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 CANYON COUNTY CLERK
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**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,)	Case No. CV14-21-10116
)	
Petitioner,)	MEMORANDUM DECISION
)	
vs.)	
)	
)	
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.)	
)	
)	
IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-34832 THROUGH 63- 34838 AND 63-34840 THROUGH 63-34846 ALL IN THE NAME OF EDEN'S GATE LLC)	
)	
)	

I.
BACKGROUND

This matter concerns 14 applications to appropriate ground water filed by One More Mile, LLC (“One More Mile”). R., 18-59. One More Mile was the developer of a 28-acre development in Canyon County known as the River Bluff Development. *Id.* at 327. The land now constituting the Development was originally platted and subdivided in 1910. *Id.* at 357; Tr., 26-27. At that time, it was part of a larger plat known as the Orchard Tract. *Id.* In 2007, Canyon County authorized the division of the Orchard Tract into smaller two-acre lots, including the 14 two-acre lots that today constitute the River Bluff Development. R., 358-359. These 14 lots will be referred to herein as “the subject lots.”

One More Mile acquired the subject lots in 2019 for purposes of residential development. *Id.* at 346. In furtherance of this goal, it filed 14 applications to appropriate ground water with the Idaho Department of Water Resources on January 2, 2020. R., 18-59. At that time, road, phone, power, and utility infrastructure had already been constructed to allow for residential development of the subject lots. *Id.* at 328; Tr., 91. To provide water to the prospective development, each application seeks .04 cfs of ground water for domestic purposes associated with a single home and an additional amount ranging from .05 cfs to .07 cfs for irrigation purposes. R., 18-59. The applications request ground water as the sole source of water, with each proposed appropriation to be diverted via a well to be constructed on each subject lot. *Id.*

The Farmers Co-Operative Ditch Company (“Ditch Company”) protested the applications. *Id.* at 118-145. The Ditch Company is a water delivery entity located North of the Boise River with a service area of approximately 15,000 acres (“service area”). *Id.* at 329 & 479. It owns water rights authorizing it to divert surface water from the Boise River and other sources for delivery to its shareholders to irrigate approximately 10,000 of those acres.¹ *Id.* 329. One More Mile is a Ditch Company shareholder. *Id.* at 399. It owns 64 shares of Ditch Company capital stock, authorizing it to irrigate up to 123 acres of land. *Id.* At the time the applications were filed, One More Mile owned 112 acres of land within the service area, including the subject lots. *Id.* at 329; Tr., 15. It is undisputed that Ditch Company shares are not appurtenant to any particular parcel of land and can be freely moved by a shareholder within the service area. *Id.* at 330.

¹ See water right numbers 63-138C, 63-188, 63-189, 63-190, 63-191, 63-296, 63-4851, 63-4852, 65-66, and 65-67.

An administrative hearing on the applications was held before the Department on June 15, 2020. Tr., 1. Department employee Nick Miller acted as hearing officer. *Id.* After the hearing, but prior to the issuance of a decision, Petitioner Eden's Gate, LLC ("Eden's Gate") acquired the subject lots from One More Mile. R., 200-209. The sale occurred on July 22, 2020, and was for the subject lots only. *Id.* It did not include any of One More Mile's Ditch Company shares.² *Id.* As a result, the subject lots were deeded to Eden's Gate without water shares. *Id.* One More Mile then assigned its pending applications for permit to Eden's Gate by filing the appropriate paperwork with the Department on July 29, 2020. *Id.* at 199.

The hearing officer issued a *Preliminary Order Partially Approving Applications* on May 28, 2021 ("*Preliminary Order*"). R., 226. The *Preliminary Order* approved the requests to appropriate ground water for domestic purposes. *Id.* at 238. However, it denied the requests to appropriate ground water for irrigation as contrary to the local public interest. *Id.* Eden's Gate subsequently filed a *Notice of Appeal and Petition to Review Preliminary Order*. *Id.* at 285. On October 14, 2021, the Director issued a *Final Order Partially Approving Applications* ("*Final Order*"). *Id.* at 318. The *Final Order* sustained the hearing officer's approval of the appropriation of ground water for domestic use, and his denial of the appropriation of ground water for irrigation use as contrary to the local public interest. *Id.* Eden's Gate filed a *Petition* seeking judicial review of the *Final Order* on November 1, 2021. The *Petition* asserts the *Final Order* is contrary to law and requests that it be set aside and remanded. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Petition* was held before the Court on May 9, 2021.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 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. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds

² Following the sale of the subject lots, One More Mile still owned approximately 87 acres of irrigable land within the Ditch Company service area.

