IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

TANNER LANE RANCH, LLLP, an Idaho limited liability limited partnership, Petitioner, v. THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent.	**Case No. CV-2017-0458**
IN THE MATTER OF PERMIT NO. 27-7549 IN THE NAME OF TANNER LANE RANCH, LLLP	

PETITIONER'S BRIEF

Judicial Review of the *Amended Order Affirming Preliminary Order Voiding Permit*, entered by the Idaho Department of Water Resources;
Hearing Officer Jeff Peppersack, Chief of the Water Allocation Bureau, Presiding.

Robert L. Harris, ISB #7018
D. Andrew Rawlings, ISB #9569
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone: (208)523-0620
Facsimile: (208) 523-9518

Attorneys for Petitioner
Tanner Lane Ranch, LLLP

Garrick L. Baxter, ISB #6301
Emmi L. Blades, ISB #8682
IDAHO OFFICE OF THE ATTORNEY GENERAL
P.O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 208-6700

Attorneys for Respondent
Idaho Department of Water Resources

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Petitioner Tanner Lane Ranch, LLLP ("TLR"), by and through its attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits *Petitioner's Brief.*

I. STATEMENT OF THE CASE.

A. Nature of the Case.

Under now-defunct policies of the Idaho Department of Water Resources (the "Department") concerning extensions for submitting proof of beneficial use, proof for Permit No. 27-7549 ("27-7549") was ultimately due by May 1, 1994. Yet, because of the Department's many duties, it did not conduct a field examination of 27-7549 until November 1999. At that time, although 27-7549 was not completely developed, the examiner did not express concerns to TLR, but indicated he would hold the field examination open and explicitly encouraged TLR to continue developing 27-7549. Accordingly, in the intervening years, TLR has spent an additional $300,000–$400,000 developing 27-7549.

Only **fourteen years later** has the Department, without ever actually completing the field examination, done what it could have done in 1999—**before TLR had invested hundreds of thousands of dollars**—and taken action to void 27-7549. The *Amended Order Affirming Preliminary Order Voiding Permit* (the "*Final Order*"), dated February 1, 2017, issued by Jeff Peppersack, the Department's hearing officer, ignores the statutory requirement of a completed field examination, reconstructs the historical development of 27-7549 based on inference, and reflects an agency unwilling to accept that it is barred from voiding 27-7549 fourteen years too late under the equitable principles of estoppel and laches. For these reasons, the *Final Order* is erroneous and, because it has prejudiced TLR's substantial rights, must be corrected by this Court.

B. Statement of Facts.

On September 3, 1991, James S. Johnston ("Johnston") and Paul Fankhauser ("Fankhauser") filed an *Application for Permit* with the Department, seeking a permit to divert 9.60 cfs from ground water for irrigation of 480 acres near Blackfoot, Idaho. Agency's Record Exhibits ("Ex.") at 5-8 (Exhibit 105). The application was approved by the Department and 27-7549 was issued on April 7, 1992. Ex. at 9-10 (Exhibit 106). 27-7549 authorized the construction of two ground water wells, one located in the NENE of Section 33, T02S., R36E., and one located in the SENW of the same section. Ex. at 9 (Exhibit 106). The entire 480-acre place of use was located within Section 33, T02S., R36E. Ex. at 9 (Exhibit 106). Proof of beneficial use was due on or before May 3, 1993. *See* Ex. at 5 (Exhibit 105).

On February 10, 1993, Johnston and Fankhauser filed a *Request for Extension of Time* in which to provide proof of beneficial use. Ex. at 14 (Exhibit 108). The request indicated that three phase power had not been brought to the property but the land had been cleared and leveled. Ex. at 14 (Exhibit 108). Johnston and Fankhauser sought a one-year extension. Ex. at 14 (Exhibit 108). The request was approved and the deadline for filing proof of beneficial use was extended to May 1, 1994. *See* Agency's Record ("A.R.") at 37; *see also* A.R. at 50.

On July 16, 1993, Johnston filed an *Application for Amendment of a Permit*, seeking to change the points of diversion and place of use for 27-7549. Ex. at 11-12 (Exhibit 107). The amendment was approved by the Department on August 23, 1993. Ex. at 12-13 (Exhibit 107). The amended points of diversion were located in the NENE of Section 34, T02S., R36E. and the SENW of Section 26, T02S., R36E. Ex. at 11 (Exhibit 107). The amended place of use was 480

acres, located within Sections 26 and 27, T02S, R36E (the "Farmground"). Ex. at 11 (Exhibit 107).

On April 29, 1994, Johnston and Chris Drakos ("Drakos") filed another *Request for Extension of Time*, seeking a five-month extension for the proof due date. Ex. at 18 (Exhibit 112). The request stated that power would not be brought to the property until August 1994. Ex. at 18 (Exhibit 112). This *Request for Extension of Time* was denied by the Department in a letter dated May 24, 1994 (already after proof of beneficial use was due). A.R. at 37. The Department stated that it was not authorized to grant a second extension of time. A.R. at 37; *see also* A.R. at 36. The deadline for filing proof of beneficial use remained set as May 1, 1994. A.R. at 37. The Department's position for granting extensions of time at this time is different than the Department's position today, which generally allows for multiple extensions of time to be granted up to a maximum development period of ten (10) years. Had the Department then followed the Department's policy now and allowed extensions up to a maximum of ten (10) years, the latest proof of beneficial use due date could have been May 3, 2003.

Johnston and Drakos filed proof of beneficial use for Permit 27-7549 on June 17, 1994—47 days after proof was due. Ex. at 20 (Exhibit 114). The proof of beneficial use included an affirmation that the permit holders had completed all development that would occur under the permit. Ex. at 20 (Exhibit 114). Both understood that development was complete if the wells were drilled and available for diversion of water. Hearing Transcript ("Tr.") at p. 65, ll. 21-25.

On August 11, 1994, the Department received an assignment of permit stating that Johnston had assigned his interest in 27-7549 to Lambert Produce, Inc. (of which Drakos was president).

Ex. at 17 (Exhibit 111). The assignment did not discuss Fankhauser's interest in the permit. Ex. at 17 (Exhibit 111). On May 17, 2007, Fankhauser sent a letter to the Department stating that he did not have a property interest in any pending applications within the Eastern Snake Plain Aquifer. A.R. at 86. The Department responded to Fankhauser, noting that he would be removed as a co-owner of 27-7549. A.R. at 89. In April 2014, the Department processed another assignment of permit, wherein ownership of 27-7549 was conveyed by Lambert Produce, Inc. to TLR. A.R. at 111. TLR is now the sole owner of 27-7549. A.R. at 114; *see also* A.R. at 89.

