

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

EDEN'S GATE, LLC,

Petitioner,

v.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN in his  
official capacity as Director of the Idaho  
Department of Water Resources,

Respondents,

&

FARMERS CO-OPERATIVE DITCH  
COMPANY,

Intervenor.

Case No. CV14-21-10116

**RESPONDENTS' BRIEF**

IN THE MATTER OF APPLICATION FOR  
PERMIT NO. 63-34832 THROUGH 63-34838  
AND 63-34840 THROUGH 63-34846 IN THE  
NAME OF EDEN'S GATE LLC

Appeal from the Idaho Department of Water Resources, Director Gary Spackman Presiding.

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## STATEMENT OF THE CASE

### I. THE NATURE OF THE CASE.

This case is a proceeding under the Idaho Administrative Procedure Act for judicial review of an order issued by the Director of the Idaho Department of Water Resources (“Department”). The order partially granted fourteen applications for permits to appropriate ground water for domestic and irrigation uses (“Applications”) in a new residential development in Canyon County. The order approved the “domestic” portion of the Applications but denied the “irrigation” portion as contrary to the “local public interest.”<sup>1</sup> The Applicant/Petitioner, Eden’s Gate LLC (“EG”), asserts that the Applications should have been approved in full.

The land in question has been in agricultural production for many years and irrigated with surface water delivered by Protestant/Intervenor Farmers Co-Operative Ditch Company (“FCDC”). EG is now developing the land as fourteen individual residential lots. The Director determined it is in the local public interest to maintain the use of readily available surface water to irrigate the land, and not in the local public interest to develop new ground water supplies that would replace surface water as the primary source of irrigation water. These determinations are consistent with the public interest in “encourag[ing] the use of surface water for irrigation,” Idaho Code § 67-6537(1), and supported by substantial evidence in the record.

EG’s primary argument is that the Director erred as a matter of law in taking the legislative intent stated in Idaho Code § 67-6537 into consideration as a factor in the local public

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<sup>1</sup> Idaho Code § 42-203A(5)(e).

interest analysis. EG also argues that the local public interest favors full approval of the Applications if the analysis is limited to the “proper” factors. These arguments are contrary to the plain language of Idaho Code §§ 42-203A(5)(e) and 42-202B(3). In the end, EG’s various arguments reduce to a single contention: that the Director abused his discretion to identify, weigh, and balance the elements of the local public interest in this case. The record demonstrates, however, that the Director’s local public interest findings and conclusions are well within the Director’s broad authority and discretion to identify and weigh the elements of the local public interest as that term is defined in Idaho Code § 42-202B(3).

## **II. THE COURSE OF THE PROCEEDINGS.**

The fourteen permit Applications were filed on January 2, 2020, by One More Mile, LLC (“OMM”), and FCDC filed timely protests to each Application. R.318.<sup>2</sup> A pre-hearing conference was held on March 19, 2020, but OMM and FCDC were not able to resolve the protests and requested that the matter be set for discovery and hearing. R.152, 318. The hearing officer issued an order granting this request and consolidating the contested cases. *Id.*

The hearing took place on June 15, 2020. Several witnesses testified, and exhibits were admitted into the record. R.318. The hearing officer also took official notice of the Applications

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<sup>2</sup> The settled agency record was filed in electronic form, is not organized in separate “volumes,” and does not have numbered “lines.” I.A.R. 35(e). Citations to the record in this brief, therefore, consist of “R.” followed by the page number (without the leading zeros). Citations to exhibits accepted into the record also use this format because the exhibits are included in the electronic file comprising the settled agency record. Citations to the hearing transcript refer to the six-digit bates number at the bottom of the page (without the leading zeros) rather than to the number at the top of the page.



and various Department documents identified in the consolidation order, including past orders and decisions of the Department, reports, measurements, stream flow records, and well driller reports. *Id.* Evidence was submitted regarding Idaho Code § 67-6537 and an FCDC resolution adopted in March 2022 that was intended to “hit the same notes” as the statute and “encourage people to use surface water for primary irrigation, primary water source.” Tr.221; *see also* Tr.83-84, 216-21, 230-34, 240-41, 251, 273, 276 (testimony regarding Idaho Code § 67-6537 and the FCDC resolution); R.497, 500-02 (FCDC board minutes and resolution).

After the hearing but before issuance of a preliminary order, OMM filed with the Department an *Assignment of Application for Permit*, and a *Notice of Assignment of Application*. R.199-214, 318-19 (“Assignment”). The Assignment conveyed to EG the Applications and the twenty-eight acres underlying the proposed points of diversion and places of use. *Id.* The Assignment did not include, however, any of OMM’s sixty-four (64) shares of FCDC capital stock, some of which have been used to irrigate the twenty-eight acres that are being developed as fourteen individual residential lots. R.199-214, 318, 329, 399.<sup>3</sup> The *Notice of Assignment of Application* was accompanied by the *Affidavit of Madison Richards*, an original governor of EG, which stated that EG intends to sell the fourteen lots, and to include the respective permits with the lots. R.210-11, 319.

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<sup>3</sup> Each FCDC share authorizes irrigation of two acres within FCDC’s service area, but the individual shares are not appurtenant to any specific acres. Shareholders are allowed to transfer their shares to other landowners for use elsewhere within FCDC’s service area, subject to the approval of FCDC’s board of directors. R.330.

FCDC filed a response to the Assignment, arguing it was an attempt to circumvent FCDC's Articles, Bylaws, and Resolutions, and "manufacture" a situation in which surface water was no longer available for use on the proposed places of use. R.215-20, 319. FCDC also argued that Idaho Code § 67-6537's "policy" of encouraging the use of surface water for irrigation should apply even though no formal "land use change" had been proposed in this case. *Id.* OMM filed a response to FCDC's objection arguing that any "policy" in Idaho Code § 67-6537 is limited to cases involving applications for "land use changes," and that there is nothing "nefarious" in transferring land without also transferring the FCDC shares that have been used on the land. R.221-24.

The hearing officer issued a *Preliminary Order Partially Approving Applications* on May 28, 2021 ("*Preliminary Order*"). The *Preliminary Order* considered the effect of the Assignment on the Applications and approved the "domestic" use but denied the "irrigation" use as contrary to the local public interest. R.238-39. EG filed a *Notice of Appeal and Petition to Review Preliminary Order* with the Department on June 11, 2021, accompanied by a supporting memorandum. R.271-87, 319 ("*Exceptions*"). FCDC filed a response to the *Exceptions* on June 24, 2021, and EG filed a reply in support of the *Exceptions* on July 6, 2021. R.288-309, 319.

The Director issued the *Order on Exceptions; Final Order Partially Approving Applications* ("*Final Order*") on October 14, 2021. The *Final Order* took the "legislative intent" of Idaho Code § 67-6537 into consideration as a "statement of public interest value" for purposes of the local public interest analysis. R.322-23. The *Final Order* sustained the *Preliminary Order*'s approval of the "domestic" portion of the Application and denial of the "irrigation"

portion,<sup>4</sup> and amended the *Preliminary Order*'s local public interest analysis to reflect the Director's review of the *Exceptions*. R.326; R.335.

### III. THE FACTS OF THE CASE.

The Applications were filed by OMM in connection with its plan for residential development of OMM's land located near Fruitland, in Canyon County. R.320, 360. The Applications seek fourteen new ground water rights for domestic and irrigation purposes within the "River Bluff Development." *Id.* The twenty-eight acres of land underlying the Applications' proposed points of diversion and places of use are part of a larger parcel owned by OMM, all of which has historically been in agricultural production. R.323, 358-59, 583-85; Tr. 25, 44-46. The OMM lands are within FCDC's service area and have been irrigated with surface water delivered by FCDC pursuant to shares held by OMM and its predecessors in interest. R.322, 329, 583-84; Tr.21, 25-26, 44-46. OMM used water from FCDC to drip-irrigate sweet potatoes on the proposed places of use in 2018 and 2019. R.329. OMM also used water from FCDC to irrigate sugar beets on a portion of the proposed places of use in 2020, while the Applications were pending. R.329; Tr.49.

