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, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent.	Case No. CV-2017-458
IN THE MATTER OF PERMIT NO 27-7549 IN THE NAME OF TANNER LANE RANCH, LLLP	

RESPONDENT'S BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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A. NATURE OF THE CASE

This is a judicial review proceeding on a final order issued by the Idaho Department of Water Resources ("Department") refusing a license and voiding water right permit no. 27-7549 ("Permit"). The Department voided the Permit due to the permit holder's failure to apply water to a beneficial use within the development period as mandated by statute.

B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

An application for the Permit was filed on September 3, 1991, by James S. Johnston and Paul Fankhauser. Ex. 105 at 5–8.[1] The application sought a permit to divert 9.60 cfs of groundwater to irrigate 480 acres in Section 33, T02S, R36E, in Bingham County, Idaho. *Id.* The Department approved the application and the Permit was issued on April 7, 1992. Ex. 106 at 9–10. The Permit allowed for the construction of two wells and was issued on the condition that "[p]roof of construction of works and application of water to beneficial use shall be submitted on or before May 3, 1993." Ex. 106 at 9.

On February 10, 1993, Johnson and Fankhauser requested a one-year extension of the proof deadline. Ex. 108 at 14. The Department extended the deadline to May 1, 1994. *Id.* In a letter accompanying the approved extension request, the Department informed Johnston and Fankhauser that "[i]t is important that you work diligently toward the completion of this project during the construction period allowed since the department may not be able to grant additional extensions." R. 49.

[1] Exhibits in the agency record are identified according to their exhibit number and the corresponding Bates page numbers.

On July 16, 1993, Johnson filed an application to amend the Permit to change the points of diversion and place of use, which was approved by the Department. Ex. 107 at 11–13. As amended, the Permit allowed for the diversion of groundwater from two wells, one in the NENE of Section 34, T02S, R36E, and one in the SENW of Section 26, T02S, R36E, to irrigate 480 acres in Sections 26 and 27, T02S, R36E. *Id.* at 11–12. The place of use for the Permit, as amended, was owned by Lambert Produce, Co. *Id.* at 11. A second request for an extension of the proof deadline was filed by Johnson and Chris Drakos, president of Lambert Produce, Co., on May 12, 1994.[2] Ex. 112 at 18; *see also* Ex. 111 at 17, Tr. at 23:24–24:1. The Department denied the extension on May 20, 1994, stating that "the department is not authorized to grant an additional extension of time."[3] Ex. 112 at 18.

Well Driller Reports were submitted to the Department on June 15, 1994. Ex. 116 at 23; Ex. 117 at 24. According to the reports, a well was developed in the SENW of Section 26 on

[2] The Request for Extension of Time is dated April 29, 1994, but the file stamp indicates that it was not received by the Department until May 12, 1994. Ex. 112 at 18. As the request was not received until after the proof deadline, it was found to be untimely. R. 36.

[3] Tanner Lane Ranch, LLLP ("TLR") states that the Department denied the second extension under "now-defunct policies." *Pet'r's Br.* at 1. It is true that the Department now allows for multiple extensions in certain circumstances. However, a challenge was never raised to the Department's denial of the second request for extension under the former policy. As admitted by TLR, "its predecessors-in-interest did not appeal the decision made by the Department in 1994 not to grant an extension past the one year extension that was granted." R. 162. In the proceeding before the hearing officer, TLR had requested that its development deadline be retroactively extended to May 3, 2003, because the Department now allows for multiple extensions up to a maximum development period of ten years. *Id.* The hearing officer rejected this request, concluding that "TLR is asking the Department to ignore lawful decisions and procedures in place over 20 years ago" and "the Department will not revisit the decision 20 years later." R. 177. It is undisputed that the Department was acting in accordance with the policy in place at the time the second request for extension was received. The permit holders were also given notice of this policy on several occasions prior to them filing the second request for an extension. R. 41, 42, 49. The denial of the second request for extension was never appealed and the hearing officer's conclusions regarding this issue have not been challenged on judicial review. Therefore, the Department's decision to deny the second request for an extension is outside the scope of this proceeding.

April 28, 1994.[4] Ex. 116 at 23. The second well in the NENE of Section 34 was not developed until May 25, 1994. Ex. 117 at 24.

Proof of Beneficial Use for the Permit was filed on June 17, 1994—47 days after the proof deadline. Ex. 114 at 20. Under "Extent of Use" Johnson and Drakos stated that 9.6 cfs of groundwater was being diverted and used to irrigate 480 acres. *Id.* The proof form was signed by both Drakos and Johnson and affirmed that they "have completed all development that will occur under [the Permit] and water has been applied according to the provisions of the permit." *Id.* Their signature also affirmed that the information provided was a "true statement of the extent to which the above numbered permit has been developed," and that they agreed to "relinquish any undeveloped portion of the permit to the state of Idaho." *Id.*

On August 11, 1994, the Department was notified that Johnson assigned his interest in the Permit to Lambert Produce, Co.[5] Ex. 111 at 17. The Department received another notice of assignment in 2014, stating Lambert Produce, Co. assigned its interest in the Permit to TLR. R. 111. Drakos is also the president of TLR. Tr. at 8:10–15.

The Department conducted a field examination on November 4, 1999. Ex. 122 at 40. The field examination report prepared by Keith Wilson, a Department employee, included photographs of temporary pumps and a photo identified as "place of use." *Id.* at 41–42. No measurements were included in the report. *Id.* at 39–40. The report stated that Wilson could not get good measurements because the permit holder was having issues with power and was using temporary pumps. *Id.* at 39. The report further stated that Wilson would "check back when

[4] Although the Well Driller Report stated that a well was drilled in the SENW of Section 26, it appears the well was actually drilled in the SWSE of Section 27. *Compare* R. 104, *with* Ex. 116 at 23.
[5] Fankhauser sent a letter to the Department in 2007, stating that he did not have a water interest within the Eastern Snake Plain Aquifer. R. 86. The Department sent him a letter in response, informing him that his letter had been processed as a relinquishment of his ownership interest in the Permit. R. 89.

system pumps are repaired." *Id.* The report only discussed the pump measurements and did not comment on or otherwise address the extent of beneficial use. *Id.* at 37–42.

In July 2000, Wilson wrote Drakos a letter stating that "[f]rom your conversation with Steve Mueller it appears that you thought that the licensing field exam for 27-07549 had been completed." Ex. 121 at 36. Like the report, the letter focused on the pump measurements:

> When I made the measurements last year, the measurements seemed to be unreliable and the total was well below the permitted amount. Since the pumps were only temporary, and would be replaced soon I felt that it would be in your best interest to re-measure the system when the system was up to capacity. I thought that we discussed the measurement and had decided that a re-measurement of the system was needed. With this in mind the readings were discarded.