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. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III. ANALYSIS

An application for permit to appropriate water is evaluated against the criteria set forth in Idaho Code § 42-203A(5). The Director may reject, partially approve, or condition an application for permit where he finds the proposed water 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

I.C. § 42-203(A)(5).

The Director found (1) the proposed permits will not reduce the quantity of water under existing water rights, (2) the water supply is sufficient for the proposed uses, (3) the applications were filed in good faith, (4) Eden's Gate has sufficient financial resources to complete the project, and (5) the proposed water uses are consistent with principles of conservation of water resources. R., 318-338. The Director's findings with respect to these criteria are not challenged. At issue are his findings with respect to the local public interest.

A. Local public Interest.

One criterion the Director must consider is whether the proposed appropriations “will conflict with the local public interest.” I.C. § 42-203A(5). The Director’s ability to evaluate the local public interest is limited. He may only evaluate “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” I.C. § 42-202B(3). That the legislature intended the definition of local public interest to be narrowly defined is established by its amendment of the term in 2003. 2003 Idaho Sess. Laws 298. Prior to 2003, the term local public interest was broadly defined as “the affairs of the people in the area directly affected by the proposed use.” 1978 Idaho Sess. Laws 306. The Idaho Supreme Court recognized that the 2003 amendment “narrowed the definition of local public interest considerably.” *Chisholm v. Idaho Dept. of Water Resources*, 142 Idaho 159, 164 fn.3 125 P.3d 515, 520 fn.3 (2005).

i. The Director exceeded his authority and abused his discretion by applying the policy of Idaho Code § 67-6537 to the facts of this case.

The Ditch Company protested the applications on the basis they are inconsistent with Idaho Code § 67-6537. *Id.* at 118-145. That statute provides in pertinent 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.

I.C. § 67-6537 (emphasis added).

Idaho Code § 67-6537 is a part of Idaho’s Land Use Planning Act. That Act was promulgated to “promote the health, safety and general welfare of the people of the State of Idaho,” and the powers conferred therein are vested in local governments, not the Department.

I.C. §§ 67-6502 & 67-6503. The Director recognized this distinction and stopped short of formally applying the statute itself to this proceeding. R., 323. That said, he considered the generalized “public interest value of encouraging the use of surface water and systems before developing new ground water sources” he found to be expressed by the legislature in Idaho Code § 67-6537. *Id.* He did so by evaluating Idaho Code § 67-6537 under Idaho Code § 42-203A(5)’s local public interest criterion:

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.*

Id. (emphasis added). The Director therefore “recognize[d] the public interest value the Idaho Legislature adopts in Idaho Code § 67-6537,” and relied upon that in holding the proposed appropriations are contrary to the local public interest. *Id.* at 322-326. The Court finds the Director abused his discretion in this respect.

The policy expressed by the legislature under Idaho Code § 67-6537 is, by its terms, limited in scope. It applies only in the context of “applicants proposing to make land use changes” under Idaho’s Land Use Planning Act. I.C. § 67-6537. No such applicants or applications are involved in this proceeding. By applying the policy in a context which the legislature did not intend (i.e., in the context of an application to appropriate water under Idaho Code § 42-203A) the Director impermissibly extends its scope.