Prior to assigning the land and the Applications to EG, OMM intended to develop the twenty-eight-acre tract as a group of fourteen contiguous residential lots, each approximately two acres in size. R.328-29; Tr.26. The fourteen lots were created by an administrative division of

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<sup>4</sup> The *Final Order* also noted, however, that water diverted under the "domestic" portion of each permit can be used to irrigate up to one-half (1/2) acre of land, provided total use under the permit does not exceed 13,000 gallons per day. R.320 n.4; Idaho Code § 42-111(1)(a).

OMM's land that did not require a change in the zoning designation. R.330, 358-59. The proposed places of use were zoned as agricultural, and the administrative division did not change that designation. R.330.

OMM's development plan called for drilling a single well on each of the fourteen residential lots to provide water for both domestic and irrigation uses and discontinuing the use of surface water. R.328; Tr.30-31. The costs of drilling the wells and installing pressurized irrigation systems will ultimately be passed on to the buyers of the lots. R.328. Tentative plans for future residential development of adjacent land still owned by OMM also envision discontinuing the use of surface water, and drilling wells to provide both domestic and irrigation water for each residential lot. R.505-06, 583-85; Tr.45, 70-71.

OMM assigned the Applications and the twenty-eight acres to EG after the administrative hearing had concluded but before the *Preliminary Order* was issued. R.318. OMM did not assign any of OMM's shares in FCDC to EG, however. *Id.* EG has the same development plans and intentions as OMM: surface water irrigation will be discontinued, and a single well will be drilled on each of the fourteen residential lots to provide water for both domestic and irrigation uses. R.210, 319. The road, phone, power, and utility infrastructure necessary for residential development of the fourteen lots is in place, and no additional Canyon County approvals are needed to list the lots for sale. R.328.<sup>5</sup> Surface water can still be delivered to the proposed

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<sup>5</sup> As of June 15, 2020, one of the lots was pending sale contingent upon approval of the Applications. R.328.

places of use via FCDC's conveyance and distribution system, and FCDC is willing and able to continue delivering surface water to the proposed places of use. R.325.

FCDC is a privately held, non-profit cooperative ditch company that originated in 1902 when early settlers pooled their resources to purchase water rights. R.329; 411-12. FCDC holds six water rights to divert from the Boise River. R.329, 414. The water rights authorize irrigation of approximately 15,093 acres within a 21,636-acre place of use defined by a "digital boundary," Idaho Code §§ 42-202B(2), 42-1411(2)(h), which is known as FCDC's "service area." R.329, 414; SRBA Partial Decrees for water rights 63-138C, 63-188, 63-189, 63-190, 63-191, 63-296.<sup>6</sup> FCDC issues shares of stock that entitle shareholders to use surface water diverted under FCDC's water rights and delivered through FCDC's conveyance and distribution system. R.329, 412, 484. Each share entitles the holder to irrigate two acres. R.423.

While FCDC's shares are not appurtenant to the lands they are associated with, transfers of shares to other landowners within FCDC's service area are subject to approval by its board of directors. R.330, 484. FCDC desires to keep its water rights in agricultural production, and to avoid having its surface water deliveries replaced with other water sources, such as ground water or waste water. R.330; Tr.213. FCDC's board of directors has adopted a resolution stating that shareholders must use the surface water delivered pursuant to their shares for irrigation before using ground water for irrigation purposes. R.330.

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<sup>6</sup> FCDC also holds irrigation water rights to divert from the Sand Hollow Drain (63-485) and the Conway Drain (63-10240). R.329.

## **ADDITIONAL ISSUES PRESENTED ON APPEAL**

The Respondents do not present any additional issues in this appeal.

## **STANDARD OF REVIEW**

Judicial review of a final decision of the Department is governed by the judicial review provisions of the Idaho Administrative Procedure Act (“IDAPA”), Idaho Code §§ 67-5270-5279. Under these provisions, a court reviews an appeal from an agency decision based on the record created before the agency. *Id.* § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Id.* § 67-5279(1). The agency’s factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 522, 376 P.3d 722, 726 (2016). The court shall affirm the agency decision unless it finds that the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3). The petitioner bears the burden of showing that the agency erred, *Mercy Med. Ctr. v. Ada County, Bd. of Comm’rs*, 146 Idaho 226, 229, 192 P.3d 1050, 1053 (2008), and must also show that one of the petitioner’s substantial rights has been prejudiced. Idaho Code § 67-5279(4).

## ARGUMENT

This case presents a question of the “local public interest.” Idaho Code § 42-203A(5)(e). The question is which type of irrigation better serves the local public interest under the circumstances of this case: ground water irrigation or surface water irrigation. The *Final Order* ultimately concluded that “[t]he determinative factor in this case is the local public interest of preventing readily available surface water from being replaced by ground water irrigation,” and therefore denied the “irrigation” portion of the Applications. R.326, 336.<sup>7</sup>

In reaching this conclusion, the Director considered Idaho Code § 67-6537’s expressly stated “intent . . . to encourage the use of surface water for irrigation” and criteria for determining when surface water is “reasonably available” for irrigation use. Idaho Code § 67-6537(1); R.322-23, 325. This statute is part of the Local Land Use Planning Act (“LLUPA”), which is set forth in chapter 65, Title 67, Idaho Code.<sup>8</sup> Idaho Code § 67-6537 states, in part, that “[t]he 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.” Idaho Code § 67-6537(1).<sup>9</sup>

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<sup>7</sup> The *Final Order* approved the “domestic” portion of the Applications. R.336

<sup>8</sup> The record sometimes refers to “LUPA” rather than “LLUPA.” This brief uses the acronym “LLUPA” because the Act’s “short title” is the “Local Land Use Planning Act.” Idaho Code § 67-6501.

<sup>9</sup> The full text of Idaho Code § 67-6537 is as follows:

(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

EG asserts the Applications should have been approved in full because taking the intent of Idaho Code § 67-6537 into consideration as a factor in the local public interest analysis contravened the plain language of that statute, exceeded the Director’s statutory authority, and expanded the analysis beyond the statutory definition of the “local public interest.” *Appellant’s*

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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.
- (2) Consistent with sections 42-108 and 42-222, Idaho Code, any change in the nature of use of surface water provided by an irrigation delivery entity must be authorized by the entity holding the water right(s) for the available surface water. Nothing in this section shall alter the authority and discretion of irrigation delivery entities to apportion, allocate and distribute surface water, or for municipalities, counties, or water and sewer districts to pass ordinances or regulations to promote the use of surface water for irrigation.
- (3) Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired thereunder.
- (4) When considering amending, repealing or adopting a comprehensive plan, the local governing board shall consider the effect the proposed amendment, repeal or adoption of the comprehensive plan would have on the source, quantity and quality of ground water in the area.

Idaho Code § 67-6537.



*Opening Brief* (“*EG Brief*”) at 10-27, 31-34. EG also argues the Applications should be approved in full if the “proper” local public interest factors are considered. *Id.* at 18 n.4, 23, 27-31.

These arguments should be rejected. As discussed below, the Director’s decision to consider the explicit “intent” expressed in Idaho Code § 67-6537 as a factor in the local public interest analysis was well within the Director’s broad authority and discretion to determine what the relevant local public interest considerations are in any given case, and to assess, weigh, and balance those factors. *Shokal v. Dunn*, 109 Idaho 330, 337-39, 707 P.2d 441, 448-50 (1985). It is EG’s arguments, not the *Final Order*, that are contrary to statute and decisions of the Idaho Supreme Court. EG’s arguments ultimately reduce to contentions that the Director abused his discretion in identifying, weighing, and balancing the local public interests in this case. The record demonstrates that those contentions are without merit.

