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District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho

FEB 14 2013

By _____ Clerk

_____ Deputy Clerk

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

FRANK ASTORQUIA, Petitioner, vs. STATE OF IDAHO, DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho, Respondent. IN THE MATTER OF WATER RIGHT LICENSE NO. 37-7460 IN THE NAME OF FRANK AND/OR JOSEPHINE ASTORQUIA	**Case No. CV-WA-2012-14102** **RESPONDENT IDWR'S RESPONSE BRIEF**

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STATEMENT OF THE CASE

This is a proceeding for judicial review of a final agency order of the Idaho Department of Water Resources ("IDWR"). Frank Astorquia ("Astorquia") filed an application for permit to appropriate water in 1975. However, despite repeated notices from IDWR, Astorquia failed to timely submit proof of beneficial use during the development period. It was not until 2002, almost 20 years after the already-extended deadline to submit proof of beneficial use had passed and the permit had twice lapsed, that Astorquia submitted proof of beneficial use. Consequently, bound by Idaho law, IDWR advanced the priority date of the permit to 2002 when it most recently reinstated the permit. On June 25, 2012, IDWR issued an order affirming the advancement of the priority date to 2002 and concluding that the licensed quantity should be 3.33 cubic feet per second ("cfs").

Astorquia now appeals IDWR's June 25, 2012 order, trying to hoist the blame for his repeated failure to act on IDWR. Astorquia argues that his failure to submit timely proof of beneficial use is IDWR's fault under a convoluted theory that if IDWR had granted Astorquia a five year extension of time to submit proof of beneficial use instead of a three year extension of time back in 1981, then somehow this would have caused Astorquia to not delay his submission of proof of beneficial use until 2002. This argument is unavailing because Astorquia failed to timely contest the order granting the three year extension of time back in 1981 and cannot now challenge the 30-year-old action of IDWR. IDWR is authorized by statute to grant an extension of time for up to five years in length. Astorquia's argument also fails because there is no evidence suggesting he would have timely submitted proof of beneficial use if given an extra two years nor does he prove IDWR lacked a rational basis for granting a three year extension.

ISSUES PRESENTED ON JUDICIAL REVIEW

The Department suggests the issues presented on appeal are the following:

1. Whether IDWR's 1981 order to extend the deadline for submitting proof of beneficial use in connection with Astorquia's permit can be challenged in 2002?
2. Whether the Amended Preliminary Order which complies with the relevant statutes, is based on substantial evidence in the record and is not arbitrary, capricious or an abuse of discretion should be affirmed?
3. Whether the Court should stay this matter pending resolution of subcase 37-7460 in the Snake River Basin Adjudication ("SRBA") even though the SRBA is not a forum for collaterally attacking a license, the authority to determine priority in a licensing proceeding rests with IDWR, and a stay is not proper relief in this judicial review?
4. Whether the Court should remand this matter to IDWR for consideration of additional information when Astorquia failed to timely present the information to IDWR and failed to comply with I.C. § 67-5276?
5. Whether IDWR is entitled to attorney's fees and costs pursuant to I.C. § 12-117(1) because Astorquia's appeal lacks reasonable basis in fact or law?

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 1975, Astorquia filed an application to appropriate water with IDWR, seeking 6.40 cfs of groundwater for irrigating 320 acres. (R. 1-4.) On December 5, 1975, IDWR issued permit number 37-7460 to Astorquia and noted proof of beneficial use was due on or before December 1, 1980. (R. 4.) By letter dated September 30, 1980, IDWR reminded Astorquia that proof of beneficial use was due on or before December 1, 1980 and cautioned that the permit will lapse if proof of beneficial use or a request for extension of time in which to file

the proof is not timely submitted. (R. 16.) IDWR provided a beneficial use postcard and a request for extension of time form[1] along with the reminder letter. (R. 16.) Astorquia failed to submit proof of beneficial use or request an extension by December 1, 1980, so by letter dated December 4, 1980, IDWR notified Astorquia that permit number 37-7460 had lapsed for failure to provide proof of beneficial use. (R. 18.)

