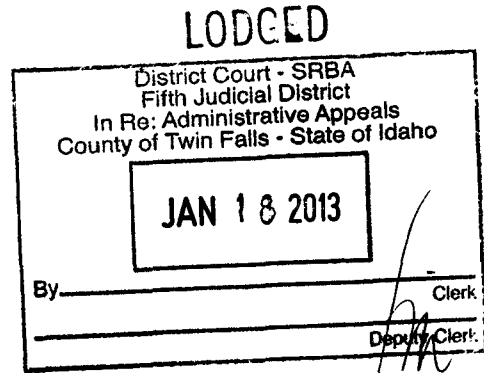


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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

FRANK ASTORQUIA,)	
)	Case No. CV WA 12 14102
Petitioner,)	
)	
vs.)	PETITIONER ASTORQUIA
)	OPENING BRIEF
STATE OF IDAHO, DEPARTMENT OF)	
WATER RESOURCES, an agency of the)	
State of Idaho,)	
)	
Respondent.)	
)	
_____)	
IN THE MATTER OF WATER RIGHT)	
LICENSE NO. 37-7460 IN THE NAME)	
OF FRANK ASTORQUIA AND/OR)	
JOSEPHINE ASTORQUIA)	
_____)	

Petitioner Frank Astorquia, though his counsel Beeman and Associates, P.C., submits his opening brief in support of the following issues arising from the Amended Preliminary Order in the matter of Water Right License No. 37-7460 issued by Respondent, State of Idaho, Department of Water Resources (IDWR), on June 25, 2012.

- 1. This Petition for Judicial Review should be stayed pending the final determination of SRBA claim 37-7460 because the SRBA court has equitable jurisdiction to confirm the 1975 priority date for the 200 acres that were developed during the authorized time of development under permit 37-7460.**

The Petitioner's assertion of a November 26, 1975 priority date for 37-7460 is based on development of 199.5 acres of ground water irrigation under Permit 37-7460. The Permit was issued to the Astorquias in 1975 and the 199.5 acres have been continuously irrigated by the Astorquias since 1976.

The priority date is an element of the water right that can be determined by the SRBA court. *See Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993). *See also*, SRBA record for subcases 61-02248B and 61-07189 (Batruel challenge to Magic West's 61-02248B and 61-07189) supporting decreed elements in conformance with water use during the authorized time of development under a permit prior to licensing.

The relevant actions affecting 37-7460 all occurred prior to the commencement of the SRBA on November 19, 1987, and included significant impacts from the Swan Falls litigation and settlement.

Subsequent to the Astorquias' application for and approval of Permit 37-7460 (10-20-75; 12-05-75), the Idaho Public Utilities Commission approved Idaho Power's irrigation embargo (IPUC Order 14595 of April 27, 1979) which was confirmed and extended by IPUC Order 15305 on February 1, 1980. The Astorquias' request for extension of time to submit proof of beneficial use was filed January 7, 1981 indicating that "well has been dug, and 200 acres are being irrigated" but "because of moratorium on new power hookups, I cannot get enough electrical power to pump water to the other 120 acres."

Although the Astorquias asked for a five-year extension of time (to December 1, 1985) to complete development of the additional acres, IDWR only granted a three-year extension to January 1, 1984. In the meantime, as a result of the November 9, 1982 Idaho Supreme Court decision holding that Idaho Power's water rights at Swan Falls were not subordinated to upstream development, Idaho Power filed a complaint in Ada County on March 30, 1983 against water rights in each of the 24 hydrologic basins upstream from Swan Falls Dam. The Astorquias' 37-7460 was named in the complaint and was not dismissed from the action until January 4, 1985, following the signing of the Swan Falls Agreement and Contract in October 1984.

Had the Astorquias request to IDWR for a five-year extension been granted, the permit would not have been subject to lapsing until after December 1, 1985. However, the permit was lapsed on January 4, 1984. Between January 4, 1984 when the Astorquia permit was lapsed and December 1, 1985, the date the Astorquias had requested as the new deadline, the following actions occurred:

- The IPUC rescinded approval of Idaho Power's irrigation embargo (IPUC Order 18641 on January 23, 1984).
- Framework for final resolution of Swan Falls was signed on October 1, 1984.
- Swan Falls Agreement and Swan Falls Contract were signed on October 25, 1984.
- The Astorquias 37-7460 was dismissed from the Idaho Power Swan Falls case in Ada County (Civil No. 81375) – January 4, 1985.
- IDWR sent a letter to all permit holders affected by the Swan Falls controversy regarding proof of beneficial use requirements that had changed due to legislation implementing the Swan Falls Agreement (September 1, 1985).

Understandably, this was confusing to the Astorquias. The Swan Falls proceeding indicated that 37-7460 was a valid right, even a year after IDWR had lapsed 37-7460. Also, IDWR records for neighboring ground water right 37-7465 (filed within six weeks of the Astorquias' permit application) show that 37-7465 was given the five-year extension that the Astorquias did not receive and also received the September 1, 1985 notice regarding changes in proof of beneficial use for permit holders. This information is included in the timeline in the IDWR record.