**I. IT IS WELL WITHIN THE DIRECTOR’S STATUTORY AUTHORITY TO CONSIDER THE EXPRESSLY STATED “INTENT” OF IDAHO CODE § 67-6537 AS A FACTOR IN THE LOCAL PUBLIC INTEREST ANALYSIS.**

The Applications and protests raised the question of whether the “local public interest,” Idaho Code § 42-203A(5)(e), is better served by irrigating the proposed places of use with an existing surface water supply, or by developing new ground water supplies. R.320. The Director took the statement of public interest expressed in Idaho Code § 67-6537 into consideration as a factor in this inquiry. R.322-23. The Director determined that “[w]hile Idaho Code § 67-6537 does not require IDWR to consider LUPA in the water appropriation process,” the statute “expressly states the public interest value of encouraging the use of existing surface

water and systems before developing new ground water sources.” R.323. The Director further determined “[i]t is proper to *consider*” this statement “as a relevant and important factor when analyzing the local public interest of approving new ground water sources on lands already served by surface water and delivery systems.” *Id.* (italics in original). The Director’s decision to consider the express legislative intent of Idaho Code § 67-6537 as a factor in the local public interest analysis was well within the Director’s statutory authority to assess and protect the local public interest.

**A. The “Local Public Interest” Standards of Idaho Code §§ 42-203A(5)(e) and 42-202B(3).**

Idaho Code § 42-203A states, in relevant part, that when a proposed use of water “will conflict with the local public interest as defined in section 42-202B, Idaho Code,” the Director “may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.” Idaho Code § 42-203A(5). This provision “places upon the Director the affirmative *duty* to assess and protect the public interest.” *Shokal*, 109 Idaho at 337, 707 P.2d at 448 (italics in original). 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 Director must “secure the greatest possible benefit from [the public waters] for the public.” *Shokal*, 109 Idaho at 338, 707 P.2d at 449 (brackets in original; citation omitted); *see*

also Statement of Purpose RS 13046 (H.B. 284, 57<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess.) (Idaho 2003) (same).<sup>10</sup> “The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources’ sound discretion.” *Shokal*, 109 Idaho at 339, 707 P.2d at 450; *see also* Statement of Purpose RS 13046 (same). In making this determination, it is appropriate for the Director to consider whether the Legislature has “provide[d] guidance in a related statute” as to where the public interest lies. *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

**B. The Director Correctly Concluded That Idaho Code § 67-6537 Provides Legislative Guidance for the Local Public Interest Analysis in This Case.**

It is undisputed that the Applications’ proposed places of use have historically been in agricultural production and irrigated with surface water delivered by FCDC, and that these land and water uses continued during and after the hearing. It is also undisputed that the proposed places of use are now being developed as fourteen residential lots that EG intends to sell to prospective home builders. It is further undisputed that the “irrigation” portions of the Applications are intended to authorize development of ground water irrigation systems on each of the individual lots, so that they can be irrigated with ground water rather than surface water.<sup>11</sup>

In short, actual use of the land in question has changed from agricultural to residential, regardless of whether the LLUPA zoning designation or “land use” has changed. Moreover, the

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<sup>10</sup> This is the Statement of Purpose for the 2003 legislation that added the definition of “local public interest” to Idaho Code § 42-202B. 2003 Idaho Sess. Laws 806-07. It can be viewed on the Idaho Legislature’s website. <https://legislature.idaho.gov/sessioninfo/2003/legislation/>.

<sup>11</sup> The new wells would also supply domestic water for each of the residential lots. The Director approved the “domestic” use portion of the Applications. R.336.

proposed ground water rights are intended, in part, to provide ground water supplies that would replace surface water as the source of irrigation water for the proposed places of use.

Under these circumstances, the Director determined that Idaho Code § 67-6537 “expressly states the public interest value of encouraging the use of existing surface water and systems before developing new ground water sources.” R.323; *see also id.* (“Through Idaho Code § 67-6537, the Legislature articulates the public interest of the state of Idaho to ‘encourage the use surface water for irrigation.’”). The Director also determined “[i]t 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.” R.323 (*italics in original*); *see also* R.325 (considering Idaho Code § 67-6537(1) in determining whether surface water is “reasonably available”). The plain language of the statute supports these determinations. Section 67-6537 expressly states the “intent . . . to encourage the use of surface water for irrigation.” Idaho Code § 67-6537(1). The statute requires that surface water be used as the “primary water source” for irrigation whenever a LLUPA “land use change” application has been filed and surface water is “reasonably available” for irrigation use. *Id.* The statute also provides standards for determining when surface water is to be considered “reasonably available” for irrigation use. *Id.* § 67-6537(1)(a)-(c).

In a case such as this one—where the undisputed facts show that the actual use of the land has changed from agricultural to residential, with the intent of replacing an existing surface water irrigation system with fourteen new ground water irrigation systems—it is clearly

appropriate for the Director to consider the legislative intent expressed in Idaho Code § 67-6537 as a factor in his local public interest analysis. The Director must determine “what elements of the public interest are impacted, and what the public interest requires.” *Shokal*, 109 Idaho at 339, 707 P.2d at 450. It is appropriate for the Director to look to “related statute[s]” for legislative “guidance” as to where the public interest lies. *Id.* at 337, 707 P.2d at 448.

The plain language of Idaho Code § 67-6537 provides clear legislative guidance as to where the “local public interest” lies in this case. Idaho Code §§ 42-203A(5)(e), 42-202B(3). Moreover, this language is part of the “*Local* Land Use Planning Act,” Idaho Code § 67-6501 (italics and underlining added), which is intended “to promote the health, safety, and general welfare” of the people of the State. *Id.* § 67-6502. Thus, the Director’s decision to consider the legislative intent expressed in Idaho Code § 67-6537 in analyzing the local public interest questions presented in this case was well within his broad authority and discretion to determine “what elements of the public interest are impacted, and what the public interest requires.” *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

## **II. EG’S ARGUMENTS THAT THE DIRECTOR ERRED BY CONSIDERING IDAHO CODE § 67-6537 LACK MERIT.**

EG asserts, however, that the Director contravened the plain language of Idaho Code § 67-6537 and exceeded the Director’s statutory authority under Idaho Code § 42-203A(5)(e). *EG Brief* at 10-27, 31-34. EG argues: (1) that the Director improperly exercised authority that Idaho Code § 67-6537 reserves to local planning, zoning, and development authorities; (2) that Idaho Code § 67-6537 only applies to cases involving applications for a “land use change”; (3) that

Idaho Code § 67-6537 is not a proper “local public interest” factor within Idaho Code § 42-202B(3)’s definition of the term; and (4) that the Director created a new rule or policy that exceeds the scope of Idaho Code § 67-6537. *EG Brief* at 10-11, 13, 17, 19, 22-23, 31-32. These arguments lack merit for reasons discussed below.

**A. The Director Did Not “Enforce” or “Exercise” Any Land Use Authority Reserved to Local Government Entities.**

EG asserts that the Legislature has empowered “local governments, and only governments” to apply and enforce LLUPA, *EG Brief* at 11, and “the Department has no authority to enforce LLUPA or Idaho Code § 67-6537.” *Id.* at 12; *see also id.* at 27 (“The Director has no authority to enforce Idaho Code § 67-6537.”). EG therefore argues “the Director’s attempt to enforce Idaho Code § 67-6537 exceeds his statutory authority.” *EG Brief* at 12-13; *see also id.* at 26 (“exercising statutory authority that was not delegated to him”). This strawman argument mischaracterizes the record and should be rejected.

The Director did not “enforce” Idaho Code § 67-6537 or “exercise” any land use authority that LLUPA confers on local government entities. The Applications and protests were filed pursuant to Chapter 2 of Title 42 and raised a question of the “local public interest” that is statutorily committed to the Director’s authority and discretion. R.320-22; Idaho Code § 42-203A(5)(e); *Shokal*, 109 Idaho at 339, 707 P.2d at 450. The question before the Director was not whether Idaho Code § 67-6537 requires the proposed places of use to be irrigated with surface water. It was whether the local public interest requires the proposed places of use to be irrigated with surface water. This question is statutorily committed to the Director, Idaho Code § 42-

203A(5)(e); *Shokal*, 109 Idaho at 339, 707 P.2d at 450, not to local government entities. The Director therefore had the authority—indeed, the affirmative duty—to address and resolve this question. *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

In undertaking the local public interest analysis, the Director expressly relied on the authority conferred by Idaho Code § 42-203A(5). R.321. At no point did the Director state or imply that he was “enforcing” or acting under LLUPA, Idaho Code § 67-6537, or any authority other than Idaho Code § 42-203A. To the contrary, while the *Final Order* recognized that use of the land had changed from “irrigated agriculture” to “residential lots,” it also stated that “[w]hether 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.” R.323. The *Final Order* also did not address or opine upon any question of “land use.” *See, e.g.*, R.326 (“The partial denial [of the Applications] is not, and cannot be, determinative of the success or future of the River Bluff Development.”).

