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 REPLY 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
Shantel M. Chapple Knowlton, ISB #9759
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 Reply Brief*. For the sake of clarity and brevity, TLR will use terms as defined in *Petitioner's Brief*.

I. INTRODUCTION.

TLR believes that the Department must obey all of the statutorily-mandated procedures in a timely manner. In contrast, the Department appears to believe that since it has arrived at the correct conclusion, the Department's failures to fully comply with statutory procedure are excused. The Department did not timely conduct a field examination, never completed the field examination or report, and consequently could not base its licensing decision on a field examination. All of this defies Idaho Code § 42-217. Following the Department's position to its logical end, the Department's process in this matter (and others) renders the field examination procedure required by § 42-217 a nullity, which is contrary to the words of the statute. Any such process that is contrary to the plain language of a statute should not be endorsed by this court because this court "must base [its] decision on the actual wording of the statute." *A&B Irr. Dist. v. Idaho Dep't of Water Res.*, 154 Idaho 652, 655, 301 P.3d 1270, 1273 (2012).

It does not matter to the Department that TLR's predecessor paid the required fee ($325) for the Department to conduct a complete field examination, which it must do "[u]pon receipt" of the fee and other documents. Idaho Code § 42-217. The Department delayed five years before conducting a partial field examination and fourteen more years before making a licensing decision (without ever having completed the field examination or the required report). Yet, despite assurances by the Department's authorized representative that, upon completion of development,

"everything would be fine," the Department insists that TLR alone must bear the costly and extraordinary effects of the Department's delays and the Examiner's representations. TLR asks this Court to compel the Department to bear the legal effects of its failures and to apply equity to this exceptional situation to arrive at a just outcome for all parties.

II. ARGUMENT.

Consideration of this matter is complicated by the Department's untimeliness in even attempting (though not completing) certain of its statutory duties under Idaho Code § 42-217. It took the Department five years to begin a field examination that was never completed. At that partial field examination, the Department's authorized representative, the Examiner, explained that he was holding the field examination open until development could be completed and then "everything would be fine." Tr. at p. 50, ll. 9-11. Thereafter, it took the Department fourteen years to begin the process of making a licensing decision with regard to 27-7549 and, ultimately, issue the *Final Decision*, voiding 27-7549 and reducing TLR's investments to waste.

The *Final Decision* was made "in violation of constitutional or statutory provisions," "in excess of the statutory authority of the agency," "upon unlawful procedure," and was "arbitrary, capricious, [and] an abuse of discretion." Idaho Code § 67-5279(3)(a), –(b), –(c), –(e). The Department's errors have prejudiced TLR's substantial rights. Idaho Code § 67-5279(4). It violates both law and equity, and should be corrected by this Court.

A. The Department's attempt to void 27-7549 without a complete field examination violates the statutorily-mandated licensing procedure.

The Department claims that it "acted within its statutory authority and upon proper procedure in refusing a license and voiding" 27-7549. *Respondent's Br.* at 10 (emphasis omitted, capitalization modified). Ultimately, rejecting a license and voiding a permit are actions within the statutory authority of the Department. However, the licensing process engaged in by the Department in this matter is not the statutorily-mandated, proper procedure. While the Department emphasizes its statutory right to void 27-7549, it ignores statutory mandates describing the proper procedure antecedent to its licensing decision.

The reason for the very specific statutory procedure is to adequately protect an individual's interests in their application, permit, and license. *Grover v. Idaho Public Utilities Com'n*, 83 Idaho 351, 356, 364 P.2d 167, 170 (1961) (a "permit is a valuable property right and can only be revoked as provided by statute"); *see also Hardy v. Higginson*, 123 Idaho 485, 490-91, 849 P.2d 946, 951-52 (1993). The Department would rather ignore portions of the statutory process (specifically, Idaho Code § 42-217) and excuse its actions as the unfortunate product of "[im]perfect conditions." *Respondent's Br.* at 18. However, the Department does not have authority to choose which statutory mandates it obeys—and its attempts to rely on § 42-219 and to excuse its violation of § 42-217 cannot be availing. This Court should require the Department to follow all the statutes; including the requirement to complete an actual field examination and field examination report and then, based on the information yielded by the actual field examination, to make a licensing determination.

1. The Department has not completed, resumed, or "renewed" a field examination and, consequently, has wrongfully circumvented the proper licensing process for 27-7549.

Every 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). Whenever a statute uses the term "shall," it plainly—which is to say, unambiguously—imposes a mandatory requirement. *See State v. Tribe*, 123 Idaho 721, 726, 852 P.2d 87, 92 (1993); *Roesch v. Klemann*, 155 Idaho 175, 178, 307 P.3d 192, 195 (2013); *Twin Falls Cnty. v. Idaho Com'n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012). The Idaho Supreme Court has stated clearly that "[w]e must base our decision on the actual wording of the statute," and "we must apply the statute as written." *A&B Irr. Dist.*, 154 Idaho at 655-56, 301 P.3d at 1273-74 (reversing the district court and finding that the phrase "dispose of" within twenty-one days found in Idaho Code § 67-5246 means that the matter must be decided on the merits within twenty-one days, and that an order accepting or agreeing to reconsider a final order issued by the Director does not "dispose of" the petition). Recognizing its limited role and avoiding the temptation to legislate from the bench, the Idaho Supreme Court has routinely stated "'[i]f the statute is unwise, the power to correct it resides with the legislature, not the judiciary.'" *Id*. (quoting *State Through Idaho State Bd. of Accountancy v. League Services, Inc.*, 108 Idaho 157, 159, 697 P.2d 1171, 1173 (1985)).

Against the backdrop of this statutory interpretation law, the plain language of Idaho Code § 42-217 imposes some mandatory requirements while others are discretionary. *See* Idaho Code § 42-217 (noting use of the word "shall" in contrast with use of the word "may"). The Department

"shall" conduct a field examination and the examiner "shall prepare and file a report of the investigation." *Id*.

Yet, despite this unambiguous statutory language, the Department argues that there is no binding requirement that it actually complete the field examination report, *Respondent's Br*. at 12-14, and—if there is—that the Department satisfied any requirement by somehow completing the field examination report without completing the in-field portion of the field examination, *Respondent's Br*. at 14-15. The Department's argument appears to center on the principle that the statutes and the rules selectively apply where convenient for the Department and where they coincide with the Department's current policies. To the contrary, TLR believes that the Department must comply with the mandates of the Idaho Code and its discretion cannot be used to circumvent statutory requirements. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) (referred to hereinafter as "*AFRD #2*") (the Department's discretion "is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts").

Initially, the Department provides two counterarguments why it is not required to complete a field examination. *Respondent's Br*. at 12-13. Neither counterargument is availing.

First, the Department correctly asserts that "[n]either the Idaho Code nor the [Beneficial Use Examination Rules] prevent the Department from relying on information gathered through alternative means when making a licensing determination." *Respondent's Br*. at 13. However, this misses the point. The language in Idaho Code § 42-219(1) and –(8) allows the Department to consider information gathered through alternative means, but this **does not relieve** the Department

of the requirement in Idaho Code § 42-217 to complete a field examination and field examination report. The Department can rely on other information, and while the details of each field examination must take account of "sound examination principles," *Respondent's Br.* at 13 (quoting R. at 258; IDAPA 37.03.02.001.01.), this does not relieve the Department of its statutory duties. Regardless of how much the Department feels it is not bound by its own rules, including the definition of a field examination, it **must undertake and complete a field examination and field examination report**. Idaho Code § 42-217.

Second, the Department argues that "TLR fails to consider the role of the Department's [Beneficial Use Examination Rules] and the specific purpose and scope of the [field examination]." *Respondent's Br*. at 13. In other words, because the Department has determined that 27-7549 should be voided, there is no reason for the Department to follow a cumbersome procedure (even if it is mandated by statute) in order to conclude that 27-7549 should be voided. *See Respondent's Br*. at 14 ("Not only would the renewed on-site inspection in 2013 not have been useful, it would not have affected the Department's conclusion"). This reasoning, couched in terms of "purpose" and legislative policy, is untenable. Even in exercising discretion, the Department must also follow the law. *AFRD #2*, 143 Idaho at 880, 154 P.3d at 451. Because a field examination is required by Idaho Code § 42-217, the Department must complete a field examination and, therefrom, a field examination report. No "purpose," policy argument, or pre-determination of the question by the Department can justify any other conclusion.