On January 5, 1981, over a month past the deadline, Astorquia submitted a Request for Extension of Time form, seeking another five years to develop the permitted use of water ("Extension Request"). (R. 19.) Astorquia stated "well has been dug and 200 acres are being irrigated" in connection with the permit. (R. 19.) Astorquia requested additional time to develop the permit because Idaho Power's moratorium on new power hookups prevented him from getting enough electrical power to irrigate the other 120 acres not yet developed. (R. 19.) On January 9, 1981, IDWR reinstated the permit and, pursuant to I.C. § 42-204, extended the deadline for submission of proof of beneficial use to January 1, 1984 ("1981 Order"). (R. 19-20.) Pursuant to I.C. § 42-218a, IDWR advanced the priority date to November 26, 1975.[2] (R. 19-20.) Astorquia did not contest IDWR's 1981 Order on the permit.

By letter dated October 31, 1983, IDWR reminded Astorquia proof was due on or before January 1, 1984, and again cautioned that the permit will lapse if neither proof nor a request for extension of time is timely submitted. (R. 21.) This reminder letter also included a proof of beneficial use postcard and a request for extension of time form. (R. 21.) Astorquia again failed to submit proof of beneficial use or request an extension by January 1, 1984, so by letter dated January 4, 1984, IDWR notified Astorquia that the permit had again lapsed pursuant to I.C. § 42-

[1] The Request for Extension of Time form is subtitled, "To provide additional time in which to submit proof of beneficial use on a water right permit." (R. 19.)

[2] It appears IDWR should have advanced the priority to a slightly earlier date, but the date was not timely contested and does not affect the outcome of this appeal.

218a for failure to provide proof of beneficial use or request an extension of time for submission of proof. (R. 22.) In that lapse notice, IDWR included another proof of beneficial use postcard and another request for extension of time form. (R. 22.)

On July 3, 2002, almost twenty years past the extended proof due deadline, Astorquia petitioned IDWR not only to reinstate the permit but to do so with a November 26, 1975 priority date. (R. 42-49.) On that same day, Astorquia submitted a Proof of Beneficial Use form for permit number 37-7460 and attested to irrigation of 200 acres with 4.0 cfs. (R. 28-41, 50.) On July 11, 2002, IDWR mailed its Preliminary Order Reinstating Permit which, as required by I.C. § 42-218a.2, advanced the priority date to July 3, 2002, the date that proof and the licensing exam fee were submitted. (R. 55-60.)

On July 25, 2002, Astorquia filed an Exception to Preliminary Order, arguing 1) the 1981 Extension Request constituted proof of beneficial use of 200 acres in "substantial[] compliance with I.C. § 42-217," and 2) because IDWR failed to recognized this "compliance," IDWR erred in advancing the priority date to July 3, 2002. (R. 79-80.)

On September 25, 2002, IDWR served then-Director Karl Dreher's Final Order, rejecting the Exception to Preliminary Order and reinstating the permit with a July 3, 2002 priority date. (R. 85-89.) The Final Order states Astorquia did not timely submit proof, IDWR's approval of his Extension Request was not and could not legally be simultaneously a request for more time and a recognition of proof of beneficial use, and Astorquia failed to demonstrate IDWR made an error or mistake that would authorize IDWR to reinstate the permit with the November 26, 1975 priority. (R. 88.)

On October 23, 2002, Astorquia sought judicial review of the Final Order in the Fourth Judicial District of Idaho, Ada County. (R. 93-102.) On January 12, 2006, the court dismissed

the case without prejudice and remanded the matter to IDWR for further proceedings. (R. 136.) No further proceedings before the Director were held. (R. 408.)