What the *Final Order* did, rather, was to take Idaho Code § 67-6537’s stated intent of encouraging the use of surface water for irrigation into consideration 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.” R.323. This was well within the Director’s statutory authority and discretion to determine what elements of the local public interest are impacted by EG’s proposed use, and what the local public interest requires in this case. *Shokal*, 109 Idaho at 337, 339, 707 P.2d at 448, 450. EG’s attempt to

characterize the Director’s consideration of Idaho Code § 67-6537 as “enforcing” the statute and exceeding the Director’s statutory authority has no merit.

**B. The Director Must Assess and Protect the Local Public Interest Even in the Absence of a Formal “Land Use Change.”**

EG asserts that Idaho Code § 67-6537 had no role in this case because the statute “only applies to those persons seeking to make land use changes with local governing boards.” *EG Brief* at 13. This contention is also without merit. Section 42-203A(5) required the Director to address and resolve the local public interest issues raised in this case, *see Shokal*, 109 Idaho at 337, 707 P.2d at 448 (“affirmative *duty*”) (italics in original), regardless of whether OMM or EG had formally applied to a local authority for a land use change within the meaning of LLUPA. There is no “land use change” or LLUPA exception to Idaho Code § 42-203A(5)(e)’s requirement of assessing and protecting the local public interest, even though the Legislature is aware of the potential for the “local public interest” analysis to touch upon matters over which other agencies have primary authority, and knows how to exclude such matters from the analysis. 2003 Idaho Sess. Laws 811.<sup>12</sup>

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<sup>12</sup> The 2003 amendments to Idaho Code § 42-203A(5) include an admonition that “minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.” 2003 Idaho Sess. Laws 811. Chapter 15 vests the Idaho Water Resource Board with exclusive authority to establish “minimum stream flows.” Idaho Code §§ 42-1503, 42-1504. There is no comparable provision in Idaho Code § 42-203A(5) that excludes consideration of the legislative intent expressed in Idaho Code § 67-6537 from the local public interest analysis.



As the *Final Order* recognized, the question of whether developing the twenty-eight acres into fourteen individual residential lots amounts to a “land use change” under LLUPA “is a separate inquiry” from the local public interest analysis required by Idaho Code § 42-203A(5)(e). R.323. The mere fact that LLUPA empowers only local authorities to approve or deny applications for “land use changes” does not limit the Director’s authority to consider Idaho Code § 67-6537’s plain statement of legislative intent as a factor in the local public interest analysis in this case.

To the contrary, Idaho Code § 67-6537 states that “[n]othing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code[.]” Idaho Code § 67-6537(3). The Director’s authority (and duty) to assess and protect the local public interest arises under Title 42, *Shokal*, 109 Idaho at 337, 339, 707 P.2d at 448, 450, and Idaho Code § 67-6537(3) expressly avoids imposing any limitations on that authority. There is no merit in EG’s argument that the Director was statutorily forbidden from considering Idaho Code § 67-6537 as a factor in the local public interest analysis.<sup>13</sup>

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<sup>13</sup> EG’s reliance on *Syringa Networks, LLC v. Idaho Dep’t of Admin.*, 155 Idaho 55, 305 499 (2013), is therefore misplaced. *EG Brief* at 21-22. In that case the Department of Administration amended a “Request for Proposals” for telecommunications services and equipment after the bidding had opened, which violated explicit prohibitions in former Idaho Code § 67-5718(2) (repealed 2016) and an implementing administrative rule. 155 Idaho at 62, 305 P.3d at 506. In this case there is no prohibition, explicit or implied, against considering the “intent . . . to encourage the use of surface water for irrigation,” Idaho Code § 67-6537(1), as a factor in the local public interest analysis.

**C. The Director Did Not Go Beyond the Statutory Definition of the “Local Public Interest.”**

EG argues that the language and legislative history of the statutory definition of “local public interest” demonstrate that Idaho Code § 67-6537 is not a “proper” factor in the local public interest analysis in this case. *EG Brief* at 22; *see also id.* at 19 (“inappropriate factor”). EG also argues that nothing in Idaho Code § 67-6537 “indicates that its purpose relates to the ‘public water resource,’” and it “does not articulate policy relevant to the local public interest, or ‘public water resource,’ for water appropriation purposes.” *EG Brief* at 22. EG therefore asserts the Legislature intended to “exclude consideration” of Idaho Code § 67-6537 from any local public interest analyses. *Id.* at 23. These arguments are contrary to the language of Idaho Code §§ 42-202B and 67-6537.

Idaho Code § 42-202B defines the “local public interest” 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). EG argues that this language “eliminat[es] consideration of secondary impacts and those delegated to other state agencies.” *EG Brief* at 21. This argument is contrary to the plain language of Idaho Code § 42-202B(3). Nothing in the statute refers to impacts that are “secondary” or “delegated to other state agencies.” The statute refers, rather, to “effects” that “a proposed water use” will have on the “public water resource.” Idaho Code § 42-202B(3). EG’s argument reads language into the statute that simply is not there.

EG argues this language *should* be read into the statute, however, because of the “legislative history”—specifically, the “Statement of Purpose” for the 2003 legislation that added the definition of “local public interest” to Idaho Code § 42-202B, and the “statement of Clive Strong” to a Senate committee. *EG Brief* at 20-21. The language of the statute controls, however, and the Idaho Supreme Court has rejected the argument that the legislative history of Idaho Code § 42-202B(3) displaces the language of the statute. *See N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 525, 376 P.3d 722, 729 (2016) (“Rangen appears to argue that the non-binding Statement of Purpose supersedes the language of the statute.”). EG’s attempt to use “legislative history” to modify the language of Idaho Code § 42-202B(3) should be rejected in this case as well.

EG’s interpretation of Idaho Code § 67-6537 is also contrary to its statutory language. EG asserts that nothing in the statute “indicates that its purpose relates to the ‘public water resource’” and that the statute “does not articulate policy relevant to the . . . ‘public water resource.’” *EG Brief* at 22. Section 67-6537 expressly states, however, that its “intent” is “to encourage the *use of surface water for irrigation*,” and requires applicants proposing land use changes “to *use surface water*, where reasonably available, as *the primary water source for irrigation*.” Idaho Code § 67-6537(1) (italics and underlining added). Thus, the express—and primary—focus of the statute is the *use of water for irrigation*, and it plainly favors surface water over ground water as the “primary water source” for this purpose. EG admits this. *See EG Brief* at 23 (stating that Idaho Code § 67-6537 “states preference to use one form of water over another,” and referring to “Idaho Code § 67-6537’s surface water priority policy”).

The “public water resource,” Idaho Code § 42-202B(3), includes both surface waters and ground waters. *See* Idaho Code § 42-101 (referring to surface waters as “public waters”); *id.* § 42-226 (“All ground waters are declared to be the property of the state.”). The use of these public waters for private irrigation purposes obviously has “effects” on the “public water resource.” Idaho Code § 42-202B(3).<sup>14</sup> Thus, the plain language of Idaho Code § 67-6537(1)—and EG’s own interpretation of that language—contradicts EG’s assertion that the statute has no connection to “the public water resource.” Idaho Code § 42-202B(3).

The issue in this case is whether the local public interest favors the use of ground water or the use of surface water to irrigate EG’s residential lots. Clearly, a statutory statement of “intent . . . to encourage the use of surface water for irrigation,” Idaho Code § 67-6537(1) (underlining added), is relevant in determining “the interests that the people in the area directly affected” by EG’s proposal to irrigate with ground water “have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3). EG’s argument that the *Final Order* considered factors outside the statutory definition of “local public interest” is without merit.