Here, the Department concedes that "the investigation [or field examination] was not completed" by the Examiner. *Respondent's Br.* at 12. Further, "no renewed field examination

was conducted." *Respondent's Br.* at 4. Nevertheless, the Department contends it adequately followed the statutory procedure by "conduct[ing] a renewed examination of beneficial use occurring under [27-7549] in 2013, relying on aerial photography and satellite imagery in addition to the information gathered during the 1999 [field examination]." *Respondent's Br.* at 12. However, this position is not congruent with the law. "The department … **shall** prepare and file a report of the investigation." Idaho Code § 42-217 (emphasis added). The field examination report is a report of the on-site investigation conducted by an examiner. *Id.* The statutory requirement relates to more than the form used. *See Respondent's Br.* at 15 (citing IDAPA 37.03.02.010.13.). Neither the hearing officer in the *Final Order* nor the Department now on review can equate a "field examination report" (a term used in Idaho Code § 42-217) with a "recommendation for licensing," *Respondent's Br.* at 15 (quoting the *Final Order*, R. at 260) or a report based on a generic "examination of beneficial use," *Respondent's Br.* at 12.

The "*2014 Report*" (as that term is defined by the Department, *Respondent's Br.* at 4) is not a field examination report. It is exactly what the Department calls it—a recommendation for licensing. But Idaho Code § 42-217 requires completion of a field examination and a field examination report. Idaho Code § 42-219 does not provide any exception to that requirement. The Department has failed to satisfy that requirement of Idaho Code § 42-217, and yet remains steadfast in justifying that failure. But contrary to the Department's claims of its actions being within its discretion and 'ends justifying the means' arguments, the Department is bound by the mandatory obligations codified in statute. This Court's oversight of the Department must step in and correct this error. *AFRD #2*, 143 Idaho at 880, 154 P.3d at 451.

2. 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.

The Department does not appear to directly dispute TLR's contention that it should take the permit holder's system as it finds it when the field examination is performed. Instead, the Department denigrates the nature and value of a permit and explains why (even though it used dubious means) the Department believes it arrived at the "right" outcome. *Respondent's Br.* at 16-18. Thus, the Department pointedly contends that "[i]f the statutory procedures are not complied with [by the permit holder], no license may issue." *Respondent's Br.* at 18 (citing Idaho Code § 42-219). But the very next sentence of the Department's brief reads: "Under perfect conditions, a field examination would be conducted at or near the time that proof is submitted." *Respondent's Br.* at 18. It appears that to the Department, a permit holder's lack of absolute compliance with statutory procedures is fatal, while the Department's own violation of statutory procedures is nothing more than an unfortunate imperfect condition. This incongruity, or lack of mutuality, appears throughout the Department's argument. For obvious reasons, the Department would rather discuss TLR's statutory short-comings rather than its own. Then, the Department justifies its errors by claiming that it arrived at the correct result anyway. TLR contends that, especially for an administrative agency, the procedure used to arrive at a decision is as important (and protected) as the ultimate decision itself.

In submitting proof of beneficial use, a permit holder can choose to either (a) provide "a field examination report prepared by a certified water right examiner" or (b) pay a fee to the Department, based on the size of the permitted use of water. Idaho Code § 42-217. If the permit

holder files the fee, the Department is required to conduct a field examination. *Id*. The specific wording of the statute requires that "**[u]pon receipt** of [the] proof and the fee as required … the department **shall**" conduct the field examination. *Id*. (emphasis added). The term "upon receipt" must be considered by this Court. There is no rational reasoning that can interpret the statutory term "upon receipt" to mean anything akin to "some years later." Yet, in this case (and many others), the Department has delayed its field examination by years. TLR does not impute any malintent to the Department's failure to comply with the timing requirement of Idaho Code § 42-217, as there are any number of legitimate reasons for the Department's inaction. But **this Court must apply the statutory term "[u]pon receipt" and determine what timeliness that requires and then what the consequences are of the Department's failure to perform its duties within the timeliness limits of Idaho Code § 42-217**. This is particularly necessary because here and in other cases, the Department exacerbates its failure to conduct a timely field examination (as required by Idaho Code § 42-217) by placing the burden of proof on the permit holder, rather than on the field examination.

TLR has provided a document from another matter, showing that the Department's licensing process is evolving from what the statutes require into an office-centric approach that tends to deny licenses and places the burden of persuasion on the permit holder. *See Petitioner's Br*. at 16-17 (quoting Letter from Aaron Marshall to Steveco Canyon Farms, August 4, 2008, *available at* http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/dbjs01_.pdf).[1] The

[1] The Department takes umbrage with TLR's citation to this matter. *Respondent's Br*. at 19, n. 8 (contending that this is a factual matter outside the scope of the record of this case). However, the cited material is not factual, but demonstrates a position taken by the Department and is legal authority, properly before this Court. In any event,

Department responds that it is allowed—and even directed—to consider all relevant evidence in a licensing decision and points out that the "final decision" with regard to the licensing of a water right still rests with the Department. *Respondent's Br*. at 19-20. TLR does not contest either of these points. However, the delegation and error that the Department ignores is that the Department's evolving process **wrongfully places the burden of proof on the permit user**. The Department asks for more than just evidence; the Department asks to be persuaded. That is not the licensing process outlined in statute. The Department's departure from the statutory process is concerning to TLR and ought to be concerning to this Court.

The Department is very exacting in its requirements that permit holders comply exactly with the applicable statutes. *See, e.g., Respondent's Br*. at 18. However, the Department believes that its lack of compliance (*e.g.*, in failing to conduct a field examination "upon receipt" of TLR's submission of proof of beneficial use and the required fee) should yield no consequences. The permit holder must choose to either submit a fee (and have the Department conduct its field examination "upon receipt" thereof) or submit a completed field examination made by a qualified water right examiner. Idaho Code § 42-217. If a permit holder delays a mere 14 months, the Department is justified in voiding the permit. *See* IDAPA 37.03.02.055.01. Here, TLR complied with these requirements, submitting proof and a $325 fee for the field examination. Ex. at 21 (Exhibit 115). On the other hand, the Department argues that its untimeliness—in this case, at least 14 years—should carry no consequences.

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as a public record that is readily available, this Court may take judicial notice of the cited material. Idaho Rule of Evidence 201. The Department does not contest the accuracy, relevance, or nature of the cited material. *See Respondent's Br.* at 19, n. 8.

This Court and the Idaho Supreme Court have previously explained that delays in performing statutory duties must be reasonable. *Riley v. Rowan, In re SRBA Case No. 39576 (Subcase No. 94–00012),* Memorandum Decision (SRBA Ct. Aug. 28, 1997) *aff'd on different grounds in Riley v. Rowan*, 131 Idaho 831, 965 P.2d 191 (1998); *see also Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 255 P.3d 1152 (2011). In *Idaho Power*, the Department's lengthy delay in performing its statutory duty of issuing the license was excused by Idaho Power's failure "to demonstrate, either before the administrative agency or on appeal, that the Department's delay in issuing the license was **unreasonable under the circumstances**." *Idaho Power*, 151 Idaho at 276, 255 P.3d at 1162 (emphasis added). There, the Department "put forth several colorable justifications for its delay in issuing the license," including the lengthy resolution of the Swan Falls controversy (in which Idaho Power was in opposition to the State), implementing legislation to implement the resulting Swan Falls agreement, and conducting the Snake River Basin Adjudication (as required by the agreement). *Id.* at 276-77, 255 P.3d at 1162-63.

Here, in contrast, the Department provides no justification for its long delay in conducting the statutorily-required field exam. In contrast, TLR has shown the unreasonableness of the Department's delay and the catastrophic effect the delay has had, costing TLR hundreds of thousands of dollars. A.R. at 141. While "the Department's task in issuing a license is not ministerial," the Department's task of conducting and completing a timely field examination is ministerial—it is mandatory and in no way optional or discretionary. *Idaho Power*, 151 Idaho at 275, 255 P.3d at 1161; *see also id.* at 274, 255 P.3d at 1160 (after the submission of proof, the

"Department is then **required** to conduct a field examination" (citing Idaho Code § 42-217) (emphasis added)). Thus, there must be consequences—either legal (under this Section II.A. of TLR's argument) or equitable (under Section II.B. of TLR's argument, below)—for the Department's unreasonable delay in conducting a field examination and its failure to complete the field examination.