In August 2005, IDWR conducted a beneficial use field examination in connection with the permit. (R. 116-25.) IDWR measured an average of 1297 gallons per minute ("gpm") or 2.89 cfs from the well and a high of 1368 gpm or 3.05 cfs. (R. 117-18, 121.) In connection with the field exam, Judd Astorquia (Astorquia's son and farm operator at the time) indicated he thought the pumping rate decreased over the past few years due to drought and a drop in the water table. (R. 118.) He recalled a 1996 energy audit during which the well had a rate of approximately 1375 gpm or 3.06 cfs. (R. 118.) Judd Astorquia said he would try to find the supporting documentation, but in November 2005, he reported he could not find the report and would continue looking. (R. 118.) Based on the field exam and discussions with Judd Astorquia, IDWR intended to recommend a diversion of 3.06 cfs for the license. (R. 118, 126.)

On January 19, 2006, IDWR received Astorquia's signed application for permit amendment wherein Astorquia updated the point of diversion to reflect the location of the well and indicated he sought 3.06 cfs on 200 acres within a 258 principal place of use ("PPU") bearing a priority of July 3, 2002. (R. 138-39.) On July 6, 2011, IDWR approved the permit amendment and issued the license for 37-7460 via preliminary order for 3.06 cfs on 200 acres within a 258 acre PPU bearing a priority of July 3, 2002. (R.139, 151-55.)

On July 21, 2011, Astorquia requested a hearing to contest the preliminary order. (R. 156-79.) On March 12, 2012, IDWR held a hearing on the license. (R. 183, 206-07, 365.) On May 24, 2012, IDWR served its Preliminary Order affirming the issuance of the license with a July 3, 2002 priority and increasing the quantity to 3.33 cfs based on the pump design and accounting for a theoretical pump efficiency and slight decline in the vicinity's groundwater

level. (R. 367-69, 372-81.) On June 7, 2012, Astorquia filed a Petition for Reconsideration. (R. 382-84.) In response, on June 25, 2012, IDWR issued an Amended Preliminary Order which continued to affirm the issuance of the license with a July 3, 2002 priority and 3.33 cfs quantity. (R. 387-98.) Pursuant to I.C. §§ 67-5243 and 5245, the Amended Preliminary Order became final on July 13, 2012. From that Amended Preliminary Order, Astorquia appeals. (R. 400-14.)

STANDARD OF REVIEW

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I. C. § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; Dovel v. Dobson, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). 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 agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." Urrutia v. Blaine County, ex rel. Bd. of Comm'rs, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

The Court shall affirm IDWR's decision unless the Court finds IDWR'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 in the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. See I.C. § 67-5279(3); Barron v. IDWR, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). To challenge IDWR's decision, Astorquia must show IDWR erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of his has been prejudiced. See I.C. § 67-5279(4); Barron, 135 Idaho at 417, 18 P.3d at 222.

ARGUMENT

The Amended Preliminary Order is supported by substantial evidence in the record, buttressed by statutory authority and is not arbitrary, capricious or an abuse of discretion. At its essence, this appeal is a backdoor attempt to contest a Department order now thirty-two years old. Astorquia did not timely challenge the 1981 Order; he is foreclosed from doing so now. Even if he could so challenge it now, IDWR's 1981 Order granting Astorquia a three year extension of time in which to submit proof of beneficial use for development under the permit was in accordance with relevant statutes. The remainder of his appeal is rendered moot because he failed to exhaust his administrative remedies as to the 1981 Order, and he cannot resurrect the issues on appeal. This matter should not be stayed pending resolution in the SRBA, and no remand is justified. Throughout his appeal, he has failed to show how IDWR erred under I.C. § 67-5279(3). Therefore, the Amended Preliminary Order should be affirmed. Because Astorquia's appeal lacks any reasonable basis in law or fact, IDWR is compelled to seek attorney's fees and costs.

I. The Court should affirm the Amended Preliminary Order because IDWR did not err pursuant to I.C. § 67-5279.

A. Astorquia's appeal of IDWR's 1981 Order to extend the deadline for submitting proof of beneficial use is improper.

Astorquia's appeal obfuscates the central issue which is that he is contesting an IDWR order on his permit that is more than thirty years old. He failed to correctly protest the 1981 Order pursuant to administrative and judicial review. And even if it were somehow considered timely appealed, IDWR properly exercised its discretion in determining the length of the extension of time for submitting proof of beneficial use. Because IDWR committed no error as delineated in I.C. § 67-5279(3), the Amended Preliminary Order should be affirmed.

