

MEMORANDUM

DATE: September 6, 2022
FROM: Shelley W. Keen SWK
TO: Water Allocation Bureau and Regional Offices
COPY: Gary Spackman and Mat Weaver
RE: “Surface Water First” Requirement for Water Right Approvals

Since the 1990s, most of IDWR’s water right approvals for ground water irrigation have required the use of appurtenant surface water rights as the primary irrigation water source. In response to the *Memorandum Decision* in *Eden’s Gate, LLC v. Idaho Dep’t of Water Res.*, No. CV14-21-10116 (Canyon Cnty. Dist. Ct. Idaho, 2022) (“Eden’s Gate”), IDWR will alter its practice.

In *Eden’s Gate*, IDWR argued that it is in the local public interest to require the use of appurtenant surface water for irrigation, as opposed to authorizing an exclusive reliance on ground water. The district court found IDWR’s blanket application of this principal to be too broad. The district court stated that it “is unaware of any stated ‘blanket’ state-wide legislative policy setting forth a preference for the use of surface water over unappropriated ground water in the context of an application to appropriate water.” *Eden’s Gate* at 6-7. The Court rejected IDWR’s reference to Idaho Code § 67-6537, stating that IDWR applied the Land Use Planning Act statute “in a context which the legislature did not intend.” *Id.* at 6. To conform with the Court’s decision, IDWR will no longer automatically apply “surface water first” conditions to permits or transfers authorizing ground water irrigation on land with appurtenant surface water rights.

On a case-by-case basis, IDWR may consider requiring the use of surface water first on permits when the record (extensively documented) shows that doing so is necessary to address the appropriation criteria in Idaho Code § 42-203A(5), such as the sufficiency of the water supply, the conservation of water resources in Idaho, or the local public interest.¹ For example, appropriation of ground water from an aquifer with insufficient natural recharge may be possible if artificial recharge resulting from surface water use is continued and ground water use is minimized. When considering whether to apply “surface water first” conditions to a permit, staff must consult the Regional Manager, Water Rights Section Manager, Water Allocation Bureau Chief, or legal counsel. IDWR hearing officers are exempt from this requirement.

IDWR will also take a case-by-case approach to transfer applications, applying the review criteria in Idaho Code § 42-222(1). For example, IDWR may require the use of surface water rights when necessary to prevent enlargement of a ground water irrigation right historically used as a supplemental water supply.

¹ Note that the local public interest is narrowly construed 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), emphasis added.

When issuing water right licenses for ground water permits that do not have surface water first conditions, IDWR will continue its practice of applying surface water first requirements where the ground water use was established as a supplemental water supply. This practice guards against future enlargement of the ground water right.

In accordance with the principal of *res judicata* (a matter already decided), IDWR will continue to enforce “surface water first” conditions placed on existing decrees, licenses, permits, and transfer approvals.