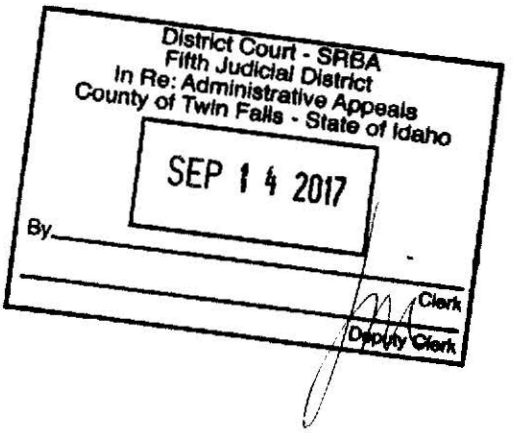
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

TANNER LANE RANCH, LLLP, an Idaho limited liability limited partnership, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent. IN THE MATTER OF PERMIT NO. 27-7549 IN THE NAME OF TANNER LANE RANCH, LLLP	Case No. CV-2017-458 **MEMORANDUM DECISION AND ORDER**



I.
STATEMENT OF THE CASE

A. Nature of the case.

This matter originated when the Petitioner filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("Department"). The order under review is the Respondent's *Amended Order Affirming Preliminary Order Voiding Permit* dated February 1, 2017 ("*Final Order*"). The *Final Order* affirms the Respondent's decision to void permit number 27-7549. The Petitioner asserts the *Final Order* is contrary to law and request that this Court set it aside and remand for further proceedings.

B. Course of proceedings and statement of facts.

This matter concerns an application to appropriate water. R., 15-18. The application was filed on September 3, 1991, by James Johnston and Paul Frankhauser. *Id.* It sought to

appropriate 9.60 cfs of ground water for the irrigation of 480 acres in Bingham County. *Id.* On April 7, 1992, the Department approved the application and issued permit no. 27-7549. *Id.* at 13-14. The permit was subject to the following condition: "Proof of construction of works and application of water to beneficial use shall be submitted on or before May 3, 1993." *Id.* at 13. On February 10, 1993, Johnston and Frankhauser filed a request for an extension of time to submit proof of beneficial use. *Id.* at 12. The Department approved the request and extended the deadline until May 1, 1994. *Id.*

On April 29, 1994, Johnston and Chris Drakos filed another request for extension of time to submit proof of beneficial use.[1] *Id.* at 8. The Department denied the request. *Id.* It then informed the permit holders that the permit lapsed due to their failure to timely submit proof of beneficial use. *Id.* at 41. Johnston and Drakos proceeded to file proof of beneficial use on June 17, 1994, 47 days late. *Id.* at 7. In their proof, Johnston and Drakos represented that the full amount of water authorized under the permit had been applied to irrigate 480 acres. *Id.* On July 26, 1994, Johnston assigned his interest in the permit to Chris Drakos, acting in his capacity as president of Lambert Produce Co., Inc.[2] *Id.* at 6.

On August 23, 1994, the Department acknowledged receipt of the proof of beneficial use, entered an order reinstating the permit, and advanced its priority date to October 20, 1991. *Id.* at 28. It informed Drakos that a field examination would be conducted to confirm the use being made of the water. *Id.* A Department employee conducted the field examination on November 4, 1999. Ex. 122. The field examiner noted he could not get reliable water measurements because the permit holder was using temporary pumps to divert water due to an issue with power supply. *Id.* As a result, the field examination was not completed, and the field examiner reported he would "check back when system pumps are repaired." *Id.* The Department never conducted a follow-up field exam. *Id.*

No further action was taken until 2013 when the Department initiated a review of the permit to determine the extent of beneficial use occurring thereunder. Using satellite imagery and aerial photographs from the 1990s and early 2000s, the Department determined that very limited water use occurred under the permit prior to the proof of beneficial use deadline of May

[1] At the time, the record does not reflect that Drakos had any interest in the permit. However, it does establish that Johnston subsequently assigned his interest in the permit to Drakos.

[2] The assignment did not address Frankhauser's interest in the permit. However, Frankhauser subsequently disavowed any interest in the permit, and the Department removed him as co-holder. *Id.* at 134.

1, 1994. It determined that 25 acres at most were flood irrigated prior to that date. As a result, the Department proposed that a license be issued for a diversion rate of .50 cfs for the irrigation of 25 acres. R.,101-110. On April 11, 2014, Chris Drakos assigned his interest in the permit to the Petitioner, who became sole owner of the permit.[3] *Id.* at 111-112. The Petitioner ultimately disagreed with the Department's proposal to issue a license for the irrigation of 25 acres.