1. Astorquia's appeal is not supported by law.

Astorquia failed to properly contest IDWR's 1981 Order on his permit to extend by three years the deadline for submitting proof of beneficial use. To properly contest IDWR's 1981 Order, Astorquia needed to request a hearing in accordance with I.C. § 42-1701A (3). See I.C. § 42-204. In other words, Astorquia should have filed a written petition with the director within fifteen days of receipt of IDWR's 1981 Order. See I.C. § 42-1701A(3) (1989 Supp.).[3] Astorquia failed to do so. Astorquia's attempt to challenge the extension of time to submit proof of beneficial use is an improper collateral attack on a previously issued order. See Mosman v. Mathison, 90 Idaho 76, 84-85, 408 P.2d 450, 454-55 (1965). Bootstrapping his latent disagreement with the 1981 Order to his appeal of a 2012 order does not restart the clock. Therefore the Court should dismiss his appeal as untimely.

2. IDWR's 1981 Order was within its statutory authority.

Even if Astorquia could challenge IDWR's 1981 Order, his appeal should be denied because IDWR acted within the scope of its authority. IDWR could extend the proof deadline for up to five years, and Astorquia's belated submission precipitated the priority advancement.

a. Operative statute authorizes three year extension.

IDWR is authorized to grant an extension of time in which to complete development of a permit and application to full beneficial use for a period of time "not exceeding five (5) years." I.C. § 42-204(5).[4] There is no statutory mandate that IDWR grant a five year extension upon request. Rather the plain language of the statute makes it clear that five years is the upper limit of the range of possible extension periods.

[3] The operative version of I.C. § 42-1701A in 1981 appears in the 1989 Supplement.
[4] Section 42-204(4) was the operative statute in 1981 for extensions of time on permits. It was later renumbered to I.C. § 42-204(5).

IDWR's 1981 Order allowed Astorquia another three years to submit proof of beneficial use. (R. 19-20.) By statute, IDWR could allow up to five years. See I.C. § 42-204(5). Three years is within the range permitted by statute. Therefore, IDWR acted in accordance with its statutory authority.

b. Operative statute mandates priority advancement.

Astorquia cannot demonstrate he would have submitted proof of beneficial use before 2002 had IDWR extended his deadline to five years. He does not cite to evidence in the record which supports his theory. Further crippling his argument, the record works against him. Astorquia had multiple reminders of the upcoming deadlines. (R. 20-22.) IDWR repeatedly provided him with copies of the beneficial use postcard[5] and the request for extension of time to submit proof form. (R. 16, 21-22.) And yet he failed to timely act. His tardiness triggered the priority date advancement. See I.C. § 42-218a. IDWR's reinstatement of the permit in the 1981 Order necessarily had to reflect advanced priority dates. Thus, IDWR's 1981 Order advancing the priority date is not arbitrary, capricious or an abuse of discretion because the operative statute so required.

3. Astorquia fails to properly raise the issue of error.

While his appeal suggests IDWR erred by only granting a three year extension of time and that somehow a five year extension would have prompted Astorquia to timely comply with subsequent deadlines, Astorquia neglects to offer evidentiary support substantiating that the "error" is arbitrary, capricious, an abuse of discretion, or violates his equal protection rights.

[5] I.C. § 42-217 specifies proof of beneficial use shall be "submitted by such users... upon forms furnished by the department of water resources" and shall include proof of beneficial use fees. Astorquia's Extension Request is on a Request for Extension of Time form, not a proof of beneficial use form, and he did not include payment of proof of beneficial use fees along with it. (R. 19.)