Id. The letter then requested that "[t]o facilitate completing the licensing field exam please contact me so that we can discuss what needs to be done." *Id.* Drakos did not contact the Department and no renewed field examination was conducted. Tr. at 53:10–19, 68:20–69:25.

In 2013, the Department initiated a review of the Permit to determine the extent of beneficial use that occurred during the development period. *See* R. 90. The Department concluded that because the proof deadline was not extended a second time and only one well was completed before May 1, 1994, "[a]ny license issued for 27-7549, if one can be issued, would be limited to the beneficial use occurring between April 28, 1994 and May 1, 1994 from the Well in the SWSE of Section 27." *Id.*

On April 7, 2014, Department employee James Cefalo prepared a *Beneficial Use Field Report* for the Permit ("*2014 Report*"). R. 106–07. The *2014 Report* states that the Permit could have at most been used to irrigate 25 acres in Sections 27 and 34, T02S, R36E. R. 106. This conclusion was based on "1987/1992/2004 aerial photos." *Id.* The *2014 Report* also noted that a

field examination had been conducted in 1999, but that "[n]o measurement was completed" and that the "[s]ystem has changed significantly since 1999." R. 107.

The *2014 Report* was accompanied by a memorandum dated February 13, 2014. R. 109. The memorandum states that there is "[n]o direct evidence about the extent of irrigation taking place prior to May 1, 1994." *Id.* The memorandum further provides that while there are no aerial photos or satellite imagery for 1994 or 1995, "1992 and 2004 aerial photos show that approximately 25 pasture acres could have been flood irrigated by the well in Sec. 27." *Id.*; *see also* R. 91–96. It was also concluded that the "[c]urrent system does not reflect system existing in 1994" because "[s]ignificant changes to the system occurred between 2004 and 2006." R. 109; *see also* R. 96–97.

Based on the forgoing, it was proposed that a "[l]icense will be issued based on the limited evidence available: 25 acres, .5 cfs, 100 acre-feet." R. 109. The Department sent a proposed license to TLR's counsel along with an application to amend the Permit to match the Department's beneficial use findings. R. 101–05. The location of the well actually developed was noted in the *2014 Report* to be located in the SWSE Quarter of Section 27, T02S, R36E, which did not match the point of diversion description in the Permit. *Compare* R. 104, *with* Ex. 107 at 11. Because of this discrepancy, an amendment to the Permit was required before a license could issue. R. 254; *Pet'r's Br.* at 7; Idaho Code § 42-211. TLR did not sign and return the included application to amend the Permit. R. 118; *Pet'r's Br.* at 7.

During the review, the Department learned that TLR was irrigating more acres than was authorized under its existing ground water rights. R. 115–17. Even assuming that 480 acres were being irrigated under the Permit, the Department concluded that TLR was using groundwater to irrigate an additional 120 acres without a valid groundwater right. R. 119. The

Department sent TLR a *Notice of Violation and Order to Cease and Desist* ("NOV") on July 15, 2014. *Id.* (No. E2014-656). On December 22, 2014, the Department and TLR entered into a *Consent Order and Agreement* on the NOV. R. 118–20. As part of the agreement, the Department agreed not to void the Permit or issue a license for the smaller recommended amount until after December 31, 2014. R. 119. TLR agreed that "[i]f TLR does not want permit number 27-7549 to be voided, TLR must have a signed amendment for licensing submitted and the fee paid by December 31, 2014." R. 120. TLR did not submit an amendment. R. 255; *Pet'r's Br.* at 8.

On January 2, 2015, the Department issued a *Preliminary Order Voiding Permit* ("*Preliminary Order*"). R. 121–25. The *Preliminary Order* concluded that no license should issue and Permit 27-7549 should be voided under Idaho Code § 42-219 because "the applicant has not fully complied with the law and conditions of the permit." R. 123–24; Idaho Code § 42-219(8). Additionally, the *Preliminary Order* concluded that a license could not issue where TLR had not filed an application to amend the permit to correct the legal description of the point of diversion." R. 124; Idaho Code § 42-211.

TLR filed a Protest to the *Preliminary Order* and a Petition for Hearing on January 16, 2015. R. 129–30. At the status conference held on February 18, 2015, it was agreed that TLR would submit proposed findings of fact, and the hearing officer would issue a decision based on the written record rather than holding a formal fact-finding hearing. R. 133. The hearing officer issued the *Order Affirming Preliminary Order Voiding Permit* on August 31, 2015. R. 133–45. The hearing officer rejected TLR's argument that the Department should consider development under the permit that occurred after the proof deadline because the Department failed to conduct a timely field examination. R. 144. The hearing officer concluded that "[t]he law does not allow

for additional development under a permit if the Department is slow in conducting a field exam and issuing a license. Beneficial use of the water must be accomplished by the proof due date, not by the field exam date." *Id.*

TLR filed a petition for reconsideration of the *Order Affirming Preliminary Order Voiding Permit* on September 14, 2015, which the hearing officer denied on October 5, 2015. R. 149–72, 174–77. TLR then filed exceptions to the *Order Affirming Preliminary Order Voiding Permit* with the Department's Director on October 19, 2015. R. 181–207. TLR argued, in part, that the hearing officer erred in not adopting its proposed findings of fact in full and that it should have the opportunity to present evidence at a hearing. R. 186–91. In the *Order Granting Exceptions in Part and Remanding for Evidentiary Hearing*, the Director concluded that "[t]here were no due process violations since TLR was given an opportunity to develop the record in this matter and TLR voluntarily chose to forgo that opportunity." R. 208. However, the Director decided to remand the matter to the hearing officer to hold an evidentiary hearing. *Id.*

A hearing was held before the hearing officer on November 30, 2016. R. 212; Tr. at 1. At the hearing, the hearing officer took official notice of the Department's water right file for the Permit. Tr. at 5:19–23. Additionally, Drakos offered testimony concerning the development of works and application of water to beneficial use under the Permit. Contrary to the affirmations in the proof of beneficial use filed with the Department, Drakos testified that wells were drilled but irrigation was not complete at the time proof was submitted. Tr. at 67:10–21; *see also* Tr. at 34:9–40:21. Drakos testified that by 1999 he was irrigating at most seven or eight acres under the Permit. Tr. at 47:18–23.

Drakos testified that after the 1999 field examination he ran electricity to the wells and installed center pivots. Tr. at 54:2–10, 60:6–61:22. He testified that he began irrigating

substantial acreage under the permit sometime between 2004 and 2005. Tr. at 61:23–63:11. Drakos alleged that he continued to invest money to develop his farm because Wilson did not inform him during the 1999 field examination or in the 2000 letter that there were any issues with the Permit or that he should stop developing under the Permit.[6] Tr. at 50:5–17, 53:17–54:25, 60:6–64:13. Although Drakos testified that he received the letter from Wilson in 2000, he did not contact Wilson after receiving the letter to set up a follow up examination. Tr. at 53:10–19, 68:20–69:25.