That the legislature did not intend applications to appropriate water to be denied based on the policy set forth in Idaho Code § 67-6537 is clear from statute’s plain language. Had the legislature intended the policy of Idaho Code § 67-6537 to be applied in such a context, it would have amended Idaho Code § 42-203A to reflect that intent. It did not. Rather, it specifically chose to limit the application of that statute and its underlying policy to applicants proposing to make land use changes under Idaho’s Land Use Planning Act. No such applicants are involved here. The Court 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.³

The Court additionally finds that Canyon County is the local government vested with the authority to enforce the provisions of Idaho's Land Use Planning Act in this case. It is undisputed that Canyon County did not require the use of surface water on the subject lots as a condition of subdivision approval in 1910 when the land was originally subdivided. Likewise, it did not require the use of surface water in 2007 when it authorized the division of the Orchard Tract into smaller two-acre lots. Indeed, the Director found that at this time "no additional Canyon County approvals are necessary to sell the parcels to prospective home builders." R., 333. Permitting the Ditch Company and the Department to raise and consider Idaho Code § 67-6537 and/or its underlying policy in this proceeding results in duplicative litigation and potential inconsistent results. It permits the Department to potentially override the decision of another local agency. Such outcomes are discouraged by the legislature's 2003 amendment to the definition of local public interest, which was intended in part to limit the Department's ability to consider impacts to the local public interest delegated to other state and local agencies. *See e.g.*, Statement of Purpose, 2003 Idaho Sess. Laws 298 (providing "[a]s noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (19785), 'it is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors that role is vested' in other agencies"). For these reasons, the Court finds the Director exceeded his authority and abused his discretion by applying the legislative policy of Idaho Code § 67-6537 to the facts of this case by way of Idaho Code § 42-203A(5)'s local public interest criterion.

ii. The finding that the requests to appropriate ground water for irrigation are contrary to the local public interest is not supported by substantial evidence.

In denying the requests to appropriate ground water for irrigation, the Director held that 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." R., 326. Even if the Director correctly relied upon the legislative policy set forth in Idaho Code § 67-6537 in

³ With respect to ground water, the legislature states in the Ground Water Act that "it is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state." I.C. § 42-234.

reaching this decision, the Court finds the Director's findings with respect to the local public interest are not supported by substantial evidence.

a. The finding that surface water is available to irrigate the subject lots is not supported.

In denying the requests to appropriate ground water for irrigation, the Director made the finding that surface water is available to irrigate the subject lots. R., 323-325. The Court finds this finding is not supported by the record. The evidence establishes that One More Mile deeded the subject lots to Eden's Gate without Ditch Company shares. *Id.* at 200-209. That One More Mile had the legal right to transfer the subject lots to Eden's Gate without shares is undisputed. The Director found, and the Ditch Company admits, shares are not appurtenant to any particular parcel of land under the Ditch Company's bylaws.⁴ *Id.* at 330. As a result, a shareholder is free to change where water is used and may move shares to irrigate different parcels of land within the service area. *Id.* Therefore, there is no evidence that One More Mile was prohibited from selling, or that Eden's Gate was prohibited from buying, land within the service area without shares. There is also no evidence that Eden's Gate holds surface water rights authorizing it to irrigate the subject lots. The reality is that Eden's Gate does not own, nor has it ever owned, shares entitling it to the delivery of surface irrigation water from the Ditch Company. Nor does it own water rights entitling it to divert surface water from any source for purposes of irrigating the subject lots.

Notwithstanding, the Director held that surface water is available to Eden's Gate to irrigate the subject lots:

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.

...

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

⁴ In the Court's experience this fact is unique to the bylaws of the Ditch Company, as delivery entity shares are generally made appurtenant to the land on which they are used.

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.

R., 323.

Absent from the Director's analysis is evidence of actual, legally useable, surface water available to the subject lots at this time. Instead, the Director focuses on the fact that Ditch Company shares had been previously used on the subject lots prior to Eden Gate's ownership. The record establishes that One More Mile irrigated at a least a portion of the subject lots in 2018, 2019, and 2020 with its Ditch Company shares.⁵ Tr., 20; 46-50. However, the relevancy of this prior use is questionable given the undisputed fact those shares were not conveyed to Eden's Gate when it purchased the subject lots in 2021. As a result, the record is clear that Eden's Gate is not, and never has been, a Ditch Company shareholder. Further, that the surface water used in 2018, 2019, and 2020, is not owned by Eden's Gate and is not legally available to it going forward.

