owners. *EG Declaration* at 1. OMM also stated the intent of filing the Applications is to sell the parcels for residential development. Testimony of Craig Froerer. OMM's assignment of the Applications to EG, which intends to sell the lots for residential development is consistent with OMM's original intent. EG has not amended the Applications to show any other intent.

OMM has legal access to the property necessary to construct and operate the proposed project. No obvious impediments exist to successful completion of the project. The Assignment included evidence that EG is now the owner of the parcels. EG has legal access to the property necessary to construct and operate the proposed development or to sell the parcels to prospective home builders.

Therefore, OMM met its burden to demonstrate the Applications were made in good faith and not for speculative purposes. The Assignment and associated documents conveyed all interest in the Applications and ownership of the land to EG and demonstrate EG has similar intentions as those demonstrated by OMM, so the Assignment of the Applications to EG does not materially affect this analysis.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria for determining whether an applicant has sufficient financial resources to complete a project. "An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director." IDAPA 37.03.08.045.01.d.i.

FCDC stipulated that the sufficiency of the applicant's financial resources is not at issue. The applicant still has the burden to come forward with evidence demonstrating the proposals meet this criterion. IDAPA 37.03.08.040.04. The costs of developing the water uses proposed in the Applications will ultimately be borne by the buyers of the parcels. The cost of drilling each well proposed under the Applications will be borne by the buyer of the parcel where the well is drilled. If installation of a pressurized irrigation system is necessary to distribute surface water for irrigation purposes, OMM (or EG) will initially bear the cost, but ultimately the cost will be passed on to the buyers of the parcels in the form of higher lot prices. Neither OMM nor EG proposes to bear the cost of well construction or the cost of installing a pressurized irrigation system. Other utility infrastructure is already in place to allow for development of the residences and irrigation uses proposed.

The Idaho Supreme Court has held:

The water resources of this state are not so limited that they must be safeguarded with permits issued *only* when the applicant has secured all necessary financing prior to the water appropriation permit application. At the same time, the applicant must make a showing that it is reasonably probable he or she will obtain the necessary financing within five years.

Shokal v. Dunn, 109 Idaho 330, 337,707 P.2d 441, 448 (1985). Given OMM's and EG's ability to purchase the land and that the water infrastructure costs will ultimately be borne by the buyers of the parcels, it is reasonably probable financial resources will be available to develop the project. Based on the premise that EG's intentions for development are similar to OMM's, the Assignment does not change the conclusion that it is reasonably probable financing will be available. The burden of establishing sufficient financial resources are available to complete the project has been met.

Local Public Interest

The Preliminary Order's analysis of the local public interest is supplanted by the Director's analysis of this criteria on Exceptions. *See supra pp. 4–9.*

In summary, the Director concludes the local public interest in maintaining the use of readily available surface water, and the benefits that stem from such use, as described above, outweigh any conflicting local public interests identified in the record. The Director also concludes the continued use of surface water may support many of the local public interests identified in the record.

The Director further concludes that, despite the Assignment, FCDC surface water *is* reasonably available to EG, and FCDC's delivery system is capable of delivering such water. Surface water is reasonably available to EG and its continued use is in the local public interest.

Conservation of Water Resources

Consideration of whether a proposed use is contrary to conservation of water resources within the State of Idaho is required by Idaho Code § 42-203A(5)(f). The conservation of water resources review is separate and distinct from the local public interest review under Idaho Code § 42-203A(5)(e). The conservation of water resources review is an evaluation of the efficiency of the proposed water use.¹²

The Applications propose using 0.03 cfs per acre for irrigation. This is consistent with Department standards of efficiency for irrigation of small (< 5 acre) parcels. The proposal to divert up to 0.04 cfs for Domestic use is also consistent with Department standard appropriations.

The proposals are consistent with principles of conservation of water resources in Idaho.

¹² The efficiency conservation review is distinct from the local public interest review that can consider whether the water source should be appropriated for a given purpose or "conserved" (held in reserve) for other uses.

CONCLUSIONS OF LAW

The burdens of proof for all elements of review set forth in Idaho Code § 42-203A(5) are satisfied to the extent a partial approval may be granted.

ORDER

IT IS HEREBY ORDERED that the domestic portions of *Applications for Permit to Appropriate Water Nos. 63-34832 through 63-34838 and 63-34840 through 63-34846* are APPROVED as shown in the accompanying approval documents.

IT IS FURTHER ORDERED that the irrigation portions of *Applications for Permit to Appropriate Water No. 63-34832 through 63-34838 and 63-34840 through 63-34846* are DENIED.

Dated this 14th day of October 2021.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October 2021, I caused to be served a true and correct copy of the foregoing, *Order on Exceptions; Final Order Partially Approving Applications*, via email and U.S. Mail, upon the following:

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


- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

For Applicants

S. Bryce Farris
SAWTOOTH LAW OFFICES, PLLC
P.O. Box 7985
Boise ID 83707-7985
bryce@sawtoothlaw.com

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

For Protestant



Sarah Tschohl
Legal Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.