Department records include well driller's reports for the two wells drilled for 27-7549. A.R. at 25-26, 34-35. According to the well driller's reports, the first well (located in the SWSE of Section 27, T02S, R36E) was completed on April 28, 1994, and the second well (located in the NENE of Section 34, T02S, R36E) was completed on May 25, 1994.[1] A.R. at 25-26, 34-35. On June 2 and 3, 1994, Agricultural Services, Inc. conducted pump tests for the two ground water wells. A.R. at 32-33. Each well produced 5,000 gallons per minute within 6 hours of beginning the pump tests. A.R. at 32-33. In combination, the wells could produce 10,000 gallons per minute (22.30 cfs) under open discharge pumping conditions. A.R. at 32-33. Because these pump tests were conducted within months of the completion of the wells, they provide persuasive evidence

[1] The date the second well was completed, May 25, 1994, was—as noted by one Department hearing officer—after the proof of beneficial use was due (May 1, 1994). A.R. at 122. However, this fact is not as probative as that hearing officer indicated because of the timing of all of the relevant events. Work began on this second well on April 13, 1994. A.R. at 35. On April 29, 1994, when it became apparent that this second well would not be ready by the proof due date, Johnston and Drakos sought a second extension (for five months). Ex. at 18 (Exhibit 112). The letter, wherein the Department denied this second extension is dated May 24, 1994. A.R. at 37. It is almost a certainty that Johnston and Drakos did not receive this letter by the next day (when the second well was completed). They were proceeding under the assumption that their requested extension would be granted (which, under current Department policies, it would have been).

of the capacity of the wells that were constructed near the time of the proof due date. The water right file for 27-7549 includes a copy of a letter from Idaho Power Company to Drakos stating that the Farmground will not be supplied power until after July 1, 1994. A.R. at 39. The pump tests from June 1994 were conducted with portable diesel or propane powered pumps. Tr. at p. 38, l. 16—p. 39, l. 6.

On November 4, 1999, the Department attempted to conduct a field exam for 27-7549. Ex. at 37 (Exhibit 122); *see also* A.R. at 80. The examiner, Department employee Keith Wilson (the "Examiner"), summarized what he found in a Beneficial Use Field Report and took photographs of what was present, both of which are available in the Department's files. Ex. at 37-42 (Exhibit 122); *see also* A.R. at 80-85. There is no documentation from the Beneficial Use Field Report of any measurements or other analysis performed by the Department of the place of use. *See* Ex. at 37-42 (Exhibit 122). However, based on a subsequent letter, it appears that measurements were taken but later discarded. A.R. at 79.

During the field visit, the Examiner did not inform TLR's representative, Drakos, of any concerns with the development of 27-7549. Tr. at p. 48, l. 16—p. 49, l. 12. Drakos recalls that the Examiner encouraged him to continue further work on the wells and development of the water right permit, and that the Examiner would come back when the system was up to capacity. Tr. at p. 49, ll. 12-14; *see also* A.R. at 79. The Examiner never indicated that there was any problem or concern with the place or use or any lack of completed irrigation infrastructure on the property. Tr. at p. 48, l. 16—p. 49, l. 14.

On July 27, 2000, the Examiner sent a letter to Drakos confirming that the measurements

collected in November 1999 were unreliable. A.R. at 79. The Examiner's letter stated that the Department would conduct another field exam once Drakos (TLR) installed permanent electric or diesel pumps. A.R. at 79. The letter did not inform Drakos of any Department concerns with bringing the system up to capacity or raise any problems with the wells or need to further irrigate the place of use in order to demonstrate development of the permit. A.R. at 79.

Relying upon the Department's position as explained by the Examiner, Drakos (and TLR) had electrical power run to the wells and center pivots, installed center pivots, and engaged in other expensive measures to develop the Farmground. Tr. at p. 54, ll. 2-10. These costs totaled approximately three to four hundred thousand dollars ($300,000.00-$400,000.00). A.R. at 141 (noting that in a finding submitted by TLR, uncontested by the Department until the drafting of the order, included this figure); Tr. at p. 54, ll. 19-24 (just running the power lines cost more than $200,000). Contrary to the Examiner's representation, the Department never completed an actual in-person follow-up field exam once the "system was up to capacity." A.R. at 79.; *see also* A.R. at 109 (a Department memo noting the "[p]artial field exam conducted in November 1999").

Aerial photography indicates that center pivots were not installed at the Farmground until after 2004. A.R. at 91-97. The installation of the pivots occurred after the deadline for proof of beneficial use. This additional development (and its associated costs) would have been avoided if the Department had been diligent in completing its licensing review of 27-7549 or informed TLR that it could not engage in any further actions to develop the irrigation infrastructure. A.R. at 123 (finding that "[t]his additional development (and its associated costs) may have been avoided if the Department had been diligent in completing its licensing review of Permit 27-7549").

C. Course of Proceedings.

In 2013, the Department initiated a review of 27-7549 to determine the extent of beneficial use occurring under the permit (the "2013 Review"). A.R. at 90, 135 (¶ 16). The Department determined that limited beneficial use had occurred during the authorized development period (*i.e.*, April 7, 1992—May 1, 1994). A.R. at 115-17. The 2013 Review concluded that only one ground water well was completed prior to May 1, 1994,[2] and that well was not test pumped by Agricultural Services, Inc. until early June 1994. A.R. at 115-17. Using satellite imagery and aerial photography from the 1990s and early 2000s, the Department determined that, at most, only 25 acres were flood irrigated from the well located in the SWSE of Section 27 (the first well). A.R. at 115. Thus, as a result of this 2013 Review, the Department concluded that TLR was irrigating more acres than were authorized under its existing water rights. A.R. at 115.

On February 13, 2014, the Department sent a draft license to TLR's attorney to review. A.R. at 101-03. The draft license proposed a diversion rate of 0.50 cfs and the irrigation of 25 acres. A.R. at 102. Because the ground water well was developed in a different location than was listed on the 1993 Amended Permit, another amendment would be required before a license for 27-7549 could be issued. *See* A.R. at 104-05. The Department included an application for amendment for TLR to sign if the draft license was acceptable. A.R. at 104-05. TLR refused to sign the amendment. On July 15, 2014, the Department issued a Notice of Violation (denoted E2014-656) to TLR under Idaho Code § 42-351. A.R. at 115-17. As part of that proceeding, the

[2] *See* Footnote 1, *supra*, regarding why this fact, while literally true, does not have the relevant impact claimed by the Department.

Department notified TLR that water right 27-7549 would be reduced significantly in accordance with the 2013 Review. A.R. at 115-16.

To settle Notice of Violation E2014-656, the Department and TLR signed an Amended Consent Order and Agreement (dated December 17, 2014). A.R. at 118-20. This agreement included the following: "The Department agrees to not issue an order to void [27-7549] . . . until after December 31, 2014" and "If TLR does not want [27-7549] to be voided, TLR must have a signed amendment for licensing submitted and the fee paid by December 31, 2014." A.R. at 119-20. The amendment for licensing purposes and the associated filing fee were not provided by TLR by December 31, 2014.