The Court should not consider an issue "not supported by argument and authority in the opening brief." Dawson v. Cheyovich Fam. Trust, 149 Idaho 375, 382, 234 P.3d 699, 706 (2010). Rule 35 of the Idaho Appellate Rules is clear: "The argument [in Appellant's Brief] shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, *with citations to the authorities, statutes, and parts of the transcript and record relied upon.*" I.A.R. 35(a)(6) (emphasis added). Mere mention of an issue is insufficient for appeal. "Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." Dawson, 149 Idaho at 382-83, 234 P.3d 706-07 (citing Inama v. Boise County ex rel. Bd. of Comm'rs, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (refusing to address a constitutional takings issue when the issue was not supported by legal authority and was only mentioned in passing)). A generalized listing of issues lacking citations to the record or citations to applicable authority should not be considered on appeal. See Dawson, 149 Idaho at 383, 234 P.3d at 707; Michalk v. Michalk, 148 Idaho 224, 230, 220 P.3d 580, 586 (2009); Wheeler v. Idaho Dep't of Health & Welfare, 147 Idaho 257, 265-66, 207 P.3d 988, 996-97 (2009).

Astorquia fails to cite any part of the transcript or record relied upon in support of his contentions. And what authority he does cite works against him.

a. IDWR's 1981 Order did not violate Astorquia's equal protection rights.

Astorquia is not the victim of a discriminatory plan or intentionally singled out in violation of his equal protection rights. Astorquia cites Terrazas v. Blaine County, 147 Idaho 193, 207 P.3d 169 (2009) in support of this claim, though in passing he lists state and federal constitution "violations." (Petitioner's Br. at 5-7.) In Terrazas, the Idaho Supreme Court

affirmed the decision of a Board of County Commissioners on a zoning matter, finding the decision was based upon substantial evidence in the record and was not arbitrary or capricious, or in violation of the applicant property owners' equal protection rights. 147 Idaho at 205, 207 P.3d at 181. The Court examined what the applicants would have to show in order to prevail on their equal protection claim. Because the applicants did not assert the Board's action was "a deliberate and intentional plan of discrimination against them, based on some unjustifiable or arbitrary classification, such as race, sex, or religion, ... Applicants need only allege and prove that they have intentionally been singled out and treated differently based on a distinction that fails the rational basis test." 147 Idaho at 205, 207 P.3d at 181. However, because the applicants failed to demonstrate the Board's decision violated I.C. § 67-5279, their equal protection violation assertion also failed. Id.

Applying that "class of one" standard here, if applicable,[6] Astorquia bears the burden of proving either a deliberate and intentional plan of discrimination or that he was intentionally singled out and treated differently based on a distinction that lacks a rational basis. Astorquia has wholly neglected to substantiate that claim. He does not prove a deliberate and intentional plan of discrimination. He does not prove IDWR intentionally singled him out and treated him differently. There is no evidence in the record to support those assertions (R. 394), and Astorquia has cited to none in is opening brief. Astorquia did not contest IDWR's 1981 Order. The 1981 Order was neither arbitrary nor capricious. Instead, it reflected IDWR's statutory authority as discussed above. Therefore Terrazas actually compels the Court to find IDWR's 1981 Order does not violate Astorquia's equal protection rights.

[6] Astorquia cites nothing in support of his contention that the "class of one" equal protection claim should be recognized outside the planning and zoning arenas. Nor does he allege any vindictive action, illegitimate animus or ill will on IDWR's part. See Village of Willowbrook v. Olech, 528 U.S. 562, 565-66, 120 S.Ct. 1073, 1075 (2000) (Breyer, J., concurring).

b. IDWR's 1981 Order on the permit does not constitute a taking.