Further, these circumstances also resulted in a 29-year delay between the commencement of beneficial use under 37-7460 and IDWR's 2005 field exam. For this additional reason, the inch to the acre standard, and not something less, should apply to the rate of diversion for 37-7460 in accordance with its development in 1976.

- 2. The issue of the rate of diversion for 37-7460 should be remanded for consideration of information that became available after the March 2012 hearing but before the August 6, 2012 appeal deadline for IDWR's final order.**

The Preliminary Order in the third paragraph on Page 7 includes the following discussion:

"The design was for a deep well turbine pump driven by a 125 horsepower electric motor to lift water to the surface against 248 feet of total dynamic head. The Astorquias did not submit a pump curve, which might have contained additional useful information about the system design. The total dynamic head of 248 feet was likely estimated from a static water level in the well of 225 feet, plus a few feet of friction loss."

After the March 2012 hearing but before the August 6, 2012 appeal deadline, the Layne Pump Company provided to the Astorquias a copy of the pump curve for the

system as designed and constructed in 1976. This information was not available to the Astorquias, through no fault of their own, when this matter was heard. As suggested in the above quoted paragraph from the Preliminary Order, the pump curve does include useful information regarding the system design capacity (1700 gpm), the total dynamic head (235 feet) and the pump efficiency all of which information indicates a greater diversion capacity than recognized in the Preliminary Order.

3. IDWR's refusal to reinstate the original November 26, 1975, priority date for 37-7460 is arbitrary, capricious and an abuse of discretion

Petitioner continues to rely upon *Terrazas v. Blaine County ex rel. Bd. of Comm'rs*, 147 Idaho 193, 207 P.3d 169 (2009) as authority to determine that IDWR's refusal to reinstate the original November 26, 1975 priority date for 37-7460 is arbitrary, capricious and an abuse of discretion.

It is not disputed that the Astorquias were the only applicants for an extension in basin 37 who were granted less than the timeframe requested during the Swan Falls embargo; and upon counsel's information and belief, it is understood that this is true within the geographic area where pending ground water irrigation rights were affected by the Swan Falls embargo. IDWR Amended Preliminary Order, page 2 (item 4) and page 8 (lines 3 through 10). IDWR erroneously or mistakenly caused the entire water right permit No. 37-7460 to lapse when it is undisputed from the records contained in the IDWR file that 200 acres, out of the 320 acres authorized under the permit, had in fact been developed during the authorized time of development. The Astorquias, who were not aware their water right had been lapsed, discovered this different treatment only many

years later. The passage of time is not a bar to the verification of a valuable property right as exercised by the Astorquias since 1976.

As an example that the passage of time should not bar the establishment and verification of a valuable water right, this court is aware that Idaho Code § 42-1425 and Idaho Code § 42-1426 were passed by the Idaho legislature to allow water rights to be confirmed at the SRBA court even when those rights had been exercised without compliance with Idaho's mandatory transfer statute. Although water right 37-7460 does not involve a transfer issue, it has been exercised since 1976, similar to the "season of use" confirmed for Magic West's water right under § 42-1426. The Astorquias believe their continuous use begun during the authorized time of development under permit 37-7460 should be confirmed with the original 1975 priority date. The value of a 1975 priority date compared to the value of a 2002 priority date is evident from the subsequent delivery calls which have affected water right 37-7460. The substantial rights of the Petitioner have been prejudiced by the advancement of the priority date for 37-7460 from November 26, 1975 to July 3, 2002.

This is consistent with *Terrazas v. Blaine County ex rel. Bd. of Comm'rs*, 147 Idaho 193, 207 P.3d 169 (2009). There was no rational basis for IDWR's refusal to grant the five-year extension requested by the Astorquias. The IDWR action was arbitrary, capricious, and an abuse of discretion. Consequently, IDWR's refusal to reinstate the original November 26, 1975, priority date for 37-7460 also constitutes a violation of the Equal Protection Clauses of the United States Constitution, U.S. Const. amend. XIV, § 1, and Idaho Constitution, ID Const. art. 1, § 2, because there is no rational basis for the difference in treatment of similarly situated water users. IDWR's refusal to reinstate the

original November 26, 1975, priority date for 37-7460 also constitutes an unlawful taking without compensation under the United States Constitution, U.S. Const. amend. V, and Idaho Constitution, ID Const. art. 1, § 14.

RESPECTFULLY SUBMITTED this 17th day of January 2013.

Beeman & Associates
Attorneys for Frank Astorquia

By Josephine P. Beeman
Josephine P. Beeman

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of January 2013, the foregoing document was served upon the following by U.S. Mail, postage prepaid:

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Deputy Attorney General
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