On January 2, 2015, the Department issued a *Preliminary Order Voiding Permit*, which proposed to void 27-7549. A.R. at 121-27. On January 16, 2015, TLR filed its *Protest and Petition for Hearing*. A.R. at 129-32. On February 18, 2015, the Department held a pre-hearing status conference, and agreed that there was no need for a formal hearing, as only TLR would present evidence at any such hearing; but instead, TLR would submit proposed findings of fact, based on which the hearing officer would issue a decision. *See* A.R. at 208. On March 20, 2015, TLR submitted Proposed Findings of Fact to the Department. *See* A.R. at 208. On August 31, 2015, the hearing officer issued an *Order Affirming Preliminary Order Voiding Permit*. A.R. at 133-48.

On September 14, 2015, TLR submitted a motion for reconsideration (titled *Petitioner's Exceptions to Order Affirming Preliminary Order Voiding Permit*), which was denied by the hearing officer on October 5, 2015. A.R. at 149-71, 174-80. On October 19, 2015, TLR filed *Petitioner's Exceptions to Order Affirming Preliminary Order Voiding Permit*, appealing the

preliminary order to the Director of the Idaho Department of Water Resources (the "Director"). A.R. at 181-207.

On December 14, 2015, the Director issued an *Order Granting Exceptions in Part and Remanding for Evidentiary Hearing*. A.R. at 208-11. On November 30, 2016, the Department conducted a hearing, where the hearing officer took official notice of the Department's file for Permit 27-7549. A.R. at 223; Tr. at p. 4, ll. 3-21; Tr. at p. 5, ll. 19-23. On December 16, 2016, TLR filed *Petitioner's Post-Hearing Brief*, A.R. at 225-50, as allowed by the hearing officer. Tr. at p. 5, ll. 1-18. On February 2, 2017, the hearing officer issued the *Final Order*, as a preliminary order. A.R. at 251-266. The *Final Order* ripened and became final after fourteen days. IDAPA 37.01.01.730.02.b. TLR filed its *Notice of Appeal and Petition for Judicial Review of Final Agency Action* on March 9, 2017. *See* A.R. at 267-79.

II. ISSUES PRESENTED ON APPEAL.

A. Whether the Department's *Final Order* and the orders thereby affirmed were made in violation of constitutional or statutory provisions.

B. Whether the Department's *Final Order* and the orders thereby affirmed were made upon unlawful procedure.

C. Whether the Department's *Final Order* and the orders thereby affirmed were made without the support of substantial evidence on the record as a whole.

D. Whether the Department's *Final Order* and the orders thereby affirmed were arbitrary, capricious, or an abuse of discretion.

E. Whether the Department's actions prejudiced a substantial right of TLR.

F. Whether the Department is mandated by statute to perform an actual in-person field examination as part of the water right licensing process.

G. Whether in performing the field examination, the Department is required to take the system as it finds it, even if post-proof development occurred between the time proof was submitted and the time the in-person field exam is performed.

H. Whether the Department in barred from voiding 27-7549 because of equitable principles, specifically promissory estoppel, equitable estoppel, quasi-estoppel, and/or laches.

III. LEGAL STANDARD.

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedures Act (Idaho Code § 67-5201, *et seq.*, hereinafter the "Act"). Idaho Code § 42-1701A. Under the Act, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). Here, where the agency "was required ... to issue an order," the Court must affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of 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); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. Further, the party challenging the decision must also show that at least one of its substantial rights have been prejudiced. Idaho Code § 67-5279(4).

IV. ARGUMENT.

The task of determining the extent of beneficial use occurring during the authorized development period is complicated by the facts that the development period of 27-7549 ended many years ago and no field examination was timely conducted and also because the property is operated very differently today than it was in 1994. It is never a permit holder's burden to perform the field examination or to prove development of the permit. It is the Department's responsibility to conduct a field examination and document the extent of beneficial use as set forth under Idaho law. The Department has never completed its field examination of 27-7549. The field examination validates the licensing process and, thus, the Department is bound by what it finds in the completed field examination. Further, the Department's fourteen-year-long delay coupled with TLR's expenditure of hundreds of thousands of dollars during that time (induced by the encouragement of the Examiner) requires that equity bar the Department from pulling the rug out from under TLR after such a long delay and such extreme and costly reliance; specifically, the application of the doctrines of estoppel and laches should restrain the Department from now voiding 27-7549.

A. The Department's attempt to void 27-7549 without a complete field examination violates Idaho Code §§ 42-217 and 42-219 and the 2013 Review ignores the statutorily-mandated role of the field examination in the licensing process.

The Department failed to comply with the Idaho Code's requirements to conduct, and complete, a field examination and—based on what it finds during that field examination, to make

a licensing decision based on the evidence generated by the field examination.

1. By statute, the Department must perform a field examination to complete the licensing process for 27-7549, which it has not done.

A statute must always be construed in accordance with its plain and ordinary meaning. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011). "An unambiguous statute would have only one reasonable interpretation," which is then applied by courts and administrative agencies. *Id.* at 896, 265 P.3d at 509. Thus, "[t]he interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, [even the Idaho Supreme] Court does not construe it, but simply follows the law as written." *Id.* at 893, 265 P.3d at 506 (citation and internal quotation marks omitted). Even if a statute yields an absurd result, a court (and an administrative agency) is without authority to alter the statute, but must apply it as written. *See id.* at 894-96, 265 P.3d at 507-09.

For this reason, when the Idaho Supreme Court has imbued a statutory term with a specific definition, that definition always applies. Relevant here, the Idaho Supreme Court has "repeatedly construed the word 'shall' as being mandatory, not discretionary." *State v. Tribe*, 123 Idaho 721, 726, 852 P.2d 87, 92 (1993) (citations omitted); *Roesch v. Klemann*, 155 Idaho 175, 178, 307 P.3d 192, 195 (2013) ("This Court has held that the words 'must' and 'shall,' when used in a statute, indicate that the language is mandatory" (citations omitted)); *Twin Falls Cnty. v. Idaho Com'n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012) ("That statute contains mandatory

provisions and advisory provisions. The words 'must' and 'shall' are mandatory, and the word 'should' is not" (internal citations omitted)).