On January 2, 2015, the Department issued a *Preliminary Order* voiding the permit. *Id.* at 121-127. The Petitioner filed a protest and petitioned the Department for a hearing. *Id.* at 129-132. The Department issued an *Order* affirming the *Preliminary Order* on August 31, 2015. *Id.* at 133-146. Thereafter, an evidentiary hearing was held, after which the Department entered the *Final Order*. Tr.,1-73. The *Final Order* affirms the decision to void permit number 27-7549 on the grounds that no water was diverted and applied to a beneficial use under the permit until well after the proof of beneficial use deadline. R., 262. The Petitioner subsequently filed a *Petition* with this Court seeking judicial review of the *Final Order*. A hearing on the *Petition* was held before the Court on September 7, 2017.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and

[3] Chris Drakos is a general partner in Tanner Lane Ranch, LLLP.

proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

A. The Department's decision to void the permit is consistent with Idaho law, supported by substantial evidence, and must be affirmed.

The Idaho Legislature has delineated procedures for perfecting a water right. I.C. §§ 42-201, *et seq*. Any person desiring to appropriate water within the state must first make application to the Department for a permit.[4] I.C. § 42-202(1). Following notice, and if necessary a hearing, the Department may issue a permit to the prospective water user. I.C. §§ 42-203A & 42-204. A permit is not a vested water right under Idaho law. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 275, 255 P.3d 1152, 1161 (2011). Rather, it is an inchoate right that may ripen into a vested water right only if the water user complies with all applicable statutory requirements for obtaining a license. *Id*. One such requirement is that the user construct diversion works and apply water to beneficial use prior to what will be referred to herein as "the proof of beneficial use deadline." I.C. § 42-204. On or before the proof of beneficial use deadline, which is identified in the permit, the water user must submit written proof of the completion of diversion works and application of water to beneficial use to the Department. I.C. § 42-217. When proof is submitted, the Department must examine the water use to determine the extent of beneficial use occurring under the permit. I.C. § 42-217. Only if "the law has been fully complied with" does the Department have the statutory authority to issue a license. I.C. § 42-219; *Idaho Power Co.*, 151 Idaho at 275, 255 P.3d at 1161. And, in no case does the Department have the authority to issue a license "in excess of the amount that has been beneficially applied." I.C. § 42-219.

In this case, the Petitioner's predecessors applied for and received a permit to divert 9.60 cfs of ground water to irrigate 480 acres. The plain language of the permit required that "[p]roof of construction of works and application of water to beneficial use shall be submitted on or before May 3, 1993." R., 13. The predecessors received an extension of that deadline until May

[4] Save certain limited exceptions not applicable here.

1, 1994. *Id.* at 12. Thus, the proof of beneficial use deadline in this case was May 1, 1994. *Id.* It is undisputed that neither the Petitioner nor its predecessors applied water to beneficial use under the permit by May 1, 1994, nor were they even close.

The Petitioner concedes that neither completion of diversions works nor application of water to beneficial use occurred prior to the proof of beneficial use deadline. Tr., 62-63, 67. In fact, the pivots required to deliver water to the subject 480 acres were not installed until 2004 or 2005, well after the deadline. Tr., 62-63; R., 254. Satellite imagery and aerial photography from the 1990s and early 2000s corroborate the fact that the 480 acres were not being irrigated during those timeframes. R., 91-97. The only conflicting evidence in this regard is the 1994 Proof of Beneficial Use Form, wherein Johnston and Drakos attest they "completed all development that will occur under this permit and that water has been applied according to the provisions of the permit for the beneficial use(s) described. . . ." *Id.* The record establishes this representation to be false, and Drakos abandoned his position in this respect at the hearing before the Department.[5] Tr., 71. It is thus uncontroverted that completion of diversion works and application of water to beneficial use under the permit did not occur until at least 2004 or 2005, well after the applicable proof of beneficial use deadline.

Given the untimely application of water to beneficial use, the Department determined it "cannot issue a license and must void the Permit." R., 259. This Court agrees and finds the Department lacks the statutory authority to issue a license to the Petitioner under the circumstances. The completion of diversion works and the application of water to beneficial use prior to the beneficial use deadline were express conditions of the permit. *Id.* at 13. They are also necessary conditions for perfecting a water right under Idaho Code § 42-204. 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 the manner required by law." *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 110, 157 P.3d 600, 604 (2006). Since the Petitioner and its predecessors failed to comply with the plain language of the permit and with Idaho law, the Department lacked the statutory authority to issue a license. *Id.*; I.C. § 42-219; *Idaho Power Co.*, 151 Idaho at 275, 255 P.3d at 1161. It follows that the Department's decision to void the permit is consistent with Idaho law, supported by substantial evidence, and must be affirmed.