IDWR's 1981 Order extending by three years Astorquia's deadline to submit proof of beneficial use is not a constitutional taking. A permit is not real property nor a vested right as it gives the applicant "an inchoate right which could ripen into a legal and complete appropriation only upon the completion of the works and the application of the water to a beneficial use." Speer v. Stephenson, 16 Idaho 707, 716, 102 P. 365, 368 (1909). "The case law is clear that an applicant does not obtain a vested right at the point where an application is filed *or the permit is obtained.*" In re Idaho Power Co., 151 Idaho 266, 275-76, 255 P.3d 1152, 1160-61 (2011) (emphasis added) (citing A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist., 141 Idaho 746, 753, 118 P.3d 78, 85 (2005); Hardy v. Higginson, 123 Idaho 485, 491, 849 P.2d 946, 952 (1993); In re Hidden Springs Trout Ranch, Inc., 102 Idaho 623, 625, 636 P.2d 745, 747 (1981)). "A water right does not vest until the statutory provisions for obtaining a license are completed, including the issuance of the license." In re Idaho Power, 151 Idaho at 275, 255 P.3d at 1161.

IDWR's 1981 Order affected Astorquia's permit. (R. 19-20.) Because a permit is not a vested right, the action on his permit here (the three year extension of time) did not constitute an unconstitutional taking. It follows that IDWR did not act in violation of constitutional or statutory provisions.

B. The Amended Preliminary Order is based on controlling statutes, substantial evidence in the record and is not arbitrary, capricious or an abuse of discretion.

At the hearing, Astorquia presented evidence that suggested a three year extension was atypical for the subset of rights affected by Idaho Power's moratorium on new power hookups. (R. 347-64; Tr. 8:6-10:4, 22:4-34:22, 36:14-37:4.) An anomaly does not an error make. IDWR recognized the three year extension was atypical in the Amended Preliminary Order. (R. 388,

393-94.) In his licensing challenge, as discussed above, Astorquia failed to show the extension was deliberate discrimination or that Astorquia was intentionally singled out. The 1981 Order granted a three year extension, which was directly authorized by statute and thus cannot be lacking a rational basis under the Terrazas standard. See 147 Idaho at 205, 207 P.3d at 181.

Just as the 1981 Order did not lack a rational basis, neither does the Amended Preliminary Order. The Amended Preliminary Order determines Astorquia's request for an earlier priority date failed for four reasons: (1) challenging the 1981 Order is not timely under I.C. § 42-1701; (2) Astorquia failed to prove IDWR lacked a rational basis for a three year extension as required by Terrazas; (3) Astorquia cannot prove a five year extension would have guaranteed an earlier filing of proof, and (4) Astorquia was not harmed by the three year extension because he had multiple opportunities to request extensions. (R. 393-95.) In making its Amended Preliminary Order, IDWR had the benefit of Astorquia's licensing appeal, a hearing with exhibits and Astorquia's Petition for Reconsideration. The Amended Preliminary Order details the statutory framework for advancing priority dates due to failures to both timely submit proof of beneficial use and requests for extension of time. (R. 391- 95, 397.) IDWR's "refusal to reinstate the [] November 26, 1975 priority date" (Petitioner's Br. at 5) was dictated by statute. See I.C. § 42-218a. IDWR's decision to hold Astorquia responsible for his inaction is well-supported by the law and facts in this matter and is not arbitrary, capricious or an abuse of discretion.

C. Astorquia has not suffered the prejudice of a substantial right.

As Astorquia failed to substantiate IDWR erred in a manner specified in I.C. § 67-5279(3), he also failed to demonstrate a substantial right of his has been prejudiced. Astorquia suggests that "[t]he passage of time is not a bar to the verification of a valuable property right as

exercised by the Astorquias since 1976." (Petitioner's Br. at 6.) This argument fails because Astorquia had only a permit, an inchoate right as discussed above, until 2011.

Moreover, the advancement of priority date was due to his own inaction. Even if it is assumed for sake of argument that IDWR erred, which it did not, by granting only a three year extension as opposed to a five year extension, Astorquia has not shown a substantial right of his has been prejudiced. Astorquia was not foreclosed from seeking additional extensions of time in which to submit proof of beneficial use. Thrice IDWR advised him of such options. The cover letter to the 1981 Order, the 1983 proof due notice, and the 1984 lapse notice explicitly state additional extensions might be available. (R. 20-22.) Despite the repeated reminders of possible extensions, Astorquia chose to wait until 2002 to act. (R. 28-30, 42-50.) Quite simply, as IDWR concluded in its Amended Preliminary Order, Astorquia bears the "responsibility for not submitting proof of beneficial use or seeking another extension of time to submit proof of beneficial use." (R. 395.) Astorquia cannot point to anything in the record which demonstrates that if IDWR had granted five years then he magically would have submitted proof in compliance with that deadline. His failure to establish a substantial right was prejudiced is fatal to this appeal.