Some duties of the Department in relation to administering water rights are discretionary, while certain others are mandatory. As relevant here, Idaho Code § 42-217 provides:

> Upon receipt of such proof and the fee as required in section 42-221, Idaho Code, by **the department of water resources the department <u>shall</u> examine, or cause to be examined**:
>
> 1. The place where such water is diverted and used, and, if the use is for irrigation, he shall ascertain the area and location of the land irrigated and the nature of all the improvements which have been made as a direct result of such use.
> 2. The capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which has been beneficially applied for irrigation or other purposes.
>
> The department or the person making such examination under the direction of the department **<u>shall</u> prepare and file a report of the investigation.**

Idaho Code § 42-217 (emphasis added). Thus, the Department has the mandatory duty (1) to go to the location and investigate the beneficial use of a water right (the field examination, *see* IDAPA 37.03.02.010.11) and (2) to prepare and file a report of the investigation (the field report, *see* IDAPA 37.03.02.010.13). *See* Idaho Code § 42-217. Further, the **field report must be submitted before a licensing decision is made**, because it is only "[u]pon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same," and make a licensing decision. Idaho Code § 42-219(1). Making a licensing decision without the statutorily-mandated field report—as the Department has done

here—violates the requirement of § 42-219 to consider the evidence obtained in a field examination. *See* Idaho Code § 42-219(1); see also IDAPA 37.03.02.010.11 (defining the field examination as "[a]n **on-site** inspection or investigation to determine the extent of application of water to beneficial use and to determine compliance with terms and conditions of the water right permit" (emphasis added)). Since 1993, the Department's Beneficial Use Examination Rules have required that "[a]ll items of the field report **must** be completed and **must** provide sufficient information for the Director to determine the extent of the water right developed in order for the report to be acceptable to the Director." IDAPA 37.03.02.035.01.a (emphasis added); see also IDAPA 37.03.02.035.01.b—r (listing other requirements of a field report).

Here, the only in-person on-site action undertaken by the Department occurred on November 4, 1999, when the Examiner visited the property. At that time, the Examiner directed TLR to get electrical power and the remaining infrastructure in place because it would "be in [the applicant's] best interest to re-measure the system when the system is up to capacity." Ex. at 36 (Exhibit 121); see Ex. at 39 (Exhibit 122) (describing how the Examiner would "check bank when system pumps are repaired"); *see also* Section IV.B., *infra* (further discussing the implications of these statements). While avoiding the term "incomplete," the *Final Order* notes the items not included in the Examiner's partial field report. A.R. at 253 (¶¶ 15-16). As a field report that is not "completed," it cannot "be acceptable to the Director." IDAPA 37.03.02.035.01.a.

Since then, the Department has not conducted another field examination. A.R. at 254 (even the *Final Order* notes that "[t]he Department has not completed a follow-up field exam"). Nor has the Department ever finalized and filed a field report. This non-action is contrary to the

mandatory language (employing "shall") of Idaho Code § 42-217. Nevertheless, despite this deficiency, the Department proceeded to void 27-7549—without a complete field exam, which is required to assemble and investigate such issues pursuant to Idaho Code § 42-219(1). The Idaho Supreme Court has explained that a "permit is a valuable property right and **can only be revoked as provided by statute**." *Grover v. Idaho Public Utilities Com'n*, 83 Idaho 351, 356, 364 P.2d 167, 170 (1961) (emphasis added); *see also Hardy v. Higginson*, 123 Idaho 485, 490-91, 849 P.2d 946, 951-52 (1993) (noting that, while a water right permit is an inchoate or contingent right that is not real property, it is still a right that may ripen into a vested real property interest). As a result, the Department's exercise of this power to void a permit is being applied in violation of statutory provisions (specifically, Idaho Code §§ 42-217 and 42-219(1)); upon unlawful procedure, which requires a completed field examination and field report to contain "all the evidence in relation to such final proof," Idaho Code § 42-219(1); without the support of substantial evidence on the record, which must be investigated and assembled in a field exam report; and is arbitrary, capricious, and is an abuse of discretion. *See* Idaho Code § 67-5279(3).

2. <u>In performing the mandatory field examination, the Department must take the extant irrigation system as the Department finds it upon examination, even if post-proof development has occurred.</u>

Additionally, in terms of what the Department is to document during a field exam visit, the Department must take the permit holder's system as it finds it when the field exam is actually performed. This requirement is supported from the statutory language of Idaho Code § 42-217 and the Department's own Beneficial Use Examination Rules found at IDAPA 37.03.02.

There should be concern with what the Department's process for licensing water rights is evolving into. Evidence of this evolved and problematic process is elucidated from the proceedings in another contested case involving a separate permit that the Department voided, Water Right No. 27-7114, a matter in which counsel for TLR was involved. In that matter, the Department informed the permit holder of its intent to void a water right permit—which the Department eventually did—where proof of beneficial use was submitted in 1980. On August 4, 2008—28 years after proof of beneficial use was submitted—the Department sent the permit holder a letter explaining its findings that no additional beneficial use was developed even after a field examiner from the Department's Eastern Region performed a field exam and recommended licensing of the permit. Instead, after ignoring the field exam, the Department sent a letter in 2008 to the permit holder with the following language:

> If you believe a water right license should be issued to you, please supply information to demonstrate that you established a beneficial use of water by July 9, 1980, in accordance with permit 22-7114 above and beyond uses authorized by existing water rights. If I do not receive the requested information from you within thirty (30) days, I will take action to void your permit under the provision of Section 42-219(8), Idaho Code. If you agree that no beneficial use of water occurred under permit 22-7114, you can shorten the voiding process by completing the enclosed relinquishment form and returning it to IDWR.
>
> If you have any questions, please contact me at (208) 287-4943.
>
> Respectfully,
>
> Aaron Marshall
> Sr. Water Resource Agent
>
> Enclosure(s)

Letter from Aaron Marshall to Steveco Canyon Farms, August 4, 2008, *available at* http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/dbjs01_.pdf.

The approach taken in the Steveco permit matter (27-7114) is consistent with approach taken with TLR's 27-7549, which is that the Department is shifting responsibility to the permit holder to provide evidence of what development took place under the permit during the development period, or that evidence of what was developed is obtained by means other than a field examination. The Department's responsibility to conduct a field exam is a responsibility of the Department that cannot be delegated. There is no language in the water right licensing statutes that allow, or even suggest, that the Department can delegate the important responsibility of obtaining information from a field examination to any other private entity or individual or to another process—such as requiring the permit holder to submit evidence of development. Absent such a statutory right, an administrative agency cannot delegate these responsibilities to another person or process. "An administrative agency is limited to the power and authority granted it by the legislature. Such delegated authority is primary and exclusive in the absence of a clearly manifested expression to the contrary. An agency must exercise any authority granted by statute within the framework of that statutory grant." *Roberts v. Reed*, 121 Idaho 727, 827 P.2d 1178 (Ct. App. 1991); *see Application of N. Jersey Dist. Water Supply Comm'n,* 417 A.2d 1095, 1115-16 (N.J. 1980) ("'[A] power or duty delegated by statute to an administrative agency cannot be subdelegated in the absence of any indication that the Legislature so intends.' This is especially true when the agency attempts to subdelegate to a private person or entity, since such person or entity is not subject to public accountability" (citations omitted)); *see also* 73 C.J.S. PUBLIC ADMINISTRATIVE LAW AND PROCEDURE § 160 ("In the absence of a statute or organic act

permitting it, administrative bodies and officers cannot delegate powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment.").