It follows that EG’s reliance on the *North Snake* case is misplaced. *EG Brief* at 21, 24-26, 28, 33-34. In that case the Idaho Supreme Court held that the final order did not recognize or apply Idaho Code § 42-202B(3)’s definition of the “local public interest,” and made local public interest determinations based on factors outside the statutory definition. *N. Snake Ground Water*

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<sup>14</sup> While private water rights can be established in the “public waters,” they remain “public waters.” Idaho water rights are rights of beneficial use only, and do not transform “public waters” into “private waters.” *See Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) (“A water right . . . does not constitute ownership of the water.”).

*Dist.*, 160 Idaho at 525, 376 P.3d at 729. In this case the *Final Order* expressly recognized and applied the statutory definition of the “local public interest,” and correctly concluded that Idaho Code § 67-6537(1)’s legislative intent “to encourage the use of surface water for irrigation” is “a relevant and important factor” for analyzing the “local public interest” as that term is defined in Idaho Code § 42-202B(3). R.321-23.<sup>15</sup>

**D. The *Final Order* Did Not Create or Recognize a New “Policy” or “Rule.”**

EG asserts the Director created a new “policy” or “rule” that exceeds the scope of Idaho Code § 67-6537. *EG Brief* at 31-33. EG argues that Idaho Code § 67-6537 “does not state a public policy for broad application” and only applies in cases involving LLUPA “land use changes.” *EG Brief* at 31-32 (underlining omitted). EG argues the Director’s conclusions mean that “an application for use of groundwater, in lieu of surface water, always conflicts with local public interest,” even when “there is no impact on surface water resources” and “surface water is no longer available on the land.” *EG Brief* at 32. EG argues that under *Asarco v. State*, 138 Idaho 719, 69 P.3d 139 (2003), such a rule must be promulgated through formal rulemaking. *EG Brief* at 32-33.

Most of these arguments fail because they ultimately rely on EG’s contentions that the Director improperly exercised LLUPA authority reserved to local government entities, that the

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<sup>15</sup> There is no merit, therefore, in EG’s assertion that the *Final Order* denied EG’s right to divert unappropriated water pursuant to Section 3 of Article XV of the Idaho Constitution. That assertion relies entirely on EG’s attempt to analogize this case to the *North Snake* case. *See EG Brief* at 25 (“as in *North Snake*, [the Director] seeks to prevent the applicant from exercising its constitutional right to appropriate unappropriated water”); *id.* at 33 (“the same result [as in *North Snake*] applies here”).

Director may not consider the express “intent” of Idaho Code § 67-6537 outside of cases involving LLUPA “land use changes,” and that the Director considered factors that do not fall within the statutory definition of the “local public interest.” Those contentions are unavailing for reasons previously discussed and outfitting them in new livery does not change the fact that they are contrary to the record and the law.

Moreover, whatever statewide “policy” may be involved in this case was established by Idaho Code § 67-6537 rather than by the Director, as EG has essentially conceded. *See EG Brief* at 23 (referring to “Idaho Code § 67-6537’s surface water priority policy”). EG’s related assertion that the *Final Order* means a new ground water application “always conflicts with the local public interest” regardless of the impacts on surface water and “even if surface water is no longer available on the land,” *EG Brief* at 32, is simply hyperbole that lacks support in the *Final Order* and the record.

The local public interest analysis and conclusions of the *Final Order* were based on the facts of this case, including a discussion of the availability of surface water to irrigate the new residential lots. R.322-26. The *Final Order* clearly did not create or apply a state-wide “policy,” “rule,” or “general maxim” that “surface water must be preferred in all circumstances.” *EG Brief* at 19, 31-33. It also did not create or apply a rule, policy, or maxim of “general applicability” that any application for the use of ground water “always conflicts with the local public interest” regardless of impacts on, or availability of, surface water supplies and delivery systems. Idaho Code § 67-5201(19). EG’s reliance on the *Asarco* decision is therefore misplaced. *See Pizzuto v. Idaho Dep’t of Correction*, \_\_\_ Idaho \_\_\_, \_\_\_ P.3d \_\_\_, (Sup. Ct. Docket No. 48857) (2022

WL 775584, at \*3) (Mar. 15, 2022) (“‘General applicability’ is the first attribute of a rule under [Idaho Code § 67-5201(19)] . . . . The general applicability of a rule is, perhaps, the most salient characteristic distinguishing quasi-legislative rulemaking from a purely executive or quasi-judicial agency action.”).<sup>16</sup> Here, the *Final Order* attended to the facts and evidence presented in this case and correctly considered specific state law applicable to the issues raised by the Applications and the protests.

### **III. APPROVING THE “IRRIGATION” PORTION OF THE APPLICATIONS WOULD HAVE BEEN CONTRARY TO THE LOCAL PUBLIC INTEREST.**

The Director determined that “the local public interest in maintaining the use of surface water, and the benefits that stem from such use . . . outweigh any conflicting local public interests identified in the record.” R.326; *see also* R.335 (similar). The Director therefore concluded “[t]he ground water irrigation portion of the Applications should be denied.” *Id.* This conclusion is supported by the record and falls well within the Director’s “sound discretion” to determine “what elements of the public interest are impacted” by the Applications, and “what the public interest requires.” *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

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<sup>16</sup> The very recent *Pizzuto* decision has not yet been released for publication as of the date of the filing of this brief, and therefore is subject to revision or withdrawal. *Pizzuto* abrogated *Asarco* to the extent it “provided an incomplete definition of ‘rule’ and adopted six factors” to narrow that definition. *Pizzuto*, 2022 WL775584, at \*6. *Pizzuto* recognized, however, that the “dispositive element of the APA’s definition of ‘rule’ in this case—that a rule is a statement of general applicability—was accurately included in *Asarco*’s definition of ‘rule.’” *Id.*

**A. The Director Correctly Determined That the Local Public Interests in Retaining the Existing Surface Water Irrigation Outweigh the Local Public Interests in Developing New Ground Water Irrigation.**

In this case, the proposed places of use “historically [have been] used for irrigated agriculture, [but] are now two-acre residential lots.” R.323. EG proposes to discontinue the existing use of surface water in favor of developing fourteen new ground water irrigation systems, one for each lot. R.210, 319.

The Director determined that Idaho Code § 67-6537 “expressly states the public interest value of encouraging the use of existing surface water and systems before developing new ground water sources,” and that “[t]hrough Idaho Code § 67-6537, the Legislature articulates the public interest of the state of Idaho to ‘encourage the use of surface water for irrigation.’” R.323.<sup>17</sup> The plain language of the statute supports these determinations: “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

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<sup>17</sup> The Director also identified reasons that Idaho Code § 67-6537 encourages the use of surface water for irrigation under such circumstances:

- 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.

R.323. These considerations are also the basis for the Department’s “surface water first supplemental condition.” *Id.* This condition is often applied to ground water permits and licenses for lands already irrigated by surface water rights and forbids diversions of ground water “if use of the primary surface water right is intentionally discontinued or reduced.” R.323 n.6.



primary water source for irrigation.” Idaho Code § 67-6537(1). This statutory language provides clear legislative “guidance” as to where the local public interest lies in this case. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. Even EG concedes that this language recognizes a “surface water priority policy” and “states a preference to use one form of water over another.” *EG Brief* at 23.

The Director determined that “‘the effects of [EG’s proposed use of ground water] on the public water resource’ would increase the 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 . . . .’” R.323 (quoting Idaho Code § 42-202B(3)) (brackets in *Final Order*). The Director thus concluded “the local public interest is best served by retention and use of surface water on the subdivided parcels,” R.323, and these local public interests “outweigh any conflicting local public interests identified in the record.” R.326; *see also* R.335 (similar).