In an apparent effort to paint TLR's concerns as trivial, the Department is unsympathetically dismissive of the nature of a permit, stating that: "[b]y obtaining a permit, the permit holder does not have a water right, but rather, has established a placeholder in the priority line." *Respondent's Br.* at 17. While we agree that a permit is not a vested, licensed water right, we do not agree that it is a mere "placeholder" that the Department finds easy to dismiss. All of the cases cited by the Department[2] revolved around when a water right vested and could defeat subsequent actions (either by another water right user or by the Department). *See Basinger*, 30 Idaho at ____, 164 P. at 523-24 (regarding ownership of water rights in a quiet title action, with a permit holder claiming against a water right holder); *Idaho Power*, 151 Idaho at 270-71, 255 P.3d at 1156-57 (regarding the vesting date of a water right to preclude the Department from imposing additional conditions on the license); *Washington State Sugar*, 27 Idaho at _____, 147 P. at 1074-75 (regarding ownership of water rights in a quiet title action, with a permit holder claiming against a water right holder). A permit is less than a vested, licensed water right. However, the Department goes beyond this comparison, and paints a picture in which a permit is really nothing,

[2] *Respondent's Br.* at 16-17 (citing *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917); *Idaho Power*, 151 Idaho 266, 255 P.3d 1152; *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915)).

and that position is simply wrong. *Respondent's Br.* at 17. A permit "expresses the consent of the state that the holder may acquire a water right," but the permit itself is "an inchoate right." *Basinger*, 30 Idaho at _____, 164 P. at 524; *see also Idaho Power*, 151 Idaho at 274, 255 P.3d at 1152 (quoting *In re Hidden Springs Trout Ranch, Inc.*, 102 Idaho 623, 625, 626 P.2d 745, 747 (1981)). Far from being nothing (or just a "placeholder in the priority line"), an inchoate right is a "**right** that has not fully developed, matured, or vested." BLACK'S LAW DICTIONARY 830 (9th ed. 2009). An inchoate right may be affected by subsequent legislation or changes to the law. *See Schoorl v. Lankford*, 161 Idaho 628, 389 P.3d 173, 176 (2017); *Hardy*, 123 Idaho at 490-91, 849 P.2d at 951-52; *Hidden Springs Trout Ranch*, 102 Idaho at 624-25, 636 P.2d at 746-47. However, even so, a permit—the right, granted from the state, to undertake an action (here, to divert water and put it to beneficial use)—is still "a valuable property right and **can only be revoked as provided by statute**." *Grover*, 83 Idaho at 356, 364 P.2d at 170 (emphasis added); *see also Hardy*, 123 Idaho at 490-91, 849 P.2d at 951-52 (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).

In sum, TLR has been very up front regarding what happened during the development of 27-7549, and is not downplaying the facts as the Department has and continues to do. The majority of the development of 27-7549 occurred post-proof. However, TLR asked the Department—and now asks this Court—to look closely at the facts to see why TLR continued developing 27-7549 and to determine the legal and equitable effect of those facts. In contrast, the Department ignores its failings or claims its short-comings are entirely within the Department's discretion. TLR simply

asks that this Court hold the Department accountable to its clear statutory obligations. In other words, TLR should not now be subject to a non-statutory licensing process that does not require a field examination because of circumstances beyond TLR's control—*i.e.*, the Department's failure to conduct and complete a 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). The Department should be required to take a water system as it finds it when the field exam occurs—especially when the Department has unreasonably delayed its field examination.

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 broad strokes, the Department's argument tries to smother the spirit of equity under numerous statutory and legal arguments. Equity itself "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). In other words, "equity, though just, is not legal justice, but a rectification of legal justice." Edgar Bodenheimer et al., AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM 51 (3d ed. 2001) (quoting Aristotle, THE NICOMACHEAN ETHICS 313-317 (H. Rackham trans., Everyman's Library ed. 1947)). Because having two separate court systems providing justice caused confusion and inconvenience, courts of law and equity began to be merged,

beginning in 1848 in New York State. Bodenheimer et al., at 60-61. Idaho has likewise merged courts of law and equity—*see* footnote 3, *infra*—and for that reason, this Court is empowered to "create justice for all parties" through a "flexible" approach, rather than the application of "mechanical rules" advocated by the Department. *Climax*, 149 Idaho at 796, 241 P.3d at 969 (citation omitted).

Before ever addressing the merits of TLR's equitable arguments, the Department attempts to fashion a mechanical, brightline rule that bars application and consideration of equity in this action. Such a rule does not exist in Idaho law, and has been countermanded by the Idaho Supreme Court's explicit refusal to adopt such a rule. The Department's novel argument is that equitable considerations are outside the scope of review prescribed by Idaho Code § 67-5279. *Respondent's Br.* at 21-22. While creative, this argument cannot be prevailing. The Idaho Supreme Court has considered the application of equitable principles—specifically quasi-estoppel—in reviewing the Department's actions under the Idaho Administrative Procedures Act, Idaho Code § 67-5201, *et seq*. *See Rangen*, 159 Idaho at ____, 367 P.3d at 203-04. In reviewing the Department's decisions, the Idaho Supreme Court has explained that "[r]eview on appeal is limited to those issues raised before the administrative tribunal, with the exception of an issue the administrative tribunal lacked the authority to decide." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011) (internal quotation marks and citations omitted). Here, the Department supplies absolutely no argument that it—the administrative tribunal—lacked authority to decide issues of equity that were presented and must now be reviewed.

Additionally, the text of Idaho Code § 67-5279 provides for the consideration of TLR's equitable theories on review. By violating (and, frankly, refusing to adequately consider) the equitable theories espoused by TLR, the Department has acted "in violation of constitutional or statutory provisions." Idaho Code § 67-5279(3)(a). This is because "[e]stoppel is a creature of the common law." *Williams v. Blakley*, 114 Idaho 323, 325, 757 P.2d 186, 188 (1987); *see also Nw. Roofers & Employers Health & Sec. Tr. Fund v. Bullis*, 108 Idaho 368, 372, 699 P.2d 1382, 1386 (1985) (noting that the application of "the equitable defenses of laches and estoppel" are determined by common law; there federal common law, as the actions was brought pursuant to federal law). As part of the common law, estoppel and laches have been incorporated into the body of Idaho law by statute. Idaho Code § 73-116. This is further supported by Idaho's decision to prohibit "[t]he distinctions between actions at law and suits in equity" and, instead, to institute "one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action." IDAHO CONST., Art. V, § 1[3]. The violation of these statutory and constitutional provisions also yields a decision "in excess of the statutory authority of the agency," Idaho Code § 67-5279(3)(b), and "made upon unlawful procedure," Idaho Code § 67-5279(3)(c). Finally, incorrectly applying these equitable defenses, as required by law, is "arbitrary, capricious, [and] an abuse of discretion." Idaho Code § 67-5279(3)(e). For

[3] In 1848, New York State enacted a provision almost identical to this provision from the 1890 Idaho Constitution. *See* Aaron Friedberg, *The Merger of Law and Equity*, 12 St. John's L. Rev. 317, 318-19 (1938). "The ends that were uppermost in the minds of the codifiers were the amalgamation of law and equity into one blended system which was to constitute the sovereign law of the state; to abolish the prevalence of a distinct tribunal and a distinct system of pleading and practice for each; and to stamp out the anomaly of the existence of two conflicting legal propositions covering the identical controversy." *Id.* at 319. For that reason, the goal of this merger of law and equity necessitates that **"[w]henever there is an inconsistency between legal and equitable principles the latter will prevail**." *Id.* at 319 n. 7 (emphasis added).

these reasons, Idaho Code § 67-5279 provides for review of the equitable defenses presented by TLR in this matter.