Rather than procuring the necessary licensing information through a field examination, for which TLR paid the required fee,[3] the Department has now adopted a more office-centric approach wherein aerial photos or other web-based information is reviewed many years after a proof is submitted, or information proving what was developed is demanded of the permit holder prior to voiding the permit. The better—and statutorily-mandated—approach to avoid the licensing of post-proof development in a water right is for the Department to conduct a prompt field exam after proof of beneficial use is received. It is unknown why the Department did not follow through with a field examination for 27-7549, particularly with evidence clearly in the Department's files that the permit was not fully developed. Perhaps it was intentional, but more than likely, it was because the Department was faced with numerous other tasks at the time, such as processing SRBA water right claims, and as a result, licensing examinations for permits where proof was submitted were given a low priority within the Department for the past 30 years or so.

However, the Petitioner should not now be subject a non-statutory licensing process that does not require a field examination because of circumstances beyond the Petitioner's control—

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[3] The field report may either be submitted by the water user, if prepared by a "certified water right examiner," or it will be generated by the Department after the water users has paid the required "fee." Idaho Code § 42-217; *see also* IDAPA 37.03.02.035.02.a ("All field reports shall be prepared by or under the supervision of certified water right examiners or authorized department employees"). The water user's responsibility is to ensure "the timely submission of a completed field report ... by either paying the required examination fee to the [D]epartment or by employing a certified water right examiner." IDAPA 37.03.02.025.02. Where—as here—the water user has submitted the statutorily required proof of beneficial use and paid the fee, both the statutes and the Department's rules place the onus of the field examination on the Department. That function cannot thereafter be sub-delegated by the Department.

i.e., the Department 's failure to perform the field examination in a timely manner. This is particularly true when, by letter, the Department informed the permit holder in 1994 that it would conduct the field exam. Ex. at 21-22 (Exhibit 115).

Similarly, because the necessary information to license a water right is obtained during a field examination (measurements and photographs are taken, pump descriptions are recorded, irrigated acres are identified, etc.—*see* IDAPA 35.03.02.035.01), the Department must take the system as it finds it when it performs the field examination because any delay in performing the field examination should not be held against the permit holder. Timeliness is required of a water user. *See* IDAPA 37.03.02.055; *see also* IDAPA 37.03.02.035.02.c. Following the statute and basing decisions on licensing on a discrete event—the performance of the field examination—regardless of whether the water user's certified water right examiner or the Department's authorized employee performs the field examination creates certainty for both the permit holder and the Department. The permit holder should not be required to prove what the permit holder developed prior to proof of beneficial use being submitted, particularly with the passage of time in the decades occurring after proof is submitted. Nor should the Department be permitted to make decisions on licensing of a water right without actually performing a field examination. Such actions are contrary to statute and public policy as they introduce significant uncertainty into the water right permitting process and delegate the Department's duties to the individual permit holder.

The Department's duty to perform a field examination in order to complete the licensing process for 27-7549 is mandated by statute, which it has not done in association with this

proceeding to void 27-7549. In performing the field examination, the Department must take the system as it finds it, even if post-proof development has occurred between the time proof was submitted and the field exam is performed. It is TLR's position that if the Department conducts a field examination, it will find that development of the entire permit has occurred under 27-7549 which must be recognized by issuance of a water right license.

B. Given the unique facts of this case, the Department cannot void 27-7549 because of the equitable application of estoppel and/or laches.

"In its broadest and most general signification, equity denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men—the rule of doing to all others as we desire them to do to us." *Climax, LLC v. Snake River Oncology of E. Idaho, PLLC*, 149 Idaho 791, 796, 241 P.3d 964, 969 (2010) (citation omitted). "Equity should create justice for all parties, and is intended to be flexible rather than to adhere to mechanical rules." *Id.* (internal citations omitted). "Equity not only permits courts to analyze all the relevant facts, it also permits courts to consider any equitable remedy." *Id.* at 797, 241 P.3d at 970.

Here, equity demands that the Department be restrained from its efforts to void 27-7549. The Department is bound by the actions, representations, and statements of the Department, particularly those of its agent, Examiner Keith Wilson, in his interactions with TLR during 1999.[4]

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[4] It is worth noting that, at law, "[e]xcept as otherwise provided in this act, **every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties.**" Idaho Code § 6-903(1) (emphasis added); *see also* Idaho Code § 6-904—6-904B (listing exceptions, none of which would apply here). It is difficult to imagine how the Department could be bound by and held liable at law for the actions of its agent, Examiner, and escape the corollary binding effect in equity, together with the consequent application of equitable doctrines such as estoppel and laches. TLR believes that, rather than asserting a legal claim for damages caused by the Department, which it has not yet done, the equitable remedies it requests herein are better suited to address the issues at hand.

See Jones v. City of St. Maries, 111 Idaho 733, 739, 727 P.2d 1161, 1167 (1986) ("Government officials are liable for the negligent performance of their ministerial duties" (citation omitted)). Idaho law has long provided:

> In cases of public agents, the government or other public authority is not bound **unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act**, or is employed in his capacity as a public agent to make the declaration on representation for the government.

Buhl Highway Dist. v. Allred, 41 Idaho 54, ___, 238 P. 298, 302 (1925) (citation omitted, emphasis added).

The following evidence demonstrates that the Department had actual or constructive knowledge of what Drakos was doing under his permit after the proof due date of May 1, 1994:

1. The Letter dated June 13, 1994, from Drakos and Johnston to the Department, informing the Department that the wells had been drilled, but there was no power to the pumps and motors. Ex. at 19 (Exhibit 113).
2. The Department's records include well driller's reports for the two wells drilled under Permit No. 27-7549. A.R. at 25-26. According to the well driller's reports, the west well was completed on April 28, 1994, and the east well was completed on May 25, 1994, which was after the proof due date. Ex. at 23-24 (Exhibits 116 and 117). Both well driller's reports were submitted to the Department in May and June of 1994, shortly after the wells were drilled. Ex. at 23-24 (Exhibits 116 and 117). Department Agent James Cefalo relied upon these records in his decision as evidence of post-proof development in order to void 27-7549. A.R. at 122.
3. Letter from the Department to Drakos stating that the "next step in the process of developing a water right is for the department to conduct a field examination to confirm the use being made of the water." Ex. at 21-22 (Exhibit 115).
4. Paragraph E of the Examiner's partial field report with statement to "check back when system pumps are repaired." Ex. at 39 (Exhibit 122).
5. Photographs of property and wells during November 4, 1999 partial field examination show no irrigation system or evidence of irrigation. Ex. at 41-42 (Exhibit 122).