On February 2, 2017, the hearing officer issued the *Amended Order Affirming Preliminary Order Voiding Permit* ("*Amended Order*"). R. 251–63. Based on Drakos' testimony that irrigation was not complete at the time proof was submitted, the hearing officer concluded that the Department did not err in voiding the permit because water was not being put to beneficial use during the development period. R. 254, 259. The hearing officer rejected TLR's arguments that the Department had a mandatory duty to conduct a renewed field examination and that because it did not timely conduct a field examination it must "take the system as it finds it" and include development that has occurred after the proof deadline. R. 258–60. Additionally, the hearing officer rejected TLR's argument that the principles of estoppel and laches precluded the Department from voiding the Permit. R. 260–62.

The *Amended Order* was issued as a preliminary order under Idaho Code § 67-5243. R. 265. As no exceptions to the *Amended Order* were filed, the *Amended Order* became final on

[6] TLR's Opening Brief states that Wilson "*explicitly* encouraged TLR to continue developing 27-7549" and that "Drakos recalls that the Examiner *encouraged him* to continue further work on the wells and development of the water right permit." *Pet'r's Br.* at 1, 5 (emphasis added). In support of these allegations, TLR cites to page 49 of the Transcript, whereby Drakos testified: "He told me when I got the pumps on there, when I got the motors on there, that he would be back." Tr. at 49:12–14. Additionally, TLR cites to the 2000 letter from Wilson to Drakos (R. 79). *Pet'r's Br.* at 5. Neither of these citations supports the allegation that Wilson made *affirmative* or *explicit* statements encouraging Drakos to continue development under the Permit.

February 16, 2017. R. 265; IDAPA 37.01.01.730.01. TLR filed a petition for judicial review of the *Amended Order* on March 9, 2017. R. 267–78.

II. ISSUES ON APPEAL

1. Whether the Department acted within its statutory authority and upon proper procedure in refusing a license and voiding the Permit.
    a. Whether the Department was required under Idaho Code § 42-217 to conduct a renewed on-site inspection before making a licensing determination.
    b. Whether the Department erred as a matter of law by concluding that it could not consider post-proof development in its beneficial use examination.
    c. Whether the Department unlawfully delegated its authority to conduct an examination of beneficial use by allowing the permit holder to submit additional evidence.
2. Whether equitable principles can be invoked to preclude the Department from fulfilling its statutory duty to make a licensing determination.
3. Whether the delay in the Department's licensing determination prejudiced a substantial right of TLR.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). 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 shall affirm the agency decision unless it finds the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that

the agency erred in a manner specified in Idaho Code § 67-5279(3) and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222.

"Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). The court freely reviews questions of law. *Idaho Ground Water Ass'n v. Idaho Dep't of Water Res.*, 160 Idaho 119, 125, 369 P.3d 897, 903 (2016). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3).

IV. ARGUMENT

A. The Department Acted Within Its Statutory Authority and Upon Proper Procedure in Refusing a License and Voiding the Permit.

Idaho Code § 42-219 provides the standards for the Department to issue or deny a water right license. "If the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use." Idaho Code § 42-219(1). The quantity of water licensed "in no case shall be an amount in excess of the amount that has been beneficially applied." *Id.* Where "the applicant has not fully complied with the law and the conditions of permit, [the Department] may issue a license for that portion of the use which is in accordance with the permit, or may refuse issuance of a license and void the permit." Idaho Code § 42-219(8). The hearing officer concluded that because no water was put to beneficial use during the development period, there was no use made in accordance with

the permit. R. 259. Therefore, Idaho Code § 42-219 mandated that no license could issue and the permit must be voided. *Id.*

TLR argues that the Department's decision to refuse to issue a license and void the Permit should be overturned on the grounds that (1) the decision was made upon improper procedure because the Department did not conduct a renewed on-site inspection after the 1999 inspection; (2) the Department is required to calculate beneficial use under the Permit from the date of the field examination not from the proof deadline; and (3) the Department unlawfully delegated its duty to perform a beneficial use examination to the permit holder. *Pet'r's Br.* at 11–20.

1. The Department Was Not Required Under Idaho Code § 42-217 to Conduct a Renewed On-Site Inspection Before Making a Licensing Determination.

Idaho Code § 42-217 sets forth the procedures for determining the extent of beneficial use that occurred under a permit. "On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, the permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit." Idaho Code § 42-217. Such proof "shall include fees as provided in subsection K. of section 42-221, Idaho Code, or a field examination report prepared by a certified water right examiner." *Id.*

> Upon receipt of such proof and the fee as required in section 42-221, Idaho Code, by the department of water resources the department *shall 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.

Id. (emphasis added). "The department or the person making such examination under the direction of the department shall prepare and file a report of the investigation." *Id.*

TLR argues that the Department did not comply with the mandates of Idaho Code § 42-217 because (1) the Department relied on aerial photos and satellite imagery rather than conducting a renewed field examination and (2) the Department did not file a field report. *Pet'r's Br.* at 12–15.

i. The Department Was Not Required to Conduct a Renewed On-Site Inspection in 2013.

Idaho Code § 42-217 requires that upon receiving proof, the Department "shall examine or cause to be examined" the place of use, the capacity of the diversion works, and the quantity of water being beneficially applied. Wilson conducted an on-site field inspection of the Permit in 1999. Ex. 122 at 37–42. However, the investigation was not completed because Wilson "could not get good measurements" of the temporary pumps. *Id.* at 39. Department employee Cefalo then conducted a renewed examination of beneficial use occurring under the Permit in 2013, relying on aerial photography and satellite imagery in addition to the information gathered during the 1999 on-site inspection. R. 106–08. Based in his review of the relevant information, Cefalo concluded that little to no beneficial use had occurred under the permit prior to the proof deadline. R. at 109. TLR does not take issue with this conclusion. In fact, Drakos' testimony at the hearing in this matter confirmed that no irrigation was complete at the time proof was submitted. Tr. at 67:10–21. Because TLR cannot factually challenge the hearing officer's conclusion that no development took place prior to the proof due date, TLR challenges the order by arguing that Cefalo's 2013 investigation was procedurally deficient. Specifically, TLR argues that Cefalo erred by failing to conduct an "on-site" examination pursuant to Department's

Beneficial Use Examination Rules, IDAPA 37.03.02 ("*Examination Rules*"). *Pet'r's Br.* at 12–15.