The Department also makes two contradictory policy arguments against the application of equity against it or any state agency. First, the Department points out that estoppel cannot be applied to expand the power of an administrative agency. *Respondent's Br.* at 20. Second, the Department points out that estoppel cannot effect a limitation on the power of such an agency. *Respondent's Br.* at 20-21. It is unclear whether the Department feels that the application of estoppel to this case would expand or restrict its power. This lack of detail or explanation reduces the Department's argument in this regard results in an over-stated, under-analyzed parade of horribles intended to sway this Court. As even the Department correctly notes, these "[t]wo principles significantly limit the applicability of estoppel against government agencies." *Respondent's Br.* at 20. However, a limitation is a far cry from an outright proscription. To have the effect intended by the Department, these two principles must be undergirded by the assumption that the Department has acted flawlessly—perfectly walking the tightrope between overstepping its power and under-enforcing the statutes. The Department assumes its actions are flawless, but the very point of TLR's petition for judicial review is to have this Court provide the oversight necessary to correct the Department's errors. *AFRD #2,* 143 Idaho at 880, 154 P.3d at 451.

Throughout its argument, the Department leans heavily on the general rule that "ordinarily" equitable relief (estoppel and, by extension, laches) will not be applied against a governmental agency. *Respondent's Br.* at 20-21. Indeed, TLR acknowledges the "reluctance" of courts to apply equitable principles against governmental actors. *Terrazas v. Blaine Cnty. ex rel. Bd. of Comm'rs*,

147 Idaho 193, 200, 207 P.3d 169, 176 (2009); *see also Respondent's Br.* at 23. However, judicial reluctance is not the same as inapplicability. *See Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, ____, 367 P.3d 193, 204 (2016) ("the Court has previously left open the possibility that quasi-estoppel could apply against a government entity in exigent circumstances. These cases do not express whether quasi-estoppel might apply even where the government action at issue relates to a sovereign or governmental function. Nor do the cases disclose what constitutes an exigent circumstance warranting the application of the doctrine against the government. The Court expresses no opinion on these questions at this time." (citations omitted)). In fact, estoppel can 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). Estoppel must "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 [the Idaho Supreme] Court cannot and will not adopt a rigid standard." *Swayne*, 97 Idaho at 531, 547 P.2d at 1139.

This case presents the extraordinary circumstances that justify the application of estoppel (and laches). *See Petitioner's Br.* at 21-22, 24. Simply, the Department's decades-long delay in completing a field examination (and field examination report) and licensing determination coupled

with the Examiner's statements that induced TLR to invest about $300,000–$400,000 in continuing to develop 27-7549. Through all of this, the evidence demonstrates that the Department knew what TLR was doing. *Petitioner's Br.* at 21-22. This is the exceptional case where this Court should apply estoppel and/or laches to enforce the "notions of justice and fair play" that required of even an administrative agency like the Department. *Idaho Wool Growers*, 154 Idaho at 723, 302 P.3d at 348.

The Department contends that this case does not present the extraordinary circumstances necessary for the application of estoppel or laches. *Respondent's Br.* at 29-33. This argument largely centers on the fact that the "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." *Respondent's Br.* at 30 (quoting *Idaho Power*, 151 Idaho at 275, 255 P.3d at 1161) . However, this "detailed analysis" necessarily implicates the Department's discretion in how the analysis is conducted, what weight the evidence is given, and whether evidentiary burdens have been met. Such discretion is the ideal locus for equitable doctrines to apply. Further, the purpose of the extraordinary circumstances requirement is in order to limit the application of equity to governmental entities and constrain the unusual effects of equity to those situations where it is absolutely necessary in order to avoid manifest injustice. The Department's insistence that only the statutes, and not equity, guide the outcome of this matter is the general rule. But this case is the exception. The **circumstances of this case**, not just the circumstances of the Department's statutory framework, must be considered by this Court to determine whether equity should apply here. Facts are important. The hundreds of thousands of dollars invested, which would be relegated to waste by

the Department's action, provide the most quantitative measurement of the extraordinary circumstances present here. But TLR has presented more reasons demonstrating the exceptional facts of this matter. *See Petitioner's Br.* at 21-22, 24. The Department dismisses all of these reasons in one, brief paragraph. *Respondent's Br.* at 29. The Department's unwillingness to address the uncomfortable reality of the situation before it and confront the facts of this case—in favor of reciting the statutory strictures applicable to the Department—should not guide this Court's analysis.

TLR implores the Court to look at the facts here and see that in this case, there exists the rare extraordinary circumstances that warrant the application of promissory estoppel, equitable estoppel, quasi-estoppel, and laches. *See Petitioner's Br.* at 25-32. Specifically as to each doctrine invoked by TLR, the Department contests TLR's showing of the elements of these doctrines. *Respondent's Br.* at 23-29. However, as discussed below, none of the Department's challenges are availing.

1. Promissory estoppel bars the Department from voiding 27-7549.

At the outset, the parties appear to disagree as to the necessary elements of promissory estoppel. *See Petitioner's Br.* at 25 (listing three elements of promissory estoppel and citing *Brown v. City of Pocatello*, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010)); *compare Respondent's Br.* at 23 (listing four elements of promissory estoppel and citing *Zollinger v. Carrol*, 137 Idaho 397, 399, 49 P.3d 402, 404 (2002)). The vast majority of Idaho Supreme Court opinions (both before and after *Zollinger*) have listed the three elements of promissory estoppel proposed by TLR. *Profits Plus Capital Mgmt., LLC v. Podesta*, 156 Idaho 873, 891, 332 P.3d 785, 803 (2014);

Mitchell v. Bingham Mem'l Hosp., 130 Idaho 420, 425, 942 P.2d 544, 549 (1997); *Gillespie v. Mountain Park Estates, L.L.C.*, 138 Idaho 27, 29, 56 P.3d 1277, 1279 (2002) (citing *Mitchell*, 130 Idaho 420, 942 P.2d 544, which quotes *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 178 n. 2, 804 P.2d 900, 907 n. 2 (1991), which in turn quotes *Mohr v. Shultz*, 86 Idaho 531, 540, 388 P.2d 1002, 1008 (1964)). The three elements of promissory estoppel proposed by TLR have been enshrined in Idaho law for at least 50 years. In contrast, the Department appears to have gone out of its way to cite the minority opinion, *i.e.*, Justice Walters's recitation of four elements in *Zollinger*. *See also Black Canyon*, 119 Idaho at 182, 804 P.2d at 911 (Bistline, J., dissenting) (listing the four elements of promissory estoppel just like *Zollinger*); compare with *Black Canyon*, 119 Idaho at 178 n. 2, 804 P.2d at 907 n. 2 (the footnote of the majority opinion, listing the three elements of promissory estoppel by quoting *Mohr*, 86 Idaho at 540, 388 P.2d at 1008). The Department appears to have done this in order to draw the focus to a "specific promise" that is not included as an element of promissory estoppel anywhere else in Idaho law. The Court should not confuse the issues and apply the wrong elements.

Even if a promise is required, the statements of the Examiner are sufficient. In fact, there is remarkable documentary evidence of the Examiner's promise. In the incomplete field examination report from 1999, the Examiner wrote:

E. NARRATIVE/REMARKS/COMMENTS

Permit holder - problems w/ Power. Using temporary pumps
~~Do not use measurements~~ Could not get good measurements
check back when system pumps are repaired.

Ex. at 39 (Exhibit 122). Further, the Examiner's letter, dated July 27, 2000, states:

> Dear Mr. Drakos:
>
> From your conversation with Steve Mueller it appears that you thought that the licensing field exam for 27-07549 had been completed.
>
> 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.

Ex. at 36 (Exhibit 121). These documents unequivocally show that the Examiner directed TLR to keep working on the system (it is obvious that the "re-measurement of the system" was not to occur on the same infrastructure, but only after improvements were made to the system) and promised he would return later and "complet[e] the licensing field exam." Ex. at 36 (Exhibit 121). Added to this is Drakos's recollection that the Examiner "told [him] that everything would be fine, that when I got the motors on there, he would – everything would be fine." Tr. at p. 50, ll. 9-11. In this sense, "everything would be fine" must mean that the renovated water system would be evaluated and licensed in accordance with what it then irrigated. *See Campbell v. Parkway Surgery Ctr., LLC*, 158 Idaho 957, 964, 354 P.3d 1172, 1179 (2015) (a promise to "take care of" a debt means to pay it, as that is the plain meaning of the phrase); *see id.* at 970, 354 P.3d at 1185 (J. Jones, J., specially concurring) (excoriating "Parkway's deplorable conduct" in feigning ignorance as to what is means to "take care of" a debt).