These conclusions are supported by the record. There is substantial evidence in the record supporting the Director’s determination that the actual use of the land in question has changed from “irrigated agriculture” to “residential lots.” R.323, 358-59, 583-85; Tr. 25, 44-46. There is also substantial evidence in the record supporting the Director’s determination that approving the “irrigation” portion of the Applications would “would increase the use of ground water.” R.323. The Applications propose entirely new ground water rights that would be used, in part, to irrigate land historically irrigated with surface water. R.210, 319, 328; Tr. 30-31.

These new diversions of ground water will inevitably—intentionally—increase the use of ground water.

There is also substantial evidence in the record that approving the Applications could “possibly” diminish the use of surface water. R.323. It is undisputed that EG intends to discontinue use of surface water to irrigate the proposed places of use. R.210, 319. While OMM appears to have arranged for a sale of fourteen shares of FCDC stock<sup>18</sup> contingent upon full approval of the Applications, this does not mean there will be no net reduction in use and deliveries of FCDC’s surface water if the Applications are approved in full. The prospective purchaser did not testify, and the contingent sale document submitted into the record, R.503-04, is not a guarantee that the surface water historically used on the proposed places of use will be used for irrigation elsewhere in FCDC’s service area. The Director correctly concluded that approving the “irrigation” portion of the Applications would “possibly diminish the use of surface water.” R.323.

The Director also determined that continued use of surface water “may support many of the local public interests identified in the record.” R.326, 336. There is substantial evidence in the record to support this determination. It is undisputed that the River Bluff Development will increase local tax revenues, R.328; Tr.39-40, 100, and the record shows that the success of the River Bluff Development does not depend on approval of the “irrigation” portion of the Applications. The residential lots were listed for sale before the Applications were even filed,

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<sup>18</sup> Fourteen shares of FCDC stock provide enough water to irrigate the twenty-eight acres, i.e., the number of acres within the proposed places of use.

Tr.122, 151, and EG seeks to develop new ground water irrigation systems for reasons of convenience rather than necessity. *EG Brief* at 30; Tr.98, 107-08. The road, phone, power, and utility infrastructure necessary for residential development of the fourteen lots is in place, and no additional Canyon County approvals are needed to list the lots for sale. R.328; Tr.92, 123. Surface water can still be delivered to the proposed places of use via FCDC's conveyance and distribution system, and FCDC is willing and able to continue delivering surface water to the proposed places of use. R.325. Substantial evidence in the record thus supports the Director's conclusion that continued use of surface water for irrigation purposes "may support many of the local public interests identified in the record." R.326, 336

Thus, the record and the legislative "intent . . . to encourage the use of surface water for irrigation," Idaho Code § 67-6537(1), support the Director's conclusion that approving the "irrigation" portion of the Applications would be contrary to "the legislatively defined interests that the people in the area directly affected" by EG's proposed use of ground water "have in effects of that use on the public water resource." R.323; Idaho Code § 42-202B(3). The record and the legislative intent to encourage the use of surface water for irrigation also support the Director's determination that the local public interests in maintaining the use of readily available surface water, and the benefits that stem from such use, "outweigh any conflicting local public interests identified in the record." R.335; *see also* R.326 (similar).

**B. The Director Correctly Determined That Surface Water is “Reasonably Available.”**

The Director also addressed EG’s contention that it does not have access to surface water because the Assignment from OMM to EG did not convey any FCDC shares. R.323-25. The Director determined that “[d]espite the Assignment, FCDC surface water is reasonably available to EG, and FCDC’s delivery system is capable of delivering such water.” R.335; *see also* R.325 (similar). This conclusion is consistent with the “reasonable availability” criteria in Idaho Code § 67-6537 and is supported by substantial evidence in the record.

The Director used Idaho Code § 67-6537(1) as a guide for determining whether surface water is “reasonably available” to EG. R.325. This statute identifies three situations— subsections (1)(a), (1)(b), and (1)(c)—in which surface water is deemed to be “reasonably available” as the primary source of water for irrigation use: (a) when a surface water right is, or reasonably can be made, appurtenant to the land; (b) when the land is entitled to distribution of surface water from an irrigation delivery entity that has a distribution system capable of delivering the water to the land; or (c) when an irrigation delivery entity has sufficient available surface water rights to apportion or allocate to the land, and a distribution system capable of delivering the water to the land. R. 325; Idaho Code § 67-6537(1). The use of the word “or” at the end of subsection (1)(b) means that these are disjunctive criteria; that is, surface water is “reasonably available” if any of the three criteria are satisfied. *See Pentico v. Idaho Comm’n for Reapportionment*, \_\_\_ Idaho \_\_\_, 504 P.3d 376, 384 (2022) (“The word ‘or’ is a

‘disjunctive particle [*sic*] used to express an alternative or to give a choice of one among two or more things.’”) (citation omitted).

1. Surface Water is “Reasonably Available” Within the Meaning of Subsection (1)(a) and Subsection (1)(c) Regardless of Whether EG Holds Shares in FCDC.

Subsection (1)(a) states that surface water is “reasonably available” when “[a] surface water right is, or reasonably can be made, appurtenant to the land[.]” Idaho Code § 67-6537(1)(a). EG’s proposed places of use are within FCDC’s service area, R.329, that is, within the “digital boundary” defining the “place of use” for FCDC’s surface water rights. Idaho Code §§ 42-202B(2), 42-1411(2)(h). FCDC’s shares do not define, change, or limit the “place of use” for FCDC’s water rights, and the shares are not appurtenant to the lands upon which they have been used. R.330. Thus, FCDC’s water rights are “appurtenant” to EG’s proposed places of use regardless of whether EG holds any FCDC shares. Idaho Code § 67-6537(1)(a); *see also McInturff v. Shippey*, 165 Idaho 489, 497, 447 P.3d 937, 945 (2019) (explaining that “appurtenant to” means “tied to . . . the described place of use”). Surface water is therefore “reasonably available” to EG within the meaning of subsection (1)(a).

Surface water is also “reasonably available” to EG within the meaning of subsection (1)(c). This subsection states that surface water is “reasonably available” when “[a]n irrigation district, canal company, or other irrigation delivery entity has sufficient available surface water rights to apportion or allocate to the land and has a distribution system capable of delivering the water to the land.” Idaho Code § 67-6537(1)(c). The record shows that FCDC is an “irrigation delivery entity” within the meaning of this provision. R.329-30. The record also shows that

FCDC has “sufficient available surface water rights” to allocate surface water to EG’s proposed places of use and has a distribution system “capable of delivering the water to the land.” R.323-25, 329-30; Idaho Code § 67-6537(1)(c). It follows from the plain language that surface water is “reasonably available” to EG within the meaning of subsection(1)(c).

The fact that EG may have to acquire fourteen shares of FCDC stock to receive delivery of FCDC’s surface water, *EG Brief* at 15,<sup>19</sup> does not mean FCDC’s surface water is not “reasonably available” within the meaning of Idaho Code § 67-6537(1)(c). The only question under this provision is whether an irrigation entity has “sufficient” surface water to allocate to the land and a distribution system “capable” of delivering the water, and it is undisputed the FCDC has both sufficient surface water and a capable distribution system. “Nothing has physically changed to prevent delivery of the surface water to the parcels,” and “FCDC asserts it is willing and ready to continue to provide surface water to the parcels.” R.325.

Further, the cost of the FCDC shares is not a consideration under subsection(1)(c). Idaho law recognizes that there are always costs associated with delivering an allocation of surface water to lands served by an “irrigation delivery entity.” *See, e.g.,* Id. Const. Art XV § 4 (“upon payment therefor”); Idaho Code § 42-906 (referring to “[t]he amount to be paid by said party or parties for the delivery of said water”); Idaho Code § 43-701(4) (authorizing irrigation district boards of directors “to determine the aggregate amount necessary to be raised for all purposes

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<sup>19</sup> Each FCDC share entitles the holder to sufficient water to irrigate two acres. R.423. The proposed places of use cover twenty-eight acres, and therefore fourteen shares would provide a supply sufficient to irrigate the proposed places of use.

connected with the maintaining and operating of the works of said district”). Even so, the Legislature did not define or qualify “reasonable availability” under Idaho Code § 67-6537(1)(c) based on such costs. Further, the record shows that the cost of developing irrigation systems on the proposed places of use is not an issue in this case, regardless of whether the source is surface water or ground water, because that cost will ultimately be incorporated into the sales of the residential lots. Tr.116-18; *see also id.* at 111 (“Q. The cost has nothing to do with it? . . . A: Nothing.”). Surface water is therefore “reasonably available” to EG within the meaning of subsection (1)(c).