II. This matter should not be stayed pending subcase resolution in the SRBA.

Though resolution of Astorquia's appeal of the 1981 Order is dispositive, Astorquia raised an issue that IDWR cannot ignore. This matter should not be stayed while Astorquia pursues subcase 37-7460 in the SRBA.

A. The SRBA is not a forum which allows collateral attacks on licenses.

Astorquia asserts that this Court and the SRBA Court should ignore both that the right is based on a license (R. 153) and that Astorquia's failure to timely submit proof of beneficial use

or an extension of time request caused the priority date advancements. (Petitioner's Br. at 2-4.) Astorquia insteads suggests the SRBA Court has jurisdiction to resolve the matter of priority in this right. (Petitioner's Br. at 2-4.) Such an argument is contrary to established law.

The SRBA will not abide collateral attacks on licenses. It is law of the case that the SRBA cannot be used to challenge an IDWR administrative decision. See Memorandum Decision and Order on Challenge, Subcase Nos. 29-271 et al. (City of Pocatello), (Nov. 9, 2009) at 24 ("This Court has long held that the SRBA cannot be used as a mechanism for reconditioning or collaterally attacking a license."). Astorquia's suggestion the SRBA Court revisit IDWR's determination on the priority date issue is just another attempt to try to avoid a licensing decision that is vested by statute with the Department. See I. C. § 42-219. Astorquia cites no authority suggesting the SRBA Court has jurisdiction to determine an element of a right contested in a parallel administrative forum. IDWR knows of none.

Additionally, Astorquia is bound by his administratively-issued license. He cannot try to readjudicate the elements under a potentially more favorable legal theory in a separate proceeding, here the SRBA. See Memorandum Decision and Order on Challenge, Subcase Nos. 29-271 et al., at 26 (citations omitted). Astorquia cannot reap the benefit of the best outcome from two simultaneous proceedings.

B. Only IDWR can determine the priority date of a license.

Astorquia argues that this Court should stay the current proceeding and allow the SRBA Court to determine the priority date for water right license no. 37-7460.[7] This argument lacks

[7] If Astorquia is arguing that the SRBA district court has jurisdiction over appeals of IDWR's licensing decisions, such a result is prohibited by I.C. § 42-1401D, which provides that appeals of IDWR agency proceedings are not to be heard by the SRBA district court. The Idaho Supreme Court has ordered the presiding judge of the SRBA Court of the Fifth Circuit to hear petitions for judicial review of IDWR actions on the administration of water rights because of particular water law expertise. See Supreme Court Administrative Order, Dec. 9, 2009. This

any statutory support and must be rejected as IDWR is the sole entity vested with the authority to determine the appropriate elements of a water right license. See I.C. § 42-219. The SRBA district court has consistently sustained IDWR's jurisdiction over its licensing process. See Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law, Subcase No. 29-11609 (City of Pocatello), (Oct. 6, 2006) at 11-12; Memorandum Decision & Order on Motions for Summary Judgment, Subcase Nos. 63-2529, et al. (Pioneer Irrigation District), (June 11, 2009) at 15-16; Order on Motion to Dismiss Objections & Request for Attorneys Fees, Subcase Nos. 37-494, et al. (Valley Club), (Oct. 10, 2008), at 5-6.

Astorquia cites two cases in support of his stay request. However, they do not support Astorquia's argument. First, Astorquia cites Walker v. Big Lost River Irr. Dist., 124 Idaho 78, 856 P.2d 868 (1993). This case simply stands for the proposition that other district courts lost jurisdiction to adjudicate water rights when the SRBA district court commenced. 124 Idaho at 81, 856 P. 2d at 871 (noting once the SRBA commenced, "jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only."). Walker does not stand for the proposition that the SRBA district court overrides the licensing process established in Chapter 2 of Title 42.