[5] Drakos testified at the hearing that he thought once he drilled the wells he had finished developing the permit, notwithstanding the facts that (1) no water was applied to beneficial use, and (2) the diversion works necessary to deliver water from the wells to the place of use were not complete. Tr., 71.

B. Idaho law does not allow for post-proof development of a permit.

Notwithstanding the foregoing analysis, the Petitioner argues that a water user may legally develop a permit under Idaho law up until the time the Department conducts a field exam. Further, that the Department "must take the extant of the irrigation system as the Department finds it upon examination, even if post-proof development has occurred." These assertions are contrary to law. In fact, a simple reading of the permitting and licensing statutes establish that they do not even contemplate the possibility of post-proof development of a permit.

Idaho Code § 42-204 governs permitting. It directs in plain and unambiguous terms that when the Department issues a permit it shall require "that actual construction work and application of the water to *full beneficial use* shall be complete" by the proof of beneficial use deadline identified in the permit. I.C. § 42-204 (emphasis added). Thus, the statute does not contemplate the concept of "post-proof development" advanced by the Petitioner. To the contrary, it plainly directs that development of a permit to full beneficial use must be completed *prior* to submitting proof of beneficial use, not after.

The statutes go on to identify the limited circumstances when a proof of beneficial use deadline may be extended. During the pertinent timeframe, Idaho Code § 42-204 (1989) provided that the Department:

> [M]ay grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for *the completion of works and application of the water to full beneficial use*, upon request for extension received on or before the date set for completion, provided good cause appears therefor.

1989 Idaho Sess. Laws c.96 §1. That the plain language of the statute provides a mechanism to extend the proof of beneficial use deadline further contravenes the Petitioner's argument. If a water user is unable to develop a permit to full beneficial use prior to the proof of beneficial use deadline, the relief available to him is to seek an extension of that deadline under Idaho Code § 42-204 (1989). He may not simply continue to develop the permit post-proof in contravention of Idaho Code § 42-204. Therefore, the Court finds the Petitioner's argument to be contrary to the plain language of Idaho Code § 42-204.

The facts of this case further belie the Petitioner's argument. The Petitioner's predecessors knew they needed more time to develop their permit. As a result, they petitioned the Department to extend their proof of beneficial use deadline on two occasions. The first request was granted. R., 12. The second request was denied via order of the Director. *Id.* at 8.

The Petitioner's present argument is thus directly contrary to the Director's order denying the second request for more time to develop the permit. If the Petitioner or its predecessors believed the Director erred in denying the second extension request, they were required to timely raise the issue before the Department, exhaust their administrative remedies, and if necessary, seek judicial review. I.C. §§ 67-5271, *et seq*. They did not, and arguing for the first time in this proceeding that they should have been allowed to develop their permit up until the time of a field exam is contrary to, and constitutes an impermissible collateral attack on, the Director's denial order. *Cf., Astorquia v. State of Idaho Dept. of Water Resources*, Ada County Case No. CV-WA-2012-14102, *Memorandum Decision and Order*, p.7 (May 7, 2013).

It should be noted that the only reason a field examination was conducted in this case is because the Petitioner's predecessors made false representations to the Department when they submitted their proof of beneficial use form. As stated above, Johnston and Drakos attested to the fact that that they had completed all development that would occur under the permit. Further, that they had made full beneficial use of the water available under the permit. In fact neither was true. Had the permit holders accurately represented the state of the development under the permit when they submitted their proof the facts and circumstances culminating in this case would have been avoided. No field exam would have occurred and the permit would have been voided consistent with Idaho law. In essence, the Petitioner argues its predecessors' misrepresentations worked to extend the time in which to develop the permit. This is simply not the case, and the Director did not err in rejecting the Petitioner's argument in this respect.

C. The Department's alleged failure to conduct a field exam does not support the remedy sought.

The Petitioner argues that the Department failed to comply with its statutorily mandated duty to conduct a field examination in conjunction with making its licensing determination. Petitioner relies on Idaho Code § 42-217, which provides in relevant part:

> 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 improvements which have been made as a direct result of such use.

2. The capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which has been beneficially applied for irrigation or other purposes.

The department or such person making such examination under the direction of the department *shall* prepare and file a report of the investigation.

I.C. § 42-217 (emphasis added).