TLR's argument fails on two grounds. First, while *Examination Rule* 10.01 does reference an "on-site" investigation, *Examination Rule* 1.01 provides that the rules "[a]re intended as a guide to establish acceptable standards to determine the extent of application of water to beneficial use" and that the rules "are not intended to restrict the application of other sound examination principles by water right examiners." R. 258; IDAPA 37.03.02.001.01. Idaho Code § 42-219(1) also provides that the Department shall consider all evidence relevant to final proof. Neither the Idaho Code nor the *Examination Rules* prevent the Department from relying on information gathered through alternative means when making a licensing determination.

Second, and more importantly, TLR fails to consider the role of the Department's *Examination Rules* and the specific purpose and scope of the Beneficial Use Examination under chapter 2, title 42, Idaho Code. The explicit purpose of the examination is to determine the extent of beneficial use and compliance with the conditions of the permit. IDAPA 37.03.02.010.11. As discussed in Section 2 below, the Department cannot license a water right for a quantity in excess of the amount that has been beneficially applied. Idaho Code § 42-219(1). A permit holder is required to apply water to beneficial use before the proof deadline provided in the permit. Idaho Code § 42-204.

Here, the Permit, with the granted extension, is expressly conditioned on the construction of works and application of water to beneficial use by the proof deadline—May 1, 1994. Ex. 106 at 9; Ex. 108 at 14. Thus, the Department must determine the extent of beneficial use as of May 1, 1994. As concluded in the *2014 Report* and accompanying memorandum, "[s]ignificant

changes to the system occurred between 2004 and 2006." R. at 109; *see also* R. at 96–97. This was also confirmed by Drakos' testimony that significant irrigation was not occurring until sometime in 2004, after electricity had been run to the wells and center pivots installed. Tr. at 54:2–10, 60:6–63:11. A field examination of the subject property in 2013 would not have been probative as to whether water was being put to beneficial use prior to May 1, 1994, and therefore, would have added no evidentiary value to the beneficial use determination. Not only would the renewed on-site inspection in 2013 not have been useful, it would not have affected the Department's conclusion as to what beneficial use took place within the relevant time period. Thus, TLR suffered no prejudice by Cefalo not conducting a renewed on-site inspection.[7]

As the hearing officer concluded, the Department complied with Idaho Code § 42-217 and the *Examination Rules* by conducting an examination of the beneficial use that occurred under the Permit during the development period, utilizing methods such as aerial photographs and satellite imagery, in addition to the 1999 on-site inspection. R. 259–60. Relying on such methods rather than conducting a renewed on-site inspection was reasonable given the significant changes to the irrigation system that occurred after 2004. The Department, therefore, did not err by not conducting a renewed on-site inspection.

ii. <u>The Department Prepared and Filed a Field Report As Required Under Idaho Code § 42-217.</u>

[7] While Examination Rule 10.01 does reference an "on-site" investigation, Examination Rule 1.01 also provides that the rules "[a]re intended as a guide to establish acceptable standards to determine the extent of application of water to beneficial use." R. 258; IDAPA 37.03.02.001.01. In accordance with Examination Rule 1.01, Cefelo relied on other reliable examination methods, including aerial photographs and satellite imagery, in addition to information gathered in the 1999 inspection, in order to provide a complete examination of the beneficial use that occurred during the development period.

TLR argues that the Department did not comply with Idaho Code § 42-217 because it did not finalize and file a field report. *Pet'r's Br.* at 14. This is inaccurate. As found by the hearing officer, the Department did, in fact, prepare and file a field report in 2014. R. 260.

Idaho Code § 42-217 provides that the person conducting the beneficial use examination "shall prepare and file a report of the investigation." A "Field Report" is defined as "[t]he form provided by the Department upon which the examiner records the data gathered and describes the extent of diversion of water and application to beneficial use." IDAPA 37.03.02.010.13.

The hearing officer found that "[t]he Department completed its recommendation for licensing in 2014 in the form of a Beneficial Use Field Report based on findings from the 1999 on-site inspection and its 2013 review of aerial photography and satellite imagery." R. 260. The *2014 Report* sets forth the data gathered, methods applied, and the findings concerning the extent of diversion of water and application to beneficial use. R. 106–10; *see also* IDAPA 37.03.02.010.13. The hearing officer's finding that the Department did in fact "prepare and file a report of the investigation" as required under Idaho Code § 42-217 is supported by substantial evidence on the record. On review, TLR does not address the hearing officer's findings regarding the *2014 Report* or the evidence supporting those findings.

The Department, therefore, complied with Idaho Code § 42-217 by conducting a beneficial use examination and preparing and filing a report of the investigation. Moreover, TLR has failed to show any prejudice from the Department's completion of a field report based on satellite imagery and aerial photos rather than a renewed on-site investigation.

2. The Department Did Not Err in Concluding That It Could Not Consider Post-Proof Development in Its Beneficial Use Examination.

TLR contends that the Department must "take the permit holder's system as it finds it when the field exam is actually performed," including any development that occurred after the

proof deadline. *Pet'r's Br.* at 15. TLR does not dispute the hearing officer's finding that the water was not being put to beneficial use at the time proof was submitted in 1994. R. 254, 259; Tr. at 67:10–21; *Pet'r's Br.* at 18 ("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."). What TLR is seeking is a license with a priority date that relates back to the date of the permit application, even though water was not put to beneficial use until after the proof deadline. As the hearing officer concluded, "licensing the water use developed after the authorized development period would be contrary to Idaho law and conditions of the Permit." R. 260.

It is a "well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in a manner required by law." *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2007) (quoting *Albrethesen v. Wood River Land Co.*, 40 Idaho 49, 60, 231 P. 418, 422 (1924)). "Under the statutory method of appropriation, the appropriation is not complete and a license will not issue until there is proof of application to beneficial use for the purpose for which it was originally intended." *Id.* Until all the statutory requirements have been complied with, "including the actual application of the water, the holder of the permit has nothing but an inchoate right." *Basinger v. Taylor*, 30 Idaho 289, 297, 164 P. 522, 524 (1917).

"The case law is clear that an applicant does not obtain a vested right at the point where an application is filed or the point where a permit is obtained." *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 274, 255 P.3d 1152, 1160 (2011). "[A] water right does not vest until the statutory procedures for obtaining a license are completed, including the issuance of the

license." *Id.* at 275, 255 P.3d at 1161. "[T]he Legislature intended that all procedures under the statute be completed before an applicant obtains a vested water right." *Id.*

By obtaining a permit, the permit holder does not have a water right, but rather, has established a placeholder in the priority line. Once the permit holder "complies with all the requirements of the statute. . . he may become the owner of a water right, the priority of which will relate back to the date of the permit." *Basinger,* 30 Idaho at 297, 164 P. at 524. It has long been held in Idaho that a permit holder should only receive the benefit of "the doctrine of relation," where the permit holder complied with the statutory requirements, fulfilled the conditions of the permit, and acted with diligence in developing the water right. *Id.* at 298, 164 P. at 524; *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 38, 147 P. 1073, 1077 (1915). These principles are codified in Idaho's statutory licensing framework.