Nevertheless, the elements of promissory estoppel remain: "(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*, 148 Idaho at 807, 229 P.3d at 1169 (citations and internal quotation marks omitted). Here, the Department's actions, through its agent—the Examiner—give rise to promissory estoppel.

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. The Department takes TLR to task for making that statement "[w]ithout any citation to the record." *Respondent's Br.* at 23. Having recited the relevant facts multiple times within its prior brief, TLR dispensed with such repetitive citations. However, the record sustains this statement. The Examiner told TLR to keep working on developing 27-7549 and then the Examiner would return and "everything would be fine." Ex. at 36 (Exhibit 121); Tr. at p. 50, ll. 9-11. Based on (which is to say, in reliance upon) that promise and direction, TLR invested approximately $300,000–$400,000 in further developing 27-7549. A.R. at 141. The only reason for TLR to have invested that much money is its reliance on the Examiner's statements and promise.

Second, TLR's investment (and, unless estoppel is applied, TLR's loss) was foreseeable to the Examiner and, more importantly, to the Department. The Examiner and the Department are well aware of how much development of an agricultural irrigation water right costs. 27-7549 was intended to irrigate 480 acres. Ex. at 11 (Exhibit 107). It is for that reason that the Department charged the field examination fee of $325 for a field examination of a permit of this size. Ex. at 21 (Exhibit 115). Statements do not determine what someone could have foreseen, but merely what they did foresee. However, TLR does not have to prove that the Examiner or the Department

actually foresaw TLR's loss, *see Respondent's Br.* at 24, but merely that TLR's loss "should have been foreseeable" by the Examiner or the Department. *Brown*, 148 Idaho at 807, 229 P.3d at 1169. Simply, it is reasonable to impute the knowledge to the Examiner and Department, that TLR would expend hundreds of thousands of dollars in developing 27-7549 to irrigate 480 acres based on the Examiners directive to TLR to continue development.

Finally, the Department contends that any reliance TLR placed in the Examiner's statements on behalf of the Department are unreasonable, based on the text of the Proof of Beneficial Use form submitted by TLR's predecessors. *Respondent's Br.* at 24. However, what the Department disregards is the timing of the facts of this case. TLR's *Proof of Beneficial Use* was received by the Department on June 17, 1994. Ex. at 20 (Exhibit 114). However, the Examiner conducted the partial field examination on November 4, 1999. Ex. at 37 (Exhibit 122). It is at that time that the Examiner made his statements and promise to TLR, on behalf of the Department. And these statements were made while the Examiner was on the property where the lack of cultivated and irrigated land was in full view as evidenced by photographs taken at the time that were included in the partial field exam. Ex. at 41 (Exhibit 122) (see photograph labeled "place of use"). It was, in fact, reasonable for TLR to rely on the statements and promise made more than 5 years after submission of the *Proof of Beneficial Use* by the Examiner, who had full knowledge of the contents of that document. While the Department paints itself as locked in to a single course of action by the governing statutes, in fact, the Department has a great deal of discretion in how those statutes are accomplished. Thus, when the Examiner—representing the Department—makes

binding statements and directs TLR to continue developing 27-7549, it is reasonable for TLR to rely thereon.

For these reasons, promissory estoppel bars the Department from asserting that 27-7549 is void.

2. Equitable estoppel bars the Department from voiding 27-7549.

The Department agrees with TLT on the elements of equitable estoppel (*see Petitioner's Br.* at 26-27; *compare Respondent's Br.* at 25), which are:

> (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). The Department only contests the first and second elements. *Respondent's Br.* at 25.

As to the first element, TLR (like the Department) refers to prior argument regarding the statements made by the Examiner on behalf of the Department. Further, the Department contends that any misrepresentation made by the Examiner was an error of law and not of fact, bringing the misstatement outside the scope of equitable estoppel. *Respondent's Br.* at 25. The Examiner's statements misrepresented the time TLR had to develop 27-7549, which is a material fact. Ex. at 36 (Exhibit 121); Tr. at p. 50, ll. 9-11. While the Examiner also misrepresented aspects of law—

in essence, everything asserted by the Department in this proceeding—at the core of what the Examiner told TLR (Drakos) is this misrepresentation of fact; namely, that TLR should continue working on, developing, and investing in 27-7549 and that the Examiner would return to prepare a field exam once all of the addition development of the irrigation system was completed.

As to the second element, the Department contends that "TLR could have discovered the truth" of the law—which is to say that TLR could have discovered the law as the Department now asserts it exists. *Respondent's Br.* at 25 (citing cases for the principle that ignorance of the law is no excuse). Again, this is the Department claiming statutory mandates when they are convenient, only to later utilize its substantial discretion when it suits the Department's decisions. It is surprising that the Department would argue that TLR and its representatives should know and discover errors made by the Department's representative—a person who is an expert in how water right permits are developed and authorized to act on behalf of the Department. The Department's discretion is far-reaching and it makes sense for any ordinary water user to defer to the Department's authorized representative regarding the exercise of that discretion. Given the Department's opacity regarding its exercise of discretion, the only window into the Department's process is its representatives. There is no other way to understand how—or whether—the Department is acting in its discretionary authority.

None of the other elements are addressed herein, as the Department has not contested them. Thus, equitable estoppel bars the Department from asserting that 27-7549 is void.

3. Quasi-estoppel bar the Department from voiding 27-7549.

As to 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 Department makes three arguments against the application of quasi-estoppel, none of which should persuade this Court.

First, the Department claims that it has not changed its position, because the Examiner's statements "are contrary to the law and are not binding on the Department." *Respondent's Br.* at 26. In essence, the Department argues that it has not changed its position because, despite the Examiner's statements and promise, it never took an initial, contrary position. However, the Department provides no further analysis for this argument. There is no basis for the Department to assert that the Examiner was not its representative and could not bind the Department by his factual statements and promises. *See* Section II.B.1., *supra*. Further, where the Examiner's statements and acts would implicate the Department at law by the doctrine of *respondeat superior*, it is difficult to see how equity should view the Examiner's statements differently. *See Petitioner's Br.* at 20 n. 4 (discussing Idaho Code § 6-903(1), in an argument that has not been refuted or addressed by the Department).

Second, the Department argues that quasi-estoppel does not apply because the Department's present position "is not unconscionable." *Respondent's Br.* at 26-27. This has no bearing on quasi-estoppel, as it is not the changed position that is assessed for unconscionability,

but whether "it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position." *City of Eagle*, 150 Idaho at 454, 247 P.3d at 1042. The unconscionability lies not in the Department's newly adopted position, but in the application of that new position to the circumstances of this matter. The Department is voiding 27-7549, causing the waste of hundreds of thousands of dollars invested by TLR (in reliance on the Examiner's statements) and the other consequences described in the briefing of this matter.

Third, it is unclear exactly why the Department decides, in relation to quasi-estoppel, to impugn Drakos, asserting that he "is not a completely innocent party." *Respondent's Br.* at 27. Rather than address the uncomfortable facts of this matter, the Department instead emphasizes the misdeeds of others in an effort to downplay the actions of its Examiner. The Department contends that "[i]f Drakos had accurately attested to the extent of development, we would not be here today." *Respondent's Br.* at 27.[4] The Department's position is, above all, loose and imprecise as the

[4] This statement has no basis in law or IDWR policy and significantly overstates the legal significance of what is inputted on this form by the permit holder. What is described on the form by the permit holder is what the permit holder believes has been developed, but such claims are always subject to review and confirmation by IDWR with a field exam (as has been discussed *supra*). The current instructions for filing proof of beneficial use do not indicate that if what is represented on the proof document is not found to be entirely accurate, then the permit will be voided or other adverse action is to be taken. Rather, the instructions state that the "information entered on the proof form **should** show the extent of actual development of the project and **should** correspond to that authorized by the permit. If it does not, an amendment (change) to the permit may be required." See *Instructions for Filing Proof of Beneficial Use* found at https://idwr.idaho.gov/files/forms/instructions-for-filing-proof-of-beneficial-use.pdf (emphasis added). A review of past permitting documents on any number of previously licensed water rights would reveal differences between what was alleged as being developed in the *Proof of Beneficial Use* document and what was discovered as actually irrigated during the field exam. One example is Water Right No. 22-7336, where the permit holder alleged that 112 acres were developed under the permit, but the field exam and eventual license only confirmed the irrigation of only 82 acres. See water right documents found at http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/3q5s01_.PDF. There is no indication in this file or any other file of which we are aware where this discrepancy in what was alleged to have been developed versus what was actually developed resulted in claims or actions against the permit holder for misrepresentation. As to TLR, what was listed on the *Proof of Beneficial Use* document is not why we are before this Court. Rather, we are before this Court because of the Examiner's encouragement to continue development under the permit as described herein.