There is no dispute over the circumstances surrounding the field examination. The field examiner never completed the field examination and represented that he would return when the system pumps were repaired. The Department never conducted a follow-up field exam. No further action was taken until 2013 when the Department initiated a review of the permit and relied on satellite imagery and aerial photography to make its determination. Petitioner cites various reasons why the Department's actions failed to comply with the field examination requirement. In this case, the Court need not address whether the circumstances surrounding the field examination satisfied the necessary requirements for a field examination. Even assuming the Department failed to meet the necessary requirements, for reasons just addressed, the beneficial use deadline is controlling not the date of the field examination. The appropriate remedy would be to remand the matter for a renewed field examination. However, a renewed filed examination would not change the outcome, as the Petitioner admits no beneficial use was taking place at the time of the beneficial use deadline.

Neither Idaho Code nor the Department's *Beneficial Use Examination Rules*[6] establish a deadline for the Department to conduct a field exam after proof of beneficial use is filed. The Court acknowledges that a lengthy delay in conducting the field examination can put a permit holder in an untenable position. To the extent the field exam yields results differing from the proof of beneficial use, the current permit holder is put in the position of having to prove up the conditions as they existed years earlier. Irrigation practices may have changed, the permit may have been transferred, the original permit holder as well as other witnesses may no longer be around, etc. All of which potentially result in prejudice to the current permit holder. That said,

[6] IDAPA 37.03.02.

the circumstances in this case do not present one of those situations. Again, there is no dispute over the extent of beneficial use at the time of the beneficial use deadline.

D. Equitable theories of estoppel and laches are not available to the Petitioner.

Many of the Petitioner's arguments on judicial review lie in equitable theories of estoppel and laches. The Court finds these theories may not be invoked against the Director under the facts and circumstances present here. Decisions of the Idaho Supreme Court evidence a clear reluctance to invoke estoppel against a governmental agency in the exercise of its governmental functions. *See e.g., Floyd v. Bd. of Comm'rs of Bonneville County*, 137 Idaho at 727, 52 P.3d at 872 (2002) (holding, "Nor may the defense of estoppel be applied against the state in matters affected its governmental or sovereign functions"); *Terrazas v. Blaine County ex rel. Bd. of Comm'rs*, 147 Idaho 193, 200-201, 207 P.3d 169, 176-177 (2009) (providing that neither equitable nor quasi-estoppel may ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity). While an exception exists where a governmental agency acts in a purely business and proprietary capacity, such is not the case here. *Murtaugh Highway Dist. v. Twin Falls Highway Dist.*, 65 Idaho 260, 268, 142 P.2d 579, 582 (1943). The Legislature has vested in the Department the authority to make determinations regarding the permitting and licensing of water rights. I.C. §§ 42-201, *et seq*. By reviewing the Petitioner's permit to determine the extent of beneficial use occurring thereunder, the Director acted in his governmental capacity to fulfill the statutory and governmental duties required of him under Idaho Code §§ 42-201, *et seq*. As a result, equitable theories of estoppel and laches are not available to the Petitioner as a matter of law.

Furthermore, the Court notes that "[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, equitable theories of estoppel and laches 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). Earlier in this decision, the Court held that the Department lacks the statutory authority to issue a license in this case. This is because the Petitioner failed to satisfy the express conditions of the permit as well as the statutory conditions necessary to perfect a water right under Idaho Code § 42-204. Neither this Court nor the Department can invoke

estoppel or laches to allow the Department to issue an interest (i.e., a license) to the Petitioner which the legislature did not intent it to have. To hold otherwise would allow the Department to expand its own powers and effectively amend statutes without legislative action. It follows that equitable theories of estoppel and laches are not available to the Petitioner as a matter of law.

Last, under the equitable doctrine of unclean hands, "the Court has the discretion to evaluate the relative conduct of both parties and to determine whether the party seeking equitable relief should in the light of all the circumstances be precluded from such relief." *Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 209, 61 P.3d 557, 566 (2002). Here, the Petitioner's predecessors, including Drakos who is a general partner in the Petitioner, made false representations to the Department when they submitted their proof of beneficial use form. They attested all development under the permit including the application of water to full beneficial use had been completed as of the date of submittal. These representations were patently false. But for the false representations, the facts and circumstances on which the Petitioner bases its equitable theories would not have come to fruition. Therefore, the Court in an exercise of its discretion finds that the Petitioner is precluded from prevailing on its equitable theories under the doctrine of unclean hands.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the *Final Order* **is hereby affirmed.**

Dated September 14, 2017

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on September 14, 2017, with sufficient first-class postage to the following:

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