The Director also implies bad faith dealings and manipulation by Eden's Gate. The record does not support this implication. The Director disapproves of the fact that the subject lots were sold to Eden's Gate without shares. However, neither the Director nor the Ditch Company point to any legal impediment precluding such a transaction.⁶ Nor does the Director point to any evidence establishing that the sale of the subject parcels and/or the assignment of the applications was transacted in bad faith. To the contrary, when analyzing the good faith criterion of Idaho Code § 42-203A(5)(c), the Director found that the applications in this case "were made in good faith and not for speculative purposes." R., 334. The Director's finding in this respect is not challenged on judicial review.

At the hearing, counsel for the Respondents argued that surface water is reasonably available because the subject lots are within the Ditch Company service area. As a result, Eden's Gate can go into the market and acquire shares. There is no finding from the Director or

⁵ Aside from this, there is no other evidence that the subject lots have ever been irrigated with surface water.

⁶ That a Ditch Company shareholder may sell land within the service area without shares is undisputed. Indeed, the service area of the Ditch Company includes approximately 15,000 acres of land, but the Ditch Company's water rights only authorize enough surface water to irrigate approximately 10,000 of those acres.

evidence in the record that the Ditch Company has excess shares readily available for acquisition. Nor is there evidence of viable offers from existing shareholders to sell their shares to Eden's Gate. While it may be true that water is always available for a price, that is not a useful parameter in evaluating whether surface water is available to a particular parcel of land as it is in effect no parameter at all.

To apply a local public interest preference for the continued use of surface water irrigation over new ground water irrigation, the Director must first find that surface water is available and that finding must be supported by the record. For the reasons set forth above, the Court finds the Director's finding in this respect is not supported by evidence in the record and must be set aside.

b. The Director's finding that the use of ground water on the subject lots offends the local public interest is not supported by the record.

The Director found the use of ground water on the subject lots offends the local public interest based on the legislative policy set forth in Idaho Code § 67-6537. R., 322-326. As set forth above, he construes that policy as "encouraging the use of existing surface water and systems before developing new ground water sources." *Id.* at 323. However, aside from reciting that general statement of policy, the *Final Order* lacks specific findings as to why the use of ground water is contrary to the public interest of this specific locale. In reviewing the attendant circumstances of this case, the Court finds the Director's local public interest finding is not supported by the record.

The Director cites the "[p]reservation of ground water aquifers and ground water supply" and the "conservation of ground water for uses that typically require better water quality" as bases underlying the legislative policy of Idaho Code § 67-6537. R., 323. The record establishes neither are applicable public interest concerns in this particular locale. It is undisputed there is ample unappropriated ground water in this location of the state. *Id.* at 332-33. It is further undisputed that the appropriation of ground water by Eden's Gate will not result in injury or harm to existing water rights. *Id.* at 331-332. Moreover, the record contains no findings or evidence that the proposed appropriations, if granted, would have any adverse effect on the future use of ground water for other uses in this area in any reasonable time in the future. In fact, the Director found that the appropriation of available ground by Eden's Gate is "consistent with

principles of conservation of water resources in Idaho.” *Id.* at 335. Therefore, even if the Director is correct in his assumption that these two bases underlie the legislative policy of Idaho Code § 67-6537, the record does not establish that either are applicable public interest concerns in the particular location at issue in this proceeding.

The Director next cites the “maintenance of surface water distribution systems as sources of ground water recharge” and “preservation of the economic viability of surface water delivery entities” as additional bases underlying the legislative policy of Idaho Code § 67-6537. Again, the record establishes neither is applicable to public interest concerns in the particular location at issue in this proceeding. There is no evidence that Eden’s Gate’s use of ground water to irrigate the subject lots would have any negative effect on the viability of the Ditch Company. The record establishes that One More Mile retains the shares it owned prior to the sale of the subject lots to Eden’s Gate and continues to pay assessments on those shares to the Ditch Company. Therefore, there is no change in the amount of assessments the Ditch Company will collect if Eden’s Gate diverts ground water. It must also be noted that the Ditch Company’s service area is approximately 15,000 acres and that its water rights only permit it to divert and deliver enough water to irrigate approximately 10,000 of those acres. Therefore, Eden’s Gate’s use of ground water will not result in a reduction of acres irrigated by surface water within the service area. The amount of irrigable acreage in the service area still outnumbers the amount of irrigation water the Ditch Company is entitled to divert and deliver. As such, the shares can readily be applied to lands elsewhere within the service area.⁷