Department draws no distinction between Drakos (one of TLR's predecessors-in-interest) and TLR (the entity[5] currently contesting the Department's actions). The Department's efforts to besmirch Drakos are also ineffective because it does not ultimately change the facts that provide for the application of quasi-estoppel. The Examiner, who was acting as the Department's empowered and authorized representative, told Drakos to continue developing 27-7549 and promised to return to complete the field examination and "everything would be fine." Now, the Department has changed its position, and is seeking to completely void 27-7549. Allowing the Department to effectuate this change of position is unconscionable because of the vast sums invested by TLR into developing 27-7549 in reliance on what the Examiner had said, coupled with the fact that moratorium orders issued by the Department in the 1990s now make it virtually impossible to appropriate new irrigation water rights today. For these reasons, quasi-estoppel also applies to bar the Department from voiding 27-7549.

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

While the parties agree about the elements of laches, the Department contends that laches is not applicable to this proceeding, because: "The doctrine of laches is a defensive doctrine raised by a defendant to oppose a plaintiff's suit. … This proceeding was not initiated by the Department bringing suit to enforce its rights." *Respondent's Br*. at 28. The crux of the Department's argument

[5] TLR is a limited liability limited partnership (or LLLP). As such, it is an entity, distinct from its owners. *Costa v. Borges*, 145 Idaho 353, 357 n. 2, 179 P.3d 316, 320 n. 2 (2008) ("all partnerships are legal entities"); see also Idaho Code § 30-23-201 ("A partnership is an entity distinct from its partners").

is that the "licensing determination under Idaho Code § 42-219 is not the equivalent of a suit initiated to assert the Department's rights." *Respondent's Br.* at 28.

However, TLR contends that the 2013 Review (and the ultimate licensing decision) is the governmental equivalent of asserting a private right. It has long been the state of Idaho law that "[l]ong and continuous knowing acquiescence in another's use and enjoyment of a property or privilege may preclude one from subsequently asserting his claim." *Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 66 P.2d 115, 118 (1937) (citations omitted). Because laches is extremely fact intensive, *see Sherman Storage, LLC v. Global Signal Acquisitions II, LLC*, 159 Idaho 331, 337, 360 P.3d 340, 346 (2015), and is a matter "committed to the sound discretion of the trial court," *Sword v. Sweet*, 140 Idaho 242, 249, 92 P.3d 492, 499 (2004), this Court should look beyond the Department's overly-formalistic analysis and see this action for what it is. The Department is trying to void 27-7549. This will take something from TLR that it cannot seek to obtain again in 2017 because of Department-issued moratoria on the Eastern Snake River Plain. *See* https://www.idwr.idaho.gov/legal-actions/orders/moratorium-orders.html.

Despite not being a fully vested water right, the permit is still valuable and TLR has invested hundreds of thousands of dollars in developing it. The Department knew what was going on with 27-7549; the Department's representative (the Examiner) told the permit holder to keep working, investing, and developing 27-7549; and only now, **14 years later**, has the Department returned to completely void 27-7549. 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). Here, TLR is in a worse position and disadvantaged by the Department's delay in making its licensing decision (after directing the permit holder to continue developing 27-7549) because of the money expended and the reality of today where water rights for irrigation purposes cannot be obtained as they were in the early 1990s. For that reason, this Court should apply equity and bar the Department from voiding 27-7549 by the doctrine of laches.

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. TLR has provided numerous examples from Idaho case law demonstrating the substantial rights of TLR that have been prejudiced by the Department's actions. *Petitioner's Br.* at 32-33. In contrast, the Department maintains the same 'the ends justify the means'-style argument: "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." *Respondent's Br.* at 33. The Department cannot ignore procedures mandated by statute because it has decided it has already determined the correct result. The Department even oddly suggests that "TLR or its predecessors in interest … could have hired a

certified water right examiner to conduct the [field] examination." *Respondent's Br.* at 33, n. 11. The statute gives TLR the choice of whether to provide its own field examination report or to pay the fee to the Department for the field examination and report. Idaho Code § 42-217. TLR chose to pay the necessary fee—$325. Ex. at 21 (Exhibit 115). Once a permit holder has paid the fee, the field examination and report is a **mandatory** action the Department **must** undertake "**[u]pon receipt**" of the proof and fee. Idaho Code § 42-217 (emphasis added). It is incredible that the Department would suggest that TLR should have engaged its own certified water rights examiner when the Department failed to comply with its statutory duties after the fee for the Department's services had been paid.

The Department's only substantive contention in this regard is that nothing here prejudices TLR's ability to appropriate water. *Respondent's Br.* at 33. This position from the Department is astonishing as it is surely aware of Department-issued moratoria and permit processing procedures implemented after the permit for 27-7549 was issued, all of which make it virtually impossible for TLR or any other water user to obtain new water rights today because of the onerous full mitigation requirements. This Court can certainly take judicial notice of this reality, but in the event documentation of this reality is necessary for those involved in this matter, counsel for TLR would refer the Court and counsel to a letter dated November 29, 2010 written by current Director Gary Spackman to the mayor of the City of Rexburg found at http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/g9hl01_.pdf, a copy of which is attached to this brief for the convenience

of the parties.[6] Thus, the Department's errors here and the reality of water appropriation in 2017 have prejudiced TLR's ability to appropriate water under 27-7549 and to perfect it into a vested water right license.

Further, the Department does not contest another substantial right prejudiced by the Department's erroneous actions in relation to 27-7549; the substantial 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).

III. CONCLUSION.

On its most basic level, this case boils down to whether the Department must obey all of the statutorily-mandated procedures in a timely manner, or whether the Department's unshaken belief that it has arrived at the correct conclusion excuses its untimeliness and procedural failings. TLR believes that the Department's repeated appeals to Idaho Code § 42-219 do not—and cannot—excuse the Department's violation of Idaho Code § 42-217. The Department did not timely conduct a field examination, never completed a field examination or report, and therefore did not base its licensing decision on the field examination. The Department's process renders the statutorily-mandated field examination a nullity because of the Department's unreasonable delay

[6] This letter is a public document found in the water right backfile for Permit No. 22-13888. *See* Idaho Rule of Evidence 201. It explains the difficulties in obtaining new water rights in either the trust or non-trust areas of the Eastern Snake Plain Aquifer in plain terms to the mayor of Rexburg.

in conducting and completing the field examination, paired with the Department's focused inquiry into determining the status of the permit when proof of beneficial use was due. The Department cannot effectively nullify Idaho Code § 42-217.

Yet, the Department remains unrepentant. The Department goes so far as to sandbag this Court by pointing to an "outstanding issue" that will affect the licensure of 27-7549, yet had never been raised by the Department until now.[7] We can only conclude that the Department believes its actions are infallible and that it has reached the correct decision in regard to 27-7549, regardless of the dubious procedure utilized. This Court has to duty to correct the Department's errors—in law or at equity.