2. Surface Water Must Be Deemed “Reasonably Available” Within the Meaning of Subsection (1)(b) to Protect the Local Public Interest in Encouraging the Use of Surface Water for Irrigation.

Surface water should also be deemed “reasonably available” to EG within the meaning of subsection (1)(b) because, as the Director concluded, “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.” R.325 (*italics in original*).

Under subsection(1)(b), the availability of surface water hinges upon whether “[t]he land is entitled to distribution of surface water from an . . . irrigation delivery entity, and the entity’s distribution system is capable of delivering the water to the land.” Idaho Code § 67-6537(1)(b). It is undisputed that the proposed place of use was “entitled to distribution of surface water” from FCDC prior to the Assignment, *id.*, because OMM owned both the proposed places of use and the FCDC shares that had historically been used to irrigate that land with

surface water. R.325; R.330. While EG owns the land but not the FCDC shares, the Director determined that this “is a result of the intentional conveyance of the parcels from OMM to EG after the hearing, without the previously used FCDC shares.” R.325. There is substantial evidence in the record to support this determination.

The record shows that at all times up to and during the administrative hearing, and for approximately a month after the hearing, OMM was the sole owner of the proposed places of use and intended to develop, list, and sell the residential lots to prospective home builders. R.327-30. The first date that EG’s name appears in the record is July 22, 2020, R.200, more than a month after the administrative hearing of June 15, 2022.<sup>20</sup> There is no mention of EG in the hearing transcript, or of any plan or proposal to assign the land and Applications to another entity. The hearing did raise doubts about OMM’s development plans, however, because OMM is subject to FCDC’s policy of requiring shareholders to use surface water as the primary source of water for irrigation. R.417-18, 423, 436, 450, 452, 457, 461-62, 497, 500-02; Tr.37, 213, 215, 221, 228, 233, 240, 243, 252-53, 272-75.<sup>21</sup> These facts support the Director’s conclusion that “[a]ny lack of access by EG to surface water is a result of an intentional conveyance of the parcels from OMM to EG after the hearing, without the previously used FCDC shares.” R.325.

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<sup>20</sup> According to the online records of the Idaho Secretary of State, EG’s initial filing as a business entity was on July 16, 2022. <https://sosbiz.idaho.gov/search/business>. This Court can take judicial notice of this fact pursuant to Rule 201 of the Idaho Rules of Evidence.

<sup>21</sup> OMM’s proposal to transfer the fourteen shares—that is, the number of shares needed to irrigate the proposed places of use—is subject to approval by FCDC’s board of directors. R.330, 484, 503-04.



EG has not argued otherwise or offered any other explanation for the timing and structure of the Assignment.

As the Director recognized, it would be contrary to the local public interest to allow landowners to circumvent the local public interest in encouraging surface water irrigation through the simple expedient of a conveyance structured and intended for the sole purpose of discontinuing or reducing use of an existing surface water supply and developing new ground water supplies. *See* R.325 (“it is not in the local public interest to allow developers to intentionally manipulate access to surface water”); *see also* R.323 n.6 (“The right holder shall not divert [ground] water for irrigation purposes under this right if use of the primary surface water right is intentionally discontinued or reduced . . . .”) (quoting a “typical Department groundwater supplemental condition”) (brackets in *Final Order*). Thus, for purposes of the local public interest analysis, “surface water *is* reasonably available to EG” within the meaning of subsection (1)(b) of Idaho Code § 67-6537, R.325, 335 (italics in original), and the Assignment does not alter this conclusion.<sup>22</sup>

### **C. EG’s “Local Public Interest” Arguments Lack Merit.**

EG asserts that when the “proper” local public interest factors are considered, the analysis

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<sup>22</sup> This was a “local public interest” conclusion the Director reached pursuant to his authority under Idaho Code § 42-203A(5), not a determination of how Idaho Code § 67-6537(1)(b) would or should apply in a LLUPA case. The Director simply used Idaho Code § 67-6537 as legislative “guidance” for purposes of determining “what elements of the public interest are impacted, and what the public interest requires” in this case. *Shokal*, 109 Idaho at 337, 339, 707 P.2d at 448, 450.

weighs in favor of approving the Applications in full. *EG Brief* at 27-31.<sup>23</sup> EG makes several arguments in support of this contention, all of which ultimately fail.

1. Ground Water Supplies and Surface Water Use.

EG first asserts that “everyone concedes the water use will not deplete the groundwater resource.” *EG Brief* at 29. This assertion not only mischaracterizes the record but is facially implausible. EG is proposing to drill new wells and establish new ground water rights, so that ground water can be pumped for irrigation use. This will obviously “deplete” the local ground water to some degree: it will withdraw water from the local aquifer that otherwise would have remained in the aquifer.<sup>24</sup>

EG’s contention that “everyone concedes the water use will not deplete the groundwater resource,” *EG Brief* at 29, apparently refers to the Director’s conclusions that OMM met its burden of showing that “the aquifer can supply a sufficient quantity of water for the proposed projects,” and that the proposed use “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.” R.332-33. These conclusions, however, were not part of the “local public

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<sup>23</sup> This argument is partly based on EG’s contention that the Director erred in considering the legislative “intent . . . to encourage the use of surface water for irrigation” expressed in Idaho Code § 67-6537(1), which is incorrect for reasons discussed above.

<sup>24</sup> Withdrawals from individual wells could have significant cumulative impacts on the local ground water supply, especially considering the potential for additional residential development in the area. The record shows that tentative plans for future residential development of adjacent agricultural lands still owned by OMM also envision drilling wells to provide both domestic and irrigation water for each residential lot. R.505-06, 583-85; Tr.45, 70-71.

interest” analysis required by subsection (5)(e) of Idaho Code § 42-203A. Rather, they addressed the separate requirements of subsections (5)(a) and (5)(b): determinations of whether the proposed use “will reduce the quantity of water under existing water rights,” Idaho Code § 42-203A(5)(a), and whether “the water supply itself is insufficient for the purpose for which it is sought to be appropriated.” *Id.* § 42-203A(5)(b); R.331-33. In other words, EG’s argument assumes that the “local public interest” criterion of subsection (5)(e) of Idaho Code § 42-203A is satisfied simply because the separate and distinct criteria of subsections (5)(a) and (5)(b) are satisfied. This contention impermissibly renders the “local public interest” criterion superfluous. *See Pentico*, \_\_\_ Idaho \_\_\_, 504 P.3d at 380 (stating that “all the words and provisions of the statute” must be given effect “so that none will be void, superfluous, or redundant.”) (citation omitted); *see also Shokal*, 109 Idaho at 337, 707 P.2d at 448 (holding that Idaho Code § 42-203A(5)(e) imposes the “affirmative *duty* to assess and protect” the local public interest) (italics in original).

Moreover, the local public interests the Director identified in “preservation of ground water aquifers and ground water” and “conservation of ground water for uses that typically require better water quality,” R.323, are not limited to situations in which there is a local ground water shortage and should not be swept aside by EG’s assertion that there is plenty of water in the local aquifer. Experience in many parts of Idaho has shown that seemingly abundant local ground water supplies can rapidly decline if not carefully allocated and managed. Further, nothing in Idaho Code § 67-6537 suggests that the sufficiency of a ground water supply limits or qualifies the statutory intent of “encourag[ing] the use of surface water for irrigation.” Idaho

Code § 67-6537(1). The legislative guidance in Idaho Code § 67-6537 looks to the actual availability of sufficient surface water, *id.* § (1)(a)-(c), not the asserted abundance of ground water.