Under Idaho Code § 42-219(4), "[t]he date of priority confirmed by the license shall be the date of the application for the permit." However, the Department may only issue a license where the Department "is satisfied that the law has been fully complied with." Idaho Code § 42-219(1). Additionally, the quantity of water licensed "in no case shall be an amount in excess of the amount that has been beneficially applied." *Id.* The *Examination Rules* further provide that "[t]he amount (rate and/or volume) of water shall be limited by the smaller of the permitted amount, the amount upon which the license examination fee is paid, the capacity of the diversion works or the amount beneficially used *prior to submitting proof of beneficial use*." IDAPA 37.03.02.035.01.o (emphasis added).

The limitations in the *Examination Rules* correspond with the statutory requirement that the Department "shall require that actual construction work and application of the water to *full beneficial use shall be complete* within" the deadline established in the permit. Idaho Code § 42-

204 (emphasis added). "The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all rights under his permit." Idaho Code § 42-204.

The Permit was expressly conditioned on water being applied to beneficial use before the proof deadline. Ex. 106 at 9. With the granted extension, TLR's predecessors in interest were required to apply water to full beneficial use before May 1, 1994. Ex. 108 at 14. The record supports the hearing officer's conclusion that TLR did not put water to beneficial use before May 1, 1994. Tr. at 67:10–21; *see also* Tr. at 34:9–40:21. Because application of water to beneficial use was not complete within the statutory deadlines, the permit holders were deemed to have abandoned their rights under the Permit. Idaho Code § 42-204.

Requiring the permit holder to apply the water to full beneficial use within the proof deadline ensures that the permit holder work diligently in order to receive the benefit of having the priority date relate back to the date the application was filed. If the proof deadline is not met the conditions of the permit have not been fulfilled, and the permit holder is in not in compliance with Idaho Code § 42-204. If the statutory procedures are not complied with, no license may issue. Idaho Code § 42-219.

Under perfect conditions, a field examination would be conducted at or near the time that proof is submitted. However, delay in the beneficial use examination does not change the scope of that examination—the extent of beneficial use occurring under the permit during the development period. Nor does it change the requirement in Idaho Code § 42-204 that water be put to full beneficial use before the proof deadline. The Department, therefore, did not err in rejecting TLR's argument that the beneficial use examination must take into account post-proof development.

3. Giving the Permit Holder an Opportunity to Introduce Evidence of Beneficial Use Is Not a Delegation of the Department's Duty to Perform a Beneficial Use Examination.

TLR appears to take issue with the Department's practice of allowing a permit holder to submit evidence for the Department to consider in its beneficial use examination.[8] TLR states:

> 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 to another process—such as requiring the permit holder to submit evidence of development.

Pet'r's Br. at 17. The hearing officer rejected this argument concluding that "the Department merely offered the applicant an opportunity to provide additional information for the Department to consider. Such an opportunity is not a delegation of the Department's duty to examine." R. 260.

As discussed above, under Idaho Code § 42-219(1), the Department is to consider all evidence relevant to final proof when making a licensing determination. As part of the beneficial use examination, the Director may consider evidence in the possession of the permit holder:

> These rules shall not be construed to deprive or limit the director of the Department of Water Resources of any exercise of powers duties and jurisdiction conferred by law, nor to limit or restrict the amount or character of data, or information which may be required by the director from any owner of a water right permit or authorized representative for the proper administrative of the law.

IDAPA 37.03.02.001.02.

Giving the permit holder an opportunity to present evidence to support beneficial use is not a delegation of the Department's duty to "carefully examine" evidence of the final proof.

[8] TLR makes several statements concerning the beneficial use examination in a separate licensing proceeding. *Pet'r's Br.*at 16. However, that licensing determination is not at issue here, and statements made by TLR concerning that proceeding are not supported by evidence on the record. *See Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992) (review is limited to the record created at the agency).

See Idaho Code § 42-219(1). The final decision of whether beneficial use has been proven, and to what extent, rests with the Department. The hearing officer correctly concluded that allowing a permit holder to offer evidence of beneficial use is not an unlawful delegation of the Department's duty to conduct a beneficial use examination.

B. Neither Laches Nor Estoppel Should Apply to Preclude The Department From Fulfilling Its Statutorily Mandated Duty to Complete a Licensing Determination.

1. Estoppel and Laches Must Not Be Applied Where It Would Result in Modifying the Department's Authority as Prescribed by the Legislature.

TLR seeks to have the Department precluded from voiding the Permit under theories of estoppel or laches. *Pet'r's Br.* at 20–32. Estoppel may not ordinarily "be applied against the state in matters affecting its governmental or sovereign functions." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 809, 367 P.3d 193, 204 (2016) (quoting *Floyd v. Bd. of Comm'rs of Bonneville Cty.*, 137 Idaho 718, 727, 52 P.3d 863, 872 (2002)). Two principles significantly limit the applicability of estoppel against government agencies in these circumstances.

First, "[a]n administrative agency is limited to the power and authority granted it by the legislature." *City of Sandpoint v. Indep. Highway Dist.*, 161 Idaho 121, 126, 384 P.3d 368, 372 (2016). Accordingly, estoppel may not be invoked to confer a benefit that the agency was not authorized to give or to confer power to the agency it is otherwise lacking. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 138, 997 P.2d 591, 599 (2000). "To hold otherwise would allow an administrative agency to expand its own powers and effectively amend statutes without legislative action." *Id.*

Second, the Idaho Supreme Court has been unwilling to apply estoppel where the effect would be to strip a government agency of authority granted by the Legislature. *Terrazas v. Blaine Cty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 201, 207 P.3d 169, 177 (2009); *see also*

Wortendyke v. Borg, 138 A.D.2d 695, 697 (N.Y. App. Div. 1988) ("Generally, estoppel may not be invoked against a governmental agency to prevent it from discharging its statutory duties."). Applying judicial estoppel to prevent a government entity from acting according its statutory mandate "would place the court in opposition to the Legislature and constitute a usurpation of that body's prerogative." *Wortendyke*, 138 A.D.2d at 697. Under these principles, estoppel is generally not available where the effect would be to broaden the statutory authority of an agency or prevent the agency from exercising its statutory authority. For these reasons estoppel cannot apply here.

The Legislature has set forth the procedures and requirements for persons to obtain a water right license through the statutory appropriation method in chapter 2, title 42, Idaho Code. Under these requirements, the Department is required to make a licensing determination on a permit as provided in Idaho Code § 42-219. As discussed above, the Department cannot issue a water right license where water was not put to beneficial use within the proof deadline set forth in the permit, as doing so would contravene the mandates of Idaho Code §§ 42-204 and 42-219. Where no license can issue, the permit must be voided. Idaho Code § 42-219(8). Estopping the Department from voiding the permit would amount to requiring the Department to issue a water right license in contravention of the statutory requirements. For that reason estoppel cannot apply.