The Department has disregarded the requirements of Idaho Code § 42-217. Idaho Code § 67-5279(3)(a). It has determined an outcome and violated procedures required by statute, in excess of it authority. Idaho Code § 67-5279(3)(b). The procedure employed by the Department is a confusing mixture of policies the Department considers sufficient, without regard for statute. Idaho Code § 67-5279(3)(c). The Department's process—first deciding that 27-7549 deserves to

[7] The outstanding issue is described in footnote 10 of *Respondent's Brief* wherein the Department suggests there is an issue relating to point of diversion location exists and that TLR is required to file an amendment to correct the point of diversion before the license can issue. We do not see any issue whatsoever. Assuming that IDWR treats TLR like any other water user, IDWR routinely corrects minor variations in the development of a permit without advertisement or opportunity for protest immediately prior to licensing **by preparing** and having the permit holder execute an *Application for Amendment for Licensing Purposes*. One such example which counsel was involved in concerned Water Right No. 25-7583 where a second point of diversion was added at licensing. *See* amendment document found at http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/xrd301_.pdf and compare with permit document found at http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/x0s301_.pdf. Copies of both documents are attached hereto as addenda for the convenience of the Court and counsel. For other examples of *Applications for Amendment for Licensing Purposes* being prepared by IDWR and executed by the permit holder, see the water right backfiles for Water Right Nos. 1-7090, 1-7091, 21-7190, 22-7609, 21-7593, and 27-7577, which are just a few instances where IDWR has done this where counsel was involved.

be voided and then defending a defective procedure to arrive at that correct conclusion—is the epitome of "arbitrary, capricious, [and] an abuse of discretion." Idaho Code § 67-5279(3)(e). Finally, the Department has ignored the application of equitable doctrines (promissory estoppel, equitable estoppel, quasi-estoppel, and laches) to this case in violation of the statutorily-incorporated common law (including equity); in excess of the Department's authority; on unlawful procedure; and in a manner that is arbitrary, capricious, and an abuse of discretion. Idaho Code § 67-5279(3); *see also* Section II.B., *supra*. There errors have prejudiced TLR's substantial rights in using 27-7549 and having this permit matter properly adjudicated.[8] Idaho Code § 67-5279(4). Idaho law and equity itself demands that these errors be corrected.

This Court should hold the Department to its legal obligations, requiring the Department to perform its duties (to conduct and complete a field examination and report, Idaho Code § 42-217) and to do so in a timely manner ("upon receipt" of the proof and fees, Idaho Code § 42-217). The Department's failures in these regards have legal consequences. Further, this Court should apply the flexible rules of equity to achieve justice for the parties. *Climax*, 149 Idaho at 796, 241 P.3d at 969 (citation omitted). Under either legal or equitable theories, this Court should wholly

[8] The ability to obtain water rights in 2017 is vastly different than it was in 1991 because of the moratoria discussed herein. TLR has first-hand experience with the onerous mitigation obligations that are a reality today. TLR pursued an application for permit numbered as 27-7568 for the same TLR property that will be impacted by this Court's decision on 27-7549. TLR proposed to mitigate for this 27-7568 by leaving an 1870 priority Blackfoot River right (27-13B) undiverted. This mitigation plan was protested by the Surface Water Coalition, and after a contested case hearing, the application was denied because TLR could not mitigate for minor impacts to the Snake River (the Blackfoot River impacts were fully mitigated) even though the ground water diversions are very near to the Blackfoot River in a sandy area with depths to water around 10-20 feet during the irrigation season. See http://www.idwr.idaho.gov/apps/ExtSearch/RelatedDocs.asp?Basin=27&Sequence=7568&SplitSuffix= for documents relating to this proceeding.

set aside the Final Order and remand this matter with directions to properly apply the procedures of Idaho Code § 42-217.

Dated this 2nd day of August, 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 2nd day of August, 2017, true and correct copies of *Petitioner's Reply Brief* were served via Email and FedEx Delivery, on the following:

Garrick L. Baxter, ISB #6301
Emmi L. Blades, ISB #8682
Shantel M. Chapple Knowlton, ISB #9759
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
shantel.knowlton@ag.idaho.gov

Attorneys for Respondent
Idaho Department of Water Resources

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

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ADDENDUM A

Letter from Gary Spackman to Mayor of Rexburg, November 29, 2010.

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

November 29, 2010

MAYOR RICHARD WOODLAND
CITY OF REXBURG
35 NORTH 1ST EAST
REXBURG ID 83440

RE: Future Water Supplies for the City of Rexburg

Dear Mayor Woodland:

I recognize the difficulty the City of Rexburg has faced in securing new sources of water for your growing community. In recent months the Department of Water Resources has received two applications seeking new water rights for the city. Current water administration realities in the Eastern Snake Plain make the outcome for those applications uncertain at best. Nevertheless, I think there are options for the city. Below I briefly summarize the limitations affecting your applications to appropriate water, and I offer some alternatives for discussion. I would welcome the opportunity to meet with you and other community leaders, including officials from BYU-Idaho, to seek collaborative solutions to your pressing needs.

The City of Rexburg lies on the boundary between administrative designations called the Trust Water Area and the non-Trust Water Area. The Trust Water boundary is a convenient geopolitical estimation of a more complicated hydrogeologic boundary. Essentially, the Trust Water Area encompasses surface water and ground water tributary to the Snake River between Milner Dam and Swan Falls Dam, and the non-Trust Water Area encompasses surface water and ground water tributary to the Snake River upstream from Milner. The boundary between the Trust Water Area and the non-Trust Water Area runs from the Snake River southwest of American Falls northeastward through Rexburg and almost to Ashton. Consequently, the Trust Water Area includes most of the eastern Snake River Plain, and the non-Trust Water Area encompasses a narrow strip of land on the western side of the Snake River and the area east of the Snake River to the Wyoming border.

Since 1992 there has been a moratorium on new appropriations of Trust Water for consumptive uses. There is no moratorium in the non-Trust Water Area, but it is generally recognized that surface water and ground water in this area are nearly fully appropriated.[1] Because all of the reaches of the Snake River upstream from Milner Dam have water rights that are not fully satisfied at certain times, a new appropriation of ground water within the non-Trust Water Area would almost certainly injure senior right holders at some point each year. With supply restrictions on both sides of the Trust Water boundary, it is not likely that the City of

[1] The current draft of the forthcoming comprehensive state water plan says, "Except for winter flows in excess of the storage capacity of existing reservoirs, the reliable water supply of the Snake River Basin above Milner Dam is nearly developed."

Rexburg will be able to establish new ground water rights to meet current and future needs unless the city can provide a source of mitigation water.

In 2008 the City of Rexburg filed Application 22-13888 to appropriate ground water from several points of diversion, mostly within the non-Trust Water Area. The application was protested by senior Snake River water users upstream from Milner Dam. It is unlikely the City of Rexburg will be able to show that water is available for appropriation in the non-Trust Water Area without mitigation to offset the effects of new ground water pumping on Snake River flows.

The City of Rexburg has also filed Application 22-13975 to appropriate its own wastewater as mitigation for future ground water appropriations. The application is problematic because mitigation for a consumptive use requires giving up another consumptive use. The city's wastewater represents only the non-consumptive components of its existing water rights.

While the two existing applications may not be viable options for the City of Rexburg, there are other possibilities to consider. The following list contains mitigation options and other options that may be available to Rexburg.

- The moratorium effective in the Trust Water Area includes an exemption for multiple domestic uses. IDWR has applied this exemption to municipal water rights in the past. If the City of Rexburg were to file an application to appropriate ground water from the Trust Water Area only (essentially the west end of town), it is not clear whether it could be approved or not. While such a proposal would be exempt from the moratorium, it is within the Eastern Snake Plain Aquifer (ESPA) area conjunctively managed with the Snake River and springs along the river. Ground water appropriators in much of that area are subject to delivery calls by senior surface water users. Closer to the points of diversion for the delivery calls, IDWR has concluded that it does not make sense to issue new appropriations for domestic purposes while requiring mitigation or curtailment from existing domestic water right holders. Rexburg is so far from the points of diversion for the delivery calls that it has not been required to mitigate or curtail because the benefit from doing so would be slight at best. However, it's not clear the logic that applies to existing ground water appropriations should apply to new appropriations in the vicinity of Rexburg. Senior surface water users could argue that any new appropriation in the area of common ground water supply will injure them.

- The City of Rexburg owns 22-204C, which authorizes diversion of 27.0 cfs from the Teton River with an 1883 priority date. There are a number of more promising possibilities for this important asset:

- The city could transfer this right to municipal use, treat the water, and use it in the city. The level of treatment necessary for distribution would depend on the type of system and may be subject to DEQ regulation.