EG also argues that “surface water will continue to be used in Farmer’s Co-op’s service area” and delivered via FCDC’s distribution system, and therefore and EG’s “future non-use of Farmer’s Co-op water” will not adversely impact FCDC’s system or the incidental ground water recharge associated with it. *EG Brief* at 29-30. This assertion is not supported by the record. While OMM appears to have arranged for a contingent sale of the fourteen shares of FCDC stock, this does not mean there will be no net reduction in use and deliveries of FCDC’s surface water if the “irrigation” portions of the Applications are approved. *See supra* page 33. The Director correctly concluded that approving the “irrigation” portion of the Applications would “possibly diminish the use of surface water.” R.323.

The alternative possibility that overall use of FCDC’s surface water and distribution system will remain the same does not alter the local public interest analysis. Approving the “irrigation” portion of the Applications will increase local ground water use regardless of whether overall use of FCDC’s surface water remains the same. Even if overall surface water use in FCDC’s service area remains unchanged, approving new ground water rights as the primary source of irrigation water for land historically irrigated with surface water, and for which surface water remains reasonably available, would be contrary to Idaho Code § 67-6537’s express statement of “the public interest value of encouraging the use of existing surface water and systems before developing new ground water sources.” R.323.

## 2. Water Quality as a Local Public Interest.

EG argues it is in the local public interest to use ground water to irrigate the proposed places of use because ground water irrigation is more “convenient” for the future homeowners and FCDC’s surface water is too silty to be “compatible” with their desires and irrigation systems. *EG Brief* at 30. EG also argues that its proposed use of ground water is in the local public interest because it “will reduce runoff of silty surface water to the Snake River, increase[e] water quality, and provid[e] environmental benefits to the surrounding areas.” *EG Brief* at 30. These contentions fail for several reasons.

### a. EG is Asserting a Purely Private Interest.

EG argues it presented evidence that ground water irrigation “is a more convenient, practical, and clean means of developing water on the parcels,” and that “the quality of the surface water (silt, seed, and pesticide content), may not be compatible with the desires of the residents or the types of irrigation systems likely to be used.” *EG Brief* at 30. EG did introduce testimony along these lines, *see, e.g.*, Tr.143-44, but these considerations are more appropriately viewed as purely private interests of EG and the buyers of the residential lots than as matters of public interest. It may be true that using surface water to irrigate the residential lots will be less convenient and require more screening or filtering of the water. *Id.* It may also be true that using surface water will mean River Bluff residents will sometimes have to wait longer than they would like to begin irrigating in the spring, or will have to irrigate on a rotation basis rather than any time they want. *Id.* These considerations are not “effects” on “the public water resource,”

however. Idaho Code § 42-202B(3). They are effects on the irrigation preferences and systems of residents of the River Bluff Development. Tr.143-44.

Even if these considerations are viewed as matters of public interest, however, the statement of intent in Idaho Code § 67-6537 provides guidance for weighing and balancing the competing local public interests in this case. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. As EG recognizes, Idaho Code § 67-6537 was enacted, in part, to address concerns that surface water rights would be moved off agricultural lands being developed as residential and commercial properties and annexed into municipalities. *EG Brief* at 13. Irrigating lawns, landscaping, and gardens is obviously different from irrigating fields that are in agricultural production, and in many or even most cases it might be more “convenient” and more “compatible” with the desires of residential and commercial landowners to irrigate with ground water. *EG Brief* at 30. The “intent” language of Idaho Code § 67-6537, however, is not qualified by the “convenience” or “compatibility” of using surface water vis-à-vis some other source of water. It simply states the “intent . . . to encourage the use of surface water for irrigation,” especially in the context of land use changes, so long as surface water is “reasonably available.” Idaho Code § 67-6537(1).

In effect, the Legislature has already determined that the public interests in encouraging surface water irrigation, when surface water is reasonably available, outweigh any public interests in the “convenience” and “compatibility” of using ground water for residential and commercial irrigation. Thus, even if the “convenience” and “compatibility” of using ground water for residential irrigation in this case are “proper public water resources factors,” *EG Brief* at 31, the Director correctly determined that “the local public interest in maintaining the use of

surface water, and the benefits that stem from such use . . . outweigh any conflicting local public interests identified in the record.” R.326; *see also* R.335 (similar).

b. There are No “Environmental Benefits.”

There is nothing in the record to support EG’s contention that its proposal has “environmental benefits” because ground water use “will reduce runoff of silty surface water to the Snake River, increasing water quality.” *EG Brief* at 30 (underlining in original). While the record supports a conclusion that ground water is less silty when it comes out of the well, this says nothing about the silt content of ground water runoff into the Snake River. Further, nothing in the record suggests that the ground water runoff will not be just as silty as surface water runoff after the ground water is used for irrigation on the parcels, and then finds its way to the Snake River—which most likely will occur via the same drainage features and structures that channel surface water runoff to the river. There is also nothing in the record to suggest that the ground water runoff from the residential lots will carry fewer contaminants than surface water runoff.<sup>25</sup>

Moreover, other arguments in EG’s brief contradict the assertion that approving the Applications in full will decrease surface water runoff to the Snake River or improve the water quality of that runoff. EG asserted there will be no reduction in use of FCDC’s surface water and distribution systems because the surface water historically used on the parcels will be used somewhere else within FCDCs’ system. *EG Brief* at 29. This implies that surface water runoff

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<sup>25</sup> EG cites contaminants such as pesticides and herbicides. *EG Brief* at 9, 30. These products are often used on residential properties, however, and nothing in the record suggests that they would not be present in ground water runoff from the residential lots.

to the Snake River will also remain the same rather than decrease.<sup>26</sup> EG is trying to have it both ways, arguing on page 29 of its brief that surface water use will remain the same if the Applications are approved in full, and then on the next page implying that surface water use will decrease if the Applications are approved in full. It will be either one or the other, not both.

More to the point, however, is the fact that EG's arguments are contrary to the legislative intent expressed in Idaho Code § 67-6537. The statute expressly encourages the use of surface water as the primary water source for irrigation in cases when land use changes and surface water is reasonably available. EG's argument that it is in the local public interest to approve the "irrigation" portion of the Applications is directly contrary to the statement of legislative intent in Idaho Code § 67-6537.

**D. The Director Did Not Abuse His Discretion Under Idaho Code § 42-203A(5).**

"The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion." *Shokal*, 109 Idaho at 339, 707 P.2d at 450. All of EG's various arguments ultimately reduce to a contention that the Director abused his discretion by taking the express statement of legislative intent in Idaho Code § 67-6537 into consideration as a factor in the local public interest analysis. The record demonstrates otherwise. A claim that the Director abused his discretion is evaluated under a four-part test that asks whether the Director: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion; (3) acted consistently with

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<sup>26</sup> The total amount of runoff would likely increase, because of the additional runoff from the new ground water irrigation uses proposed by EG.



the legal standards applicable to the specific choices available; and (4) reached a decision by the exercise of reason. *Valentine v. Valentine*, \_\_\_ Idaho \_\_\_, 500 P.3d 514, 518–19 (2021).

These elements are satisfied in this case. The Director expressly recognized the local public interest question as one of discretion. R.321. The Director approved the “domestic” portion of the Applications but denied the “irrigation” portions. R.326, 335. For the reasons discussed in this brief, these actions were well within the outer boundaries of the discretion conferred by Idaho Code §§ 42-203A(5)(e) and 42-202B(3), consistent with the legal standards established by those statutes and applicable decisions of the Idaho Supreme Court, and reached by an exercise of reason. Thus, the Director’s decision to approve the “domestic” portion of the Applications but deny the “irrigation” portion as contrary to the local public interest was within the Director’s statutory authority and discretion to determine “what elements of the public interest are impacted, and what the public interest requires[.]” *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

### **CONCLUSION**

For the reasons discussed herein, the Respondents request that this Court affirm the *Final Order* in full.

Respectfully submitted this 29<sup>th</sup> day of March 2022.

/s/ Michael C. Orr  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March 2022, I caused to be served a true and correct copy of the foregoing, via iCourt E-file and Serve, upon the following:

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