2. Estoppel and Laches Are Not Bases to Overturn the Department's Licensing Determination on Judicial Review Under the Idaho Administrative Procedures Act.

In a judicial review proceeding, the right to review of an agency action is prescribed by statute and is therefore limited by that statutory grant. "[C]ourts infer that statutory administrative remedies implemented by the Legislature are intended to be exclusive." *Park v.*

Banbury, 143 Idaho 576, 578, 149 P.3d 851, 853 (2006). Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4).

Under the Act, the district court on judicial review must affirm the agency action unless it finds it is (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3). Estoppel and laches do not fit within any of the criteria set forth in Idaho Code § 67-5279(3), and thus, do not form a basis to overturn an agency action on judicial review.[9] Equity, therefore, cannot be applied in this proceeding to overturn the Department's final order refusing a license and voiding the permit.

3. TLR Has Failed to Prove It Is Entitled to Equitable Relief

Even assuming equity principles could be applied, TLR is not entitled to the relief it seeks under estoppel or laches. The burden of establishing each element of the equitable doctrine advanced rests with the proponent as does the burden of establishing "extraordinary circumstances" that would warrant applying estoppel against a government entity. *Rangen*, 159 Idaho at 809, 367 P.3d at 204; *Kelso*, 134 Idaho at 138, 997 P.2d at 599; *Zollinger v. Carrol*, 137 Idaho 397, 399, 49 P.3d 402, 404 (2002). TLR has failed to meet its burden both because it has not proven the elements of the equitable theories raised and because it has failed to show

[9] Equitable principles such as laches or estoppel are not implicated under the arbitrary and capricious standard. An agency action is not arbitrary or capricious if it has a basis in law and fact. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As discussed above, the record supports the hearing officer's conclusion that no irrigation was complete before the proof deadline and under Idaho Code §§42-204 and 42-219 no license could therefore issue.

"extraordinary circumstances" that would warrant applying estoppel against the Department acting in its capacity to regulate the appropriation of the public waters of the state.

i. TLR Has Failed to Prove the Elements of Promissory Estoppel.

To establish promissory estoppel, a party must prove the existence of all four elements: "(1) reliance upon a specific promise; (2) substantial economic loss to the promisee as a result of such reliance; (3) the loss to the promisee was or should have been foreseeable by the promisor; and (4) the promisee's reliance on the promise must have been reasonable." *Zollinger*, 137 Idaho at 399, 49 P.3d at 404. TLR has failed to establish the foregoing elements, most notably, the reliance on a specific promise, that loss was or should have been foreseeable by Wilson, and that reliance was reasonable.

Without any citation to the record, TLR alleges that it "relied on the statements from the Examiner that the Department would provide more time to TLR in order to facilitate development of 27-7549." *Pet'r's Br.* at 25. Nothing in the record supports that Wilson made such a "promise." The 2000 letter and 1999 field report state that Wilson could not get reliable pump measurements and that he would come back when Drakos informed him that the pumps were repaired. Ex. 121 at 36; Ex. 122 at 39. Additionally, Drakos' testimony was that Wilson never told him there was an issue with development in 1999 or that he should not continue developing under the permit. Tr. at 48:25–53:19. Failing to inform Drakos of a problem is not equivalent to making a specific promise. There is no evidence on the record that Wilson made any express, specific statements regarding post-proof development being considered in the beneficial use examination. Therefore, TLR has failed to establish the existence of a promise.

Additionally, any loss that would occur to Drakos would not have been foreseeable to Wilson. Wilson's statements indicate that when the field examination was performed in 1999

the pumps were not functioning correctly and Wilson could not get reliable measurements. Ex. 121 at 36; Ex. 122 at 39; Ex. 123 at 43. These statements fail to establish that Wilson could have foreseen any loss to Drakos. Even accepting Drakos testimony that Wilson never told him that there was an issue with development under the Permit, it would not have been foreseeable to Wilson that failing to inform Drakos of an issue would lead to the loss alleged here.

Also, even if the record did establish that Wilson "promised" that the Department would consider development that occurred after the proof period, any reliance on that "promise" would be unreasonable. First, such a promise is contrary to the mandates of Idaho Code § 42-204 and *Examination Rule* 35 (IDAPA 37.03.02.035.01.o). TLR could not reasonably rely on statements that are contrary to law as "all persons are presumed to know the law." *State v. Lawrence*, 70 Idaho 422, 426, 220 P.2d 380, 382 (1950).

Second, when submitting proof, Drakos was put on notice that water had to be put to full beneficial use at the time proof was submitted. In the proof form, Drakos affirmed that he "completed all development that will occur under this permit and that water has been applied according to the provisions of the permit." Ex. 114 at 20. Drakos also "relinquish[ed] any undeveloped portion of the permit to the state of Idaho." *Id.* In so far that TLR, by and through Drakos, relied on any "promise" made by Wilson that the Department would consider development that occurred after the proof deadline, such reliance was not reasonable. As the Idaho Supreme Court has reiterated, "[e]quity aids the diligent and not the negligent." *Grazer v. Jones*, 154 Idaho 58, 69, 294 P.3d 184, 195 (2013). Therefore, TLR has failed to prove the elements of promissory estoppel.

ii. TLR Has Failed to Prove the Elements of Equitable Estoppel.

Equitable estoppel requires:

> 1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth;
> (2) that the party asserting estoppel did not and could not have discovered the truth;
> (3) an intent that the misrepresentation or concealment be relied upon; and
> (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice.

Willig v. State, Dep't of Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995).

Again without citing to the record, TLR alleges that Wilson represented "that more time was allowed for TLR to develop 27-7549 and the infrastructure necessary to put it to beneficial use" and such a representation was "a concealment of a material fact regarding the development of a water right with actual or constructive knowledge of the truth." *Pet'r's Br.* at 27. As discussed above, there is no evidence in the record that Wilson made any such statements. Wilson merely stated that he would re-measure the pump system after the pumps were brought up to capacity. Ex. 121 at 36; Ex. 122 at 39.

Even assuming such statements were made, they would not be misstatements of fact but would be mistaken statements of law. "The general rule is that administrative officers of the state cannot estop the state through mistaken statements of law." *Kelso*, 134 Idaho at 138, 997 P.2d at 599. In such circumstances, there is no "concealment of a material fact." *Id.* Moreover, where the alleged statements are contrary to law, TLR could have discovered the truth. *See Lawrence*, 70 Idaho at 426, 220 P.2d at 382; *Washington Fed. Sav. and Loan Ass'n v. Transamerica Premier Ins. Co.*, 124 Idaho 913, 917, 865 P.2d 1004, 1008 (1993) ("ignorance of the law or rules of procedure are generally inexcusable"). TLR has, therefore, failed to prove the elements of equitable estoppel.

iii. TLR Has Failed to Prove the Elements of Quasi-Estoppel.