- The city could use this right for irrigation of open spaces within the city limits. The required level of treatment may be minimal for distribution through a separate irrigation system.

- The city could dedicate this right to a mitigation plan or ground water recharge project to offset Snake River depletions caused by a new appropriation of ground water. To ensure the mitigation or recharge plan is effective, the ESPA model should be run to determine where and when new depletions would occur, and the mitigation or recharge plan should be carefully crafted to offset those depletions in quantity, timing, and location.

- The city could trade this surface water right to an irrigator in exchange for a primary ground water right owned by the irrigator. If necessary, the city could provide cash or other incentives to the seller to offset any potential difference in reliability between the surface water right and the ground water right.

- At some future time the city may be able to mitigate depletions caused by new appropriations by contributing its surface water right to a regional ground water recharge site. No such recharge site exists currently, but the idea has been discussed informally for years. One variant of the regional recharge concept is for an enterprising canal company or irrigation district to identify and develop a suitable recharge site and contract with ground water right applicants to accept their mitigating surface water rights (storage or natural flow) into the site for a fee. Under the contract, the canal company would assume responsibility for measuring the volume of water committed to recharge and reporting to IDWR and the water district to ensure compliance with individual mitigation plans.

- The city may be able to rent storage water from Fremont Madison Irrigation District and use it to mitigate for a new appropriation of ground water. As with any mitigation plan, it would have to be effective in quantity, timing, and location.

- The city could buy or otherwise acquire a consumptive ground water right from another water right holder and transfer it for use in the city. If necessary, Article XV of the Idaho Constitution provides for the acquisition of water rights for domestic purposes through eminent domain.

- Recognizing the tremendous recent growth and growth potential of BYU-Idaho and acknowledging its significant role in the community, the city could work with the university to slow the need for new water supplies by reducing the per capita water use on campus. So-called "green" campuses are becoming popular marketing and planning tools for universities across the country. See the following websites:

  - http://climateculture.com/americas_greenest_campus/
  - http://greencampuspartners.com/energy-services-colleges.htm
  - http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1904

One option may not be enough to meet all of the City of Rexburg's needs. It may be necessary to pursue a diverse portfolio of water supplies while also exploring the possibility of joining with other as-yet-unidentified entities in a regional ground water recharge project. Meanwhile, the city may be able to rent water from the Water Supply Bank to meet immediate needs until a longer-term solution is crafted and implemented. The Water Supply Bank enables water right holders who are not using their water rights to rent them to others in need.[2]

As I said above, I would welcome an opportunity to meet with you and other officials from the City of Rexburg and BYU-Idaho in Rexburg or Boise to further explore options for meeting the water needs of your community.

Sincerely,

Gary Spackman, Interim Director
Idaho Department of Water Resources

Cc: Roger Warner, Rocky Mountain Environmental
Lyle Swank, IDWR Eastern Region

[2] Currently there is only a small amount of ground water available for rental from the Water Supply Bank in Administrative Basin 22, but additional water could be sought through advertising and other means.

ADDENDUM B

Water Right No. 25-7583, Permit and Application for Amendment (for Licensing Purposes).

State of Idaho
Department of Water Resources

Permit To Appropriate Water

NO. 25-07583

Proposed Priority: February 4, 1991 Maximum Diversion Rate: 0.88 CFS
This is to certify, that MELVIN FIELDING
290 E. 13TH ST.
IDAHO FALLS, ID 83404
has applied for a permit to appropriate water from: GROUNDWATER
and a permit is APPROVED for development of water as follows:

BENEFICIAL USE	PERIOD OF USE	RATE OF DIVERSION
IRRIGATION	04/01 to 11/01	0.72 CFS
DOMESTIC	01/01 to 12/31	0.16 CFS
	Totals	0.88 CFS

LOCATION OF POINT(S) OF DIVERSION: SENWNW Sec. 6, Township 01N, Range 38E
BONNEVILLE County

PLACE OF USE: IRRIGATION

TWN	RGE	SEC		ACRES		ACRES		ACRES	TOTAL
01N	38E	6	NENW	5	NWNW	25	SWNW	4	
			SENW	2					36

Total number of acres irrigated: 36

PLACE OF USE: DOMESTIC, same as IRRIGATION use

CONDITIONS/REMARKS:

1. Proof of construction of works and application of water to beneficial use shall be submitted on or before April 1, 1994.
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.
4. Prior to the diversion of water under this permit a flow measurement port or other device as specified by the Department shall be installed to provide for the installation of measuring equipment and the determination of the rate of diversion by the Department.
5. Permit holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
6. The right to the use of water acquired under this permit shall not give rise to any right or claim against the holder of a senior right based upon the theories of forfeiture, abandonment, adverse possession, waiver, equitable estoppel, estoppel by laches or customary preference.

State of Idaho
Department of Water Resources

Permit To Appropriate Water

NO. 25-07583

CONDITIONS/REMARKS:

7. The Director retains jurisdiction of the permit and any license subsequently issued to incorporate the use into a water district, require streamflow augmentation or other action needed to protect prior surface water and groundwater rights.
8. The rate of diversion of water for irrigation under this permit and all other water rights on the same land shall not exceed 0.02 cubic feet per second for each acre of land.
9. Domestic use is for 12 homes.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the seal and signature of the Director, affixed at Boise, this

18th day of April, 1991.

for R. Keith Higginson, Director

RECEIVED
NOV 25 2009
DEPARTMENT OF WATER RESOURCES

State of Idaho
Department of Water Resources

APPLICATION FOR AMENDMENT

(For Licensing Purposes)

WATER RIGHT NO. 25-07583

Date of Priority: July 26, 1994

Maximum Diversion Rate: 0.57 CFS
Maximum Diversion Volume: 78.9 AF

Comes now TOWNSHIP PARK ESTATES WATER ASSOCIATION INC
5320 MAUNA LANI LANE
IDAHO FALLS ID 83404 and represents to the Director of the Idaho Department of Water Resources that he is the owner and holder of Permit to Appropriate the Public Waters of the State of Idaho No. 25-07583, and requests that the permit be changed as follows:

Source: GROUNDWATER

BENEFICIAL USE	PERIOD OF USE	RATE OF DIVERSION	ANNUAL VOLUME
IRRIGATION	04/01 to 10/31	0.36 CFS	71.7 AF
DOMESTIC	01/01 to 12/31	0.21 CFS	7.2 AF

LOCATION OF POINT(S) OF DIVERSION:

GROUNDWATER L4 (NW1/4NW1/4) Sec. 6, Twp 01N, Rge 38E, B.M. BONNEVILLE County
GROUNDWATER L4 (NW1/4NW1/4) Sec. 6, Twp 01N, Rge 38E, B.M. BONNEVILLE County

PLACE OF USE: IRRIGATION

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
01N 38E 6					3.6	9.4	2.9	2.0									17.9
					L3	L4	L5										

Total Acres: 17.9

PLACE OF USE: DOMESTIC

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
01N 38E 6					X	X	X	X									
					L3	L4	L5										

Permit holder asserts that no one will be injured by such change and that such change will be made at permit holder's own risk. Signed this 19 day of NOVEMBER, 2009.

(Signature)

for TOWNSHIP PARK ESTATES WATER ASSOCIATION, INC.

State of Idaho
Department of Water Resources

APPLICATION FOR AMENDMENT

(For Licensing Purposes)
WATER RIGHT NO. 25-07583

FOR DEPARTMENT USE ONLY
Preliminary check by ____ Fee = 50— Receipted by SR # 008620 Date 11-25-2009

ACTION OF THE DEPARTMENT OF WATER RESOURCES

I, GARY SPACKMAN, of the Department of Water Resources hereby approve the above Application for Amendment for Permit No. 25-07583 with the following:

CONDITIONS OF APPROVAL

1. Domestic use is for 12 homes. Irrigation of lawn, garden and landscaping associated with the home is authorized under the irrigation component of this right.

2. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above.

3. The use of water under this right shall not give rise to any claim against the holder of a senior water right based upon the theories of forfeiture, abandonment, adverse possession, waiver, equitable estoppel, estoppel by laches or customary preference.

Witness my hand this 1st day of December, 2009.

for GARY SPACKMAN
Interim Director