When evaluating the local public interest, the legislature has directed the Director must only evaluate “the interests that the people *in the area directly affected by a proposed water use* have in the effects of such use on the public water resource.” I.C. § 42-202B(3). While the Director held the use of ground water offends the local public interest, the Court finds the record does not support that finding “in the area directly affected” the by the proposed water use. Therefore, the *Final Order* must be set aside and remanded for further proceedings.

⁷ Importantly, the shares previously applied to the subject lots (28 acres) can readily be applied to 28 acres elsewhere within the service area. This is not a situation where the shares could not be used elsewhere due to limitations imposed by the size of the service area. Furthermore, no potential impediments exist with respect to changing the location of the share use as neither a transfer proceeding nor Ditch Company approval is required.

iii. Conclusion on local public interest reliance.

This case presents a non-typical set of circumstances with respect to the unrestricted movability of the shares within the service area. Further, that the land use changes were approved in the distant past and prior to the manifestation of the concerns the Land Use Planning Act was put in place to address. In this Court's view, after a careful parsing through the facts of this case, the reasoning used with respect to the local public interest criteria unwittingly creates a generalized *de facto* state-wide public interest policy restricting new appropriations of ground water. In support of this conclusion the Court points to the following facts: (1) the surface water at issue is not appurtenant to the land; (2) the local governing board did not require the use of surface water as a condition of approval; (3) that unappropriated ground water exists is undisputed; (4) the new appropriation of the ground water will have no adverse effect on existing ground or surface water rights, the Ditch Company or the condition or level of the aquifer; and (5) there is no demonstrated adverse effect on the local public interest. Rather the decision was based on a state-wide legislative policy directed at a specific set of circumstances not present in this case.

Accordingly, under these particular facts it is plausible that the Director could routinely require that available surface water sources be exhausted as a condition of approval of any future ground water appropriation. Even if the Director did not impose the condition, water users opposing new ground water appropriations could file protests citing state-wide public interest and the availability of unappropriated surface water.

B. Prejudice to substantial rights.

The *Final Order* prejudices Eden's Gate's substantial right relating to the ability to pursue the appropriation of unappropriated water. It further prejudices its substantial rights in its applications for permit. *See e.g.*, IDAPA 37.03.08.035.02.d. (providing "[a]n applicant's interest in an application for permit to appropriate water is personal property"). For the reasons set forth herein, it follows that the *Final Order* must be set aside and remanded for further proceedings.

C. Constitutionality.

Eden's Gate argues the Director's denial of its requests to appropriate unappropriated ground water violates Article XV, Section 3 of the Idaho Constitution. That provision provides

“[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied.” Idaho Const., Art. XV § 3. Because the Court finds the *Final Order* must be set aside and remanded for the reasons stated herein, it need not reach the issue of its constitutionality.

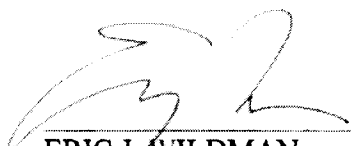
IV.
ORDER

THEREFORE, BASED ON THE FORGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The *Final Order* is affirmed in part and set aside and remanded for further proceedings in part as necessary consistent with this decision.
2. The *Final Order* is affirmed with respect to its approval of the requests to appropriate ground water for domestic purposes.
3. The *Final Order* is set aside and remanded for further proceeding as necessary with respect to its denial of the requests to appropriate ground water for irrigation purposes.

IT IS SO ORDERED.

Dated June 6, 2022



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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Director – Idaho Department of Water
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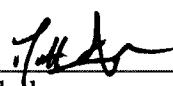
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Dated: 06/09/2022

Clerk of the Court
By 
Deputy Clerk