Astorquia also cites the SRBA district court's decision in the Magic West subcases. In the SRBA proceeding on Magic West's water rights, this Court held that Idaho's accomplished transfer statute, I.C. § 42-1425, allows a water user to expand a licensed season of use for a groundwater right so long as the volume does not change. Order Modifying Memorandum Decision and Order on Challenge, Subcase Nos. 61-02248B and 61-07189, (Jan. 4, 2002) at 7. The facts of Magic West are not analogous to this case. In Magic West, the issue involved a

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assignment is different and distinct from the SRBA district court's jurisdiction to adjudicate water rights under Chapter 14, Title 42.

change in a water right element authorized under the accomplished transfer statute. There is no comparable statutory authority in this case. Moreover, Magic West does not provide the SRBA district court with the authority to supplant the Department's authority to determine the priority date of a license as provided in I.C. § 42-219. Astorquia's suggestion otherwise ignores well-established law.

C. A stay pending resolution in the SRBA is not permitted by I.C. § 67-5279(3).

Underscoring Astorquia's misplaced appeal, he seeks a stay in this proceeding, *his own appeal*, until he can determine whether he likes the resolution in the SRBA subcase better than his chances in this proceeding. In an appeal of an administrative decision, this Court can affirm the agency decision, set aside all or part of the decision or a remand for further proceedings. I.C. § 67-5279(3). A stay is not contemplated by I.C. § 67-5279(3). Therefore, the Court should deny his request.

III. This Court should not remand the matter to IDWR for additional information because Astorquia failed to comply with I.C. § 67-5276.

It appears that by his appeal Astorquia seeks remand for inclusion of a pump curve. Notably, Astorquia does not ask this Court to determine he is entitled to a specific higher quantity. Instead he merely raises a limited argument seeking remand to IDWR for its consideration of the pump curve. His request should be denied because Astorquia failed to properly seek to augment the record in accordance with I.C. § 67-5276.

Astorquia has not satisfied the criteria of I.C. § 67-5276 for inclusion at this stage in the proceedings. Astorquia must prove the purported evidence is (1) material, related to the validity of IDWR's action and (2) there were either (a) good reasons for failure to present the evidence in earlier proceedings before IDWR, thus the court can remand the matter for IDWR to receive additional information and conduct additional fact finding, or (b) irregularities in agency

procedure in which case the Court could take proof on the matter. See I.C. § 67-5276. Since Astorquia seeks remand (Petitioner's Br. at 4-5), he would be limited to substantiating good reasons for failure to present before IDWR.[8]

He has not alleged there were good reasons for failure to present it to IDWR. Judicial review of a disputed fact must be confined to the agency record for judicial review as defined by I.C. § 67-5275(1) and supplemented by I.C. § 67-5276. See Crown Point Dev't, Inc. v. City of Sun Valley, 144 Idaho 72, 76, 156 P.3d 573, 577 (2007) (holding augmentation was improper when the proponent of the purported evidence failed to show good reasons for failure to present it to the agency and failed to allege irregularities in the agency procedure); Urrutia, 134 Idaho at 360-61, 2 P.3d at 745-46.

Astorquia does not address his reasons for failing to submit the additional information.[9] His abbreviated request for remand lacks citation to authority or the record in violation of Rule 35 of the Idaho Appellate Rules as well as the requirement for specificity in Dawson. See 149 Idaho at 382-83, 234 P.3d 706-07. Moreover, while a pump curve might be related to the licensed rate determination, it is not necessary for review of the agency action.

Materiality is a threshold consideration for determining whether the record should be augmented. See Wohrle v. Kootenai County, 147 Idaho 267, 272, 207 P.3d 998, 1003 (2009). The purported evidence must relate to the "validity of the agency action." I.C. § 67-5276(1). The Comments to the Idaho Administrative Procedure Act for this provision state "[t]he term 'validity' encompasses the scope