Quasi estoppel is distinguished from equitable estoppel "in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient." *Evans v. Idaho State Tax Comm'n*, 97 Idaho 148, 150, 540 P.2d 810, 812 (1975); *see also Weitz v. Green*¸ 148 Idaho 851, 861, 230 P.3d 743, 753 (2010) ("Quasi-estoppel differs from equitable estoppel, in that the first and fourth requirements of equitable estoppel are not required."). Quasi estoppel "has its basis in acceptance of benefits; it precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her." *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994). "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." *Willig*, 127 Idaho at 261, 899 P.2d at 971.

TLR alleges:

> 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.

Pet'r's Br. at 29.

Quasi-estoppel does not apply under the circumstances presented here. First, the Department did not change its position. The Department did not make a beneficial use determination until after completing its review in 2014. R. 106–10. Any alleged statements made by Wilson that the Department would take a position contrary to statute and the *Examination Rules* are contrary to the law and are not binding on the Department. *See Kelso & Irwin, P.A.*, 134 Idaho at 138, 997 P.2d at 599; *Terrazas*, 147 Idaho at 201, 207 P.3d at 177.

Second, the Department's position that a license cannot issue and the permit should be voided because water was not put to beneficial use during the development period is not

unconscionable, but is the statutorily mandated result of a permit holder failing to be diligent in constructing works and putting water to beneficial use. Idaho Code § 42-204. Further, Drakos was put on notice that any portion of the permit not developed at the time proof was submitted would be relinquished. Ex. 114 at 20.

Additionally, TLR, by and through Drakos, is not a completely innocent party. By filling out and signing the beneficial use proof form Drakos attested that he "completed all development that will occur under the permit and that water had been applied according to the provisions of the permit for the beneficial use(s) described below." Ex. 114 at 20. The "Extent of Use" portion of the form, filled out by Drakos and Johnson, specifies that 480 acres were being irrigated. *Id.* By signing the proof form Drakos attested that "[t]he above information is my true statement of the extent to which the above numbered permit has been developed." *Id.*

As later revealed in the hearing on this matter, the information provided by Drakos was false. Drakos testified that, contrary to the statements made on the Proof of Beneficial Use provided to the Department, irrigation was not actually complete at the time proof was submitted. Tr. at 67:10–21. If Drakos had accurately attested to the extent of development, we would not be here today. Under these circumstances, allowing the Department to void the permit and refuse a license would not be unconscionable. TLR has, therefore, failed to prove the elements of quasi-estoppel.

iv. TLR Has Failed to Prove the Elements of Laches.

"The doctrine of laches is a creation of equity and is a species of equitable estoppel." *Sears v. Berryman*, 101 Idaho 843, 848, 623 P.2d 455, 460 (1981). Laches has four elements:

> (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 defendant that plaintiff would assert his rights, and (4) injury or

> prejudice to defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

State, Dep't of Health & Welfare ex rel. State of Wash. ex rel. Nicklaus v. Annen, 126 Idaho 691, 692–93, 889 P.2d 720, 721–22 (1995).

TLR selectively quotes certain cases related to the doctrine of laches in an attempt to argue the doctrine is applicable in this proceeding. *Pet'r's Br.* at 30–31. The doctrine, however, is not applicable. The doctrine of laches is a defensive doctrine raised by a defendant to oppose a plaintiff's suit. The underlying principle is that equity will not allow a plaintiff to unreasonably delay in bringing suit to enforce his or her rights. *Sears,* 101 Idaho at 848, 623 P.2d at 460. This proceeding was not initiated by the Department bringing suit to enforce its rights.

An examination of the elements is revealing as to why laches is inapplicable. TLR frames the first element as being met if "the Department's effort to void 27-7549 . . . constitutes an invasion of TLR's rights." *Pet'r's Br.* at 31. That, however, is not the proper inquiry. Laches applies to prohibit one who knowingly allows another to infringe on their rights or property for an unreasonably extended period of time to bring suit to enforce the right. *See Eldridge v. Idaho State Penitentiary*, 54 Idaho 213, 222, 30 P.2d 781, 784 (1934). TLR has not infringed on a right of the Department. The Department has not brought suit to protect its rights or property. The Department's licensing determination under Idaho Code § 42-219 is not the equivalent of a suit initiated to assert the Department's rights. It is the required action to complete the statutory licensing process that was set in motion by the Application for Permit filed in 1991. Idaho Code §§ 42-202(1), 42-219; Ex. 105 at 5–8.

Additionally, the third element of laches requires the defendant be unaware that the plaintiff would take action. In this case, an application for a permit is filed with knowledge and

anticipation that it will result in a licensing determination. TLR frames this element as being met because TLR was not aware that the Department would delay action. *Pet'r's Br.* at 31. However, the proper inquiry is whether TLR knew the Department would take action. *See Nicklaus*, 126 Idaho at 693, 889 P.2d at 722. TLR was aware that the Department would have to go through the process of conducting a beneficial use examination and determining whether a license should issue based on the evidence relevant to the proof submitted. *See* Idaho Code §§ 42-217, 42-219.

The law is clear that in order for TLR to receive the benefit of having a water right license issued with a priority date relating back to the date of the permit application, water had to be put to full beneficial use before the proof deadline. *See* Idaho Code § 42-204. By refusing to issue a license and voiding the Permit, the Department is not inequitably asserting a right against TLR, but is completing its licensing determination in compliance with the requirements of Idaho Code § 42-219. Therefore, laches does not apply.

v. TLR Has Failed to Show Extraordinary Circumstances That Warrant Applying Laches or Estoppel to Prevent the Department From Completing a Licensing Determination.

TLR argues that exceptional circumstances exist that warrant applying estoppel to prevent the Department from voiding the Permit because: (1) the Department failed "to perform statutorily-required actions;" (2) "the property right at stake (a valuable water right);" (3) "the sums expended by TLR based on the Examiner's statements (approximately $300,000–$400,000);" and (4) because the Department would have imposed strict penalties (lapsing the permit) if the permit holder failed to timely file proof or submit the required fee. *Pet'r's Br.* at 24. None of these allegations support applying equitable principles to prevent the Department from completing its statutorily mandated duty to complete a licensing determination.

Applying estoppel under the circumstances would actually prevent the Department from performing its statutorily mandated duties and result in granting TLR a water right the Legislature did not intend it to have. The Department has "exclusive authority over the appropriation of the public surface and ground waters of the state." Idaho Code § 42-201(7). Central to this authority is the Department's role in issuing water rights obtained through the statutory appropriation method. As stated by the Idaho Supreme Court, "[u]nlike the constitutional method where only the applicant is involved, the statutory method requires action by both the applicant and the Department." *Idaho Power Co.*, 151 Idaho at 275, 255 P.3d at 1161. "[T]he Department's task in issuing a license is not ministerial because it requires the Department to engage in a detailed analysis prior to issuing a license." *Id.* "Such a determination is an integral and essential aspect of the statutory method of appropriation, and must be conducted, and a license issued, before the applicant obtains a vested water right." *Id.*

TLR frames its equity arguments as a request to estop the Department from voiding the Permit. *Pet'r's Br.* at 20–32. However, a permit is not a standalone water right. It only exists as an intermediate step in the licensing process. The Department's decision to void the Permit is one and the same as its decision to refuse the license.

In 1971, the Legislature amended Idaho Code § 42-103 to require that "the right to the use of the unappropriated waters . . . within this state shall hereafter be acquired only by appropriation under the application, permit, *and* license procedure as provided for in this title." Idaho Code § 42-103 (emphasis added); *Idaho Power Co.*, 151 Idaho at 274, 255 P.3d at 1160. "A water right does not vest until the statutory procedures for obtaining a license are completed, including the [Department's] issuance of the license." *Idaho Power Co.*, 151 Idaho at 275, 255

P.3d at 1161. If the Department concludes that no license should issue then the permit must be voided. Idaho Code § 42-219(8).

The Department conducted a beneficial use examination in accordance with Idaho Code § 42-217. It thereafter concluded that no license could issue because water was not put to beneficial use before the proof deadline as required under Idaho Code § 42-204 and the conditions of the Permit. R. 258–60. TLR has not contested the Department's determination that no water was put to beneficial use before the proof deadline. As no license could issue, the Permit must be voided under Idaho Code § 42-219.

Estopping the Department from voiding the Permit would prevent the Department from completing the licensing determination in compliance with Idaho Code § 42-219. Such a result is contrary to the mandates of chapter 2, title 42, Idaho Code. The Idaho Supreme Court has held that estoppel may not be invoked where "[t]he effect would be to strip the boards of their sole statutory authority to approve or deny subdivision applications." *Terrazas*, 147 Idaho at 201, 207 P.3d at 177. That same reasoning applies here. Invoking estoppel would, in effect, strip the Department of its exclusive authority to issue or refuse a water right license.

Additionally, estopping the Department from voiding the Permit would transform an inchoate right into a permanent water right. Under Idaho Code §§ 42-204 and 42-219, no water right license may issue where no water was put to beneficial use during the development period. Estoppel cannot, therefore, be invoked to grant TLR a water right as it would give TLR "an ownership interest which the legislature did not intend [it] to have." *Kelso & Irwin, P.A.*, 134 Idaho at 138, 997 P.2d at 599.

Drakos reliance on statements allegedly made by Wilson also does not present extraordinary circumstances. As discussed above, the record does not support the allegation that

Wilson represented that the Department would take into account post-proof development in its beneficial use examination. Moreover, even if supported by the record, such a representation would have been inapposite to the mandates of Idaho Code § 42-204 and *Examination Rule* 35 (IDAPA 37.03.02.035.01.o). The Supreme Court has established that estoppel may not be applied to statements made by employees of a state agency that would effectively alter the agency's statutory framework. *Kelso & Irwin, P.A.*, 134 Idaho at 138, 997 P.2d at 599. "To hold otherwise would allow an administrative agency to expand its own powers and effectively amend statutes without legislative action." *Id.*

The fact that the Legislature has not prescribed deadlines for the Department to complete a beneficial use examination but has proscribed deadlines for a permit holder to submit proof also does not warrant the application of estoppel or laches. Under Idaho Code §§ 42-204 and 42-217, a permit holder is required to timely file proof of beneficial use and either the required fee or an examination report by the proof deadline. As discussed above, the proof deadlines are imposed to ensure that a permit holder work diligently to construct works and put water to beneficial use. Under Idaho Code § 42-204, the permit holder is required to put water to full beneficial use by the proof deadline. "The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all rights under his permit." Idaho Code § 42-204. TLR did not put water to beneficial use by the proof deadline set forth in the Permit. Under these circumstances, estopping the Department from voiding the Permit and refusing a license due to delay in the beneficial use examination is contrary to the requirements of Idaho Code § 42-204.

Moreover, what TLR appears to be seeking in this proceeding is a determination that it is entitled to a water right license as a matter of equity. Such relief, however, is not available in a

judicial review proceeding. *See Idaho Power Co.*, 151 Idaho at 276, 255 P.3d at 1162 (the court cannot grant a water right license as a matter of law on judicial review).[10]

For the foregoing reasons, TLR has failed to present exceptional circumstances that warrant applying laches or estoppel to preclude the Department from completing its licensing determination in accordance with Idaho Code § 42-219.

C. Delay in the Department's Licensing Determination Did Not Prejudice TLR's Ability to Appropriate Water.

The crux of TLR's petition is its argument that the Department was unreasonable in delaying the beneficial use examination and licensing determination for the Permit. *See generally Pet'r's Br.* TLR, however, does not deny that had a full beneficial use examination been conducted when proof was submitted, the Department would have come to the same conclusion—water was not being put to beneficial use before the proof deadline. As discussed above, a delay in the beneficial use examination does not change the scope of the examination required under Idaho Code §§ 42-204, 42-217, and 42-219. The result of the examination would have been the same had there been no delay. Therefore, the Department's delay in the licensing determination did not prejudice TLR's ability to pursue and legally appropriate water.[11]

[10] Even if this Court determines that the Department's decision should be overturned as a matter of equity and remanded, there remains the outstanding issue that the water right was not developed at the permitted point of diversion. Compare R. 104, with Ex. 107 at 11. Under Idaho Code § 42-211, TLR is required to file an amendment to correct the point of diversion description before a license could issue. TLR has never filed an amendment to correct the legal description of the point of diversion in the Permit. See R. 124, 255; *Pet'r's Br.* at 8.

[11] Additionally, had TLR or its predecessors in interest believed that they were being injured by the Department's delay in the beneficial use examination, they could have sought a writ of mandamus to compel action by the Department. See *Idaho Power Co*., 151 Idaho at 277, 255 P.3d at 1163. Alternatively, they could have hired a certified water right examiner to conduct the beneficial use examination. See Idaho Code § 42-217.

V. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the final order refusing a license and voiding the Permit be affirmed.

RESPECTFULLY SUBMITTED this 13th day of July 2017.

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Deputy Attorney General
Chief, Natural Resources Division

SHANTEL M. CHAPPLE KNOWLTON
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of July 2017, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:
SRBA DISTRICT COURT
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TWIN FALLS ID 83303-2707
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- ☐ U.S. Mail, postage prepaid
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Shantel M. Chapple Knowlton
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