6. Letter from the Examiner to Chris Drakos, dated July 27, 2000, with the statement that "I felt that it would be in your best interest to re-measure the system when the system was up to capacity." Ex. at 36 (Exhibit 121).
7. Neither the Examiner, nor any other Department representative, either verbally or by letter informed Drakos of any Department concerns with bringing the system up to capacity, specifically, that there were any problems with the wells or need to further irrigate the place of use in order to demonstrate development of the permit. The Examiner did not tell Drakos that 27-7549 could no longer be developed. Tr. at p. 48, l. 16—p. 49, l. 12.
8. Letter from Keith Wilson to Rob Harris, dated May 20, 2013, which was consistent with Exhibit 121 letter dated July 27, 2000. Ex. at 43-47 (Exhibit 123).

With specific regard to the Examiner's actions, the Department is bound by the Examiner's statements to TLR. By virtue of Examiner's role in conducting the field examination of 27-7549, it is inferable that the Director had "authorize[d]" Examiner to do so, as a "sufficiently knowledgeable and experienced [D]epartment employee[]" to conduct field examinations. IDAPA 37.03.02.030.08. The Department is bound because the Examiner was acting within the scope of his authority in conducting the field examination of 27-7549 and, in any case, manifestly appeared to act within the authority granted to him by the Department, and was held out by the Department as having authority, to confirm the beneficial use of 27-7549. As a result, the Department is bound by the Examiner's statements for purposes of equitably applying estoppel and laches.

1. Promissory estoppel, equitable estoppel, and/or quasi-estoppel bar the Department from voiding 27-7549.

Estoppel may apply against a government agency, as long as each of the elements of the estoppel doctrine advocated by the private person can be proved. *See Willig v. State, Dept. of Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995) (considering equitable estoppel and quasi-estoppel against the Idaho Department of Health and Welfare). It has, despite more

recent equivocation by the Idaho courts, been long-standing precedent in Idaho that "the state may properly be estopped from taking conflicting positions at different times without just reason." *State v. Twin Falls-Salmon River Land & Water Co.*, 30 Idaho 41, ___, 166 P. 220, 230 (1916) (concluding that "[t]here is clearly an equitable estoppel against the state which arises out of its conduct in this matter"). Under circumstances such as those presented in this case, estoppel must be applied against the government "with caution and only in exceptional cases [with recognition] that its application is the exception and not the rule." *Naranjo v. Idaho Dep't of Correction*, 151 Idaho 916, 919-20, 265 P.3d 529, 532-33 (Ct. App. 2011) (quoting *Boise City v. Sinsel*, 72 Idaho 329, 338, 241 P.2d 173, 179 (1952)) (brackets in original); *see also City of Nampa v. Swayne*, 97 Idaho 530, 534, 547 P.2d 1135, 1139 (1976) (same).

In fact, estoppel may be one of the few tools available to a party to "prevent [a governmental entity] from taking a position inconsistent with previous actions, in order to prevent manifest injustice." *See City of Sandpoint v. Sandpoint Ind. Hwy. Dist.*, 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994) (analyzing the City of Sandpoint's claims of estoppel against the Highway District, another governmental entity). In fact, estoppel needs to "apply [against a governmental entity] where required by notions of justice and fair play." *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 723, 302 P.3d 341, 348 (2012) (citation omitted). Thus, "[t]he application of equitable estoppel [against the government] is dependent upon a case by case analysis of the equities involved and this Court cannot and will not adopt a rigid standard." *Swayne*, 97 Idaho at 531, 547 P.2d at 1139. For that reason, an initial inquiry into the application of estoppel against

the Department must first determine that extraordinary circumstances exist, warranting the equitable bar of estoppel. *See Naranjo*, 151 Idaho at 919-20, 265 P.3d at 532-33.

Here, the Department's failure to perform the statutorily-required actions (conducting the field examination, filing the field report, etc.); the property right at stake (a valuable water right); and the sums expended by TLR based on the Examiner's statements (approximately $300,000–$400,000) render the circumstances of this case extraordinary and justify the application of the doctrines of estoppel against the Department. Further, the extraordinary application of estoppel in this case is justified by the strict penalties the Department would impose on a water user who had been dilatory—meaning a 14-month delay, *see* IDAPA 37.03.02.055, rather than a 17-year delay as the Department caused here. Where proof have been submitted, but a water user otherwise procrastinates, the priority date of the permit is advanced for the first 60 days of delay, IDAPA 37.03.02.055.01.a, and then one year later, the Department has "cause ... to reject the proof of beneficial use and lapse the permit." IDAPA 37.03.02.055.01.b. This has been the case since 1993. *Id.* In other words, if TLR had delayed 14 months in either submitting an adequate field report or paying the fee (which, to be clear, TLR did not do)—let alone a 5½-year delay before completing a partial field report and a 17-year delay without completing the field report, as the Department has done with 27-7549—the Department would have been justified in voiding 27-7549. *See* IDAPA 37.03.02.055.01. Here, where the shoe is on the other foot and the Department has procrastinated; it unjustly appears that time limits are of no concern to the Department. The unjust lack of mutuality as to these issues further justifies the extraordinary application of laches against the Department.

The three varieties of estoppel presented below—promissory, equitable, and quasi-estoppel—are each an alternative to the others; the success of any one doctrine is sufficient to estop the Department without regard of the validity of the other varieties of estoppel.

a. The Department is estopped from voiding 27-7549 by the doctrine of promissory estoppel.

"In order to demonstrate promissory estoppel, three elements must be met: (1) the detriment suffered in reliance was substantial in an economic sense; (2) substantial loss to the promisee acting in reliance was or should have been foreseeable by the promisor; and (3) the promisee must have acted reasonably in justifiable reliance on the promise as made." *Brown v. City of Pocatello*, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010) (citations and internal quotation marks omitted). Here, the Department's actions, through its agent—the Examiner—give rise to promissory estoppel.

First, TLR relied on the statements from the Examiner that the Department would provide more time to TLR in order to facilitate the development of 27-7549. Accordingly, TLR acted in reliance on the Examiner's statements, to TLR's substantial detriment in an economic sense, in that TLR invested hundreds of thousands of dollars to developing 27-7549. Additionally, based on evidence that the Department had in its possession (partial field exam, letters, etc., described above) demonstrating post-proof development, and no action was taken by the Department at that time to inform Drakos of any concerns with his post-proof development, TLR has economically suffered to its significant detriment.

Second, it was foreseeable to the Department that TLR would act in reliance on the Examiner's direction and/or lack of prevention of future development by other Department personnel who had actual or constructive knowledge of Drakos's activities. It was therefore foreseeable that Drakos would invest all of the money it took to convey electricity to the site, to add pivots and pumps, and to do everything else necessary to put 27-7549 to beneficial use. When the Examiner (the Department's representative) told TLR to do so before a follow-up field examination (after which the Examiner would file the mandatory field report), it is foreseeable that TLR would comply.

Third, TLR was justified in relying on the Examiner's representations to TLR about the Department's position and TLR acted reasonably in making the necessary investments to develop 27-7549 and put it to full beneficial use. TLR had no reason to doubt what the Examiner represented. As discussed above, the Examiner was the Department's authorized agent or, alternatively, acted with the apparent authority on behalf of the Department. Given the Examiner's position and statements, it was reasonable to invest in the development of 27-7549. Thus, promissory estoppel bars the Department from asserting that 27-7549 is void.

b. The Department is estopped from voiding 27-7549 by the doctrine of equitable estoppel.

To successfully assert equitable estoppel, a party must show:

(1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth;

(2) that the party asserting estoppel did not know or could not discover the truth;

(3) that the false representation or concealment was made with the intent that it be relied upon; and

(4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

Winn v. Campbell, 145 Idaho 727, 732, 184 P.3d 852, 857 (2008) (citations omitted, lineation altered). Again, the Department's actions, through the Examiner, give rise to equitable estoppel.

First, the Examiner represented to TLR that more time was allowed for TLR to develop 27-7549 and the infrastructure necessary to put it to beneficial use. TLR does not impute any ill will to the Examiner or the Department, rather, TLR contends that the Examiner's statement constitutes a concealment of a material fact regarding the development of a water right with actual or constructive knowledge of the truth. Whether TLR had more time to develop 27-7549 was certainly a material fact. Likewise, the Examiner (and the Department) can justly be presumed to have actual or constructive knowledge of the applicable statutes and the Department's rules and procedures in this regard.

Second, TLR did not know how the Examiner's field examination should have been conducted or what the results should have been. TLR justifiably relied on the Examiner's representations—which ought to bind the Department as well. Further, Idaho Code § 42-217 shows that the Department must conduct a field examination and file a field report, which the Examiner said he would not do at that time. Thus, TLR could not have discovered procedures contrary to those outlined by the Examiner.

Third, without imputing any untoward intention, the Examiner's statements were obviously made with the intent that they be relied upon. The Examiner intended that TLR would act to develop 27-7549, and then contact him to finalize the field examination and field report.

Lastly, TLR did rely on the Examiner's statements and invested approximately $300,000–$400,000 in building the infrastructure necessary to develop 27-7549 and irrigate the land. If 27-7549 was voided now, this entire amount would be lost and useless—which is the measure of the prejudice to TLR of allowing this action to proceed. For these reasons, equitable estoppel bars the Department from asserting that 27-7549 is void.

c. *The Department is estopped from voiding 27-7549 by the doctrine of quasi-estoppel.*

The Idaho Supreme Court has explained:

> Quasi-estoppel is properly invoked against a person asserting a claim inconsistent with a position previously taken by him with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine. The doctrine of quasi-estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position.

City of Eagle v. Idaho Dep't of Water Res., 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011) (internal citations omitted). The Court of Appeals has discussed how quasi-estoppel is not as clearly defined as the other forms of estoppel, noting:

> The Idaho Supreme Court has generally described quasi-estoppel as an unconscionable change in position, but some ambiguity remains in the specific elements of quasi-estoppel. *See, e.g., Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 443, 235 P.3d 387, 393 (2010) (using a two-element test requiring an inconsistent position and either unconscionability, an advantage or disadvantage, or inducement); *Weitz v. Green*, 148 Idaho 851, 861, 230 P.3d 743, 753 (2010) (noting that "quasi-estoppel differs from equitable estoppel, in that the first and fourth requirements of equitable estoppel are not required"); *Atwood v. Smith*, 143 Idaho 110, 114, 138 P.3d 310, 314 (2006) (implying that unconscionability is a mandatory element of the two-element test); *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138

> Idaho 831, 845, 70 P.3d 669, 683 (2003) (defining quasi-estoppel as equitable estoppel minus concealment and misrepresentation). *Accord Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 357, 48 P.3d 1241, 1246 (2002) (noting quasi-estoppel is a broadly remedial doctrine, often applied ad hoc to specific fact patterns); *Williams Lake Lands, Inc. v. LeMoyne Dev., Inc.*, 108 Idaho 826, 830, 702 P.2d 864, 868 (Ct.App.1985) ("Because quasi-estoppel is an equitable doctrine, its application depends upon a case by case analysis of the equities involved, rather than upon precise definitional standards.").

Naranjo, 151 Idaho at 920, n. 2, 265 P.3d at 533, n. 2. Under any denotation of the required elements, the Department's actions through the Examiner, as well as the related inaction with information the Department had in its position showing post-proof development, also give rise to quasi-estoppel.

As described above, the Department, through the Examiner, its agent, took the position that it would leave the field report—and thus, the decision on verifying beneficial use of 27-7549—incomplete until a later date, after TLR had completed development of the system. That position is inconsistent with the position taken by the Department now, which is that TLR should have 27-7549 voided. This entire time, for almost the past 20 years, the Department has been aware of its statutory rights and duties, as well as the facts on the ground (via the Examiner's field examination) and documents in the Department's file.

The Department's changing position is now working to TLR's detriment. In reliance on the Examiner's statements, TLR has invested approximately $300,000–$400,000 to construct the infrastructure necessary to put 27-7549 to beneficial use. Under these circumstances, it would be unconscionable to allow the Department to suddenly, after 17 years, change its position and render

the entire sum of approximately $300,000–$400,000 utterly and entirely wasted. Thus, quasi-estoppel bars the Department from asserting that 27-7549 is void.

2. Laches applies against the Department, preventing it from voiding 27-7549.

The Idaho Supreme Court has also analyzed the application of the doctrine of laches against the state and its constituent governmental units. *State, Dept. of Health and Welfare ex rel. State of Washington ex rel. Nicklaus v. Annen*, 126 Idaho 691, 663-94, 889 P.2d 720, 722-23 (1995); *see also State ex rel. Johnson v. Niederer*, 123 Idaho 282, 284, 846 P.2d 933, 935 (Ct. App. 1992). "The doctrine of laches is a creation of equity and is a species of equitable estoppel." *Annen*, 126 Idaho at 694, 889 P.2d at 722 (citation omitted). "In determining whether the defense of laches applies, courts must accord due regard to all the surrounding circumstances and acts of the parties; lapse of time, standing alone, is not controlling." *Id.* Thus, the laches analysis is very fact intensive. *See Sherman Storage, LLC v. Global Signal Acquisitions II, LLC*, 159 Idaho 331, 337, 360 P.3d 340, 346 (2015). "The decision to apply laches is committed to the sound discretion of the trial court [or administrative agency]." *Sword v. Sweet*, 140 Idaho 242, 249, 92 P.3d 492, 499 (2004). The four elements of laches are:

> (1) defendant's invasion of plaintiff's rights;
>
> (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit;
>
> (3) lack of knowledge by the defendant that plaintiff would assert his rights; and
>
> (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Sherman Storage, 159 Idaho at 337, 360 P.3d at 346 (citation omitted. emphasis omitted). One of the key questions in establishing prejudice is whether the "delay … would place the [defendant] at a disadvantage or in a worse position than he would have been in had the action been prosecuted any sooner or with greater diligence." *Quintana v. Quintana*, 119 Idaho 1, 5, 802 P.2d 488, 492 (Ct. App. 1990); *see also Huppert v. Wolford*, 91 Idaho 249, 257, 420 P.2d 11, 19 (1966).

First, this action constitutes the Department's effort to void 27-7549. This will eliminate TLR's efforts to irrigate the property at issue and perfect 27-7549 (a water right permit) into a water right license—a valuable property right—and thus, constitutes an invasion of TLR's rights.

Second, the Examiner conducted the partial field examination more than 17 years ago, in November 1999. Thus, the Department has had knowledge of the status of 27-7549—which it now asserts as a basis to void 27-7549—for almost two decades. Despite having the ability to act on this information at any time, the Department has delayed for years.

Third, the Department's only representation to TLR was made through the Examiner. The Examiner told TLR that the Department would take no action to void 27-7549, but to let the Examiner return later, after 27-7549 was fully developed. TLR did not, and could not, know that the Department would delay action, only to re-assert the voidance position at a random date years later.

Fourth, TLR will be injured if the Department is allowed now, after 17 years, to completely void 27-7549. Not only will TLR lose its property right, in the water right permit, but such an action will also render useless approximately $300,000–$400,000 invested in developing the area

for irrigation during the Department's delay. While rescinding the water right permit may be the state's prerogative, causing TLR to waste hundreds of thousands of dollars is an unjust injury.

For these reasons, laches should also apply to bar the Department from undertaking this action to void 27-7549.

C. The Department's actions prejudiced TLR's substantial rights.

The Idaho Supreme Court "has not yet attempted to articulate any universal rules to govern whether a petitioner's substantial rights are being violated under I.C. § 67–5279(4)." *Two Jinn, Inc. v. Idaho Dep't of Ins.*, 154 Idaho 1, 5, 293 P.3d 150, 154 (2013) (quoting *Hawkins v. Bonneville Cnty. Bd. of Comm'rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011)). "Instead, this determination is made on a case-by-case basis." *Two Jinn*, 154 Idaho at 5, 293 P.3d at 154. From cases already decided, it is clear that prejudice to a party's substantial rights includes—among other things—the ability to appropriate water and sustain water rights in the permitting process, *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 529, 376 P.3d 722, 733 (2016); unlawful restrictions on "future conduct," *Mena v. Idaho State Bd. of Med.*, 160 Idaho 56, 66, 368 P.3d 999, 1009 (2016); unlawful restrictions of the "ability to enter freely into contracts that are neither illegal nor violate important public policies," *Two Jinn*, 154 Idaho at 5, 293 P.3d at 154; and the right to "a reasonably fair decision-making process and, of course, in proper adjudication of the proceeding by application of correct legal standards." *State Transp. Dep't v. Kalani-Keegan*, 155 Idaho 297, 302, 311 P.3d 309, 314 (Ct. App. 2013); *see also Kaseburg v. State, Bd. of Land Comm'rs*, 154 Idaho 570, 579, 300 P.3d 1058, 1067 (2013) (finding that an improper determination "prejudiced [petitioner's] substantial rights by depriving him of a more

lenient standard for the consideration of [his] Application").

Here, the Department has voided 27-7549. TLR's right and ability to use water—for which it has invested hundreds of thousands of dollars over almost two decades—is a substantial right. Without 27-7549, TLR will be prevented from diverting that water. This prejudices TLR's substantial right. Further, the Department's procedure of deciding to void 27-7549 without conducting a supporting field examination prejudices TLR's substantial right in the proper adjudication of 27-7549. Finally, the Department's refusal to apply any equitable doctrines appropriate to this case prejudices TLR's substantial right in having the Department apply correct legal standards.

V. CONCLUSION.

The Department's errors have culminated in the voiding of 27-7549. This Court is specifically empowered to right this wrong and "set aside [the Final Order], in whole or in part, and remand[the matter] for further proceedings" with lawful direction. Idaho Code § 67-5279(3). This Court should do so because the Department has erred, per Idaho Code § 67-5279(3), and affected TLR's substantial rights, as required by Idaho Code § 67-5279(4).

The Department has violated Idaho Code § 42-217 by not completing the mandatory field examination. Idaho Code § 67-5279(3)(a). Instead, the Department has adopted an easier methodology that can be completed from within the confines of its offices. While this may assist the Department with completion of its many tasks efficiently and within its budgetary and other constraints; it does not satisfy the demands of the statute and, therefore, cannot be ratified.

The Department has engaged in an unlawful procedure by not even countenancing the

application of equitable doctrines—estoppel and laches—that should prevent the Department from voiding 27-7549. Idaho Code § 67-5279(3)(c). The Examiner, as the Department's agent, made specific representations to TLR that bind the Department and estop its efforts to void 27-7549. Additionally, the Department's knowledge of what was going on with 27-7549 coupled with its passive acquiescence for 17 years requires the application of laches against the Department.

The Department's decision to void 27-7549 is not supported by substantial evidence on the record as a whole. Idaho Code § 67-5279(3)(d). The only field examination of 27-7549 ever conducted by the Department in 1999, and remains incomplete. Field examinations provide the best evidence of a water right's application to beneficial use. Yet, the Department has relied on other evidence, overall insubstantial, to void 27-7549.

The Department's voidance of 27-7549 was arbitrary, capricious, and an abuse of discretion. Idaho Code § 67-5279(3)(e). The Department has taken up a matter almost two decades after it examined 27-7549. It has acted without any consideration of the statutes, equitable principles, or the large expenditures made by TLR in the development of 27-7549.

These errors have prejudiced TLR's substantial rights in using 27-7549 and having this permit matter properly adjudicated. Idaho Code § 67-5279(4). Idaho law and equity itself demands that these errors be corrected.

Dated this 14th day of June, 2017.

Robert L. Harris

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of June, 2017, true and correct copies of *Petitioner's Brief* were served via Email and FedEx Delivery, on the following:

Garrick L. Baxter, ISB #6301
Emmi L. Blades, ISB #8682
IDAHO OFFICE OF THE ATTORNEY GENERAL
322 East Front Street
Boise, ID 83702-7374
Telephone: (208) 287-4800
Facsimile: (208) 208-6700
Email: garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

Attorneys for Respondent
Idaho Department of Water Resources

Robert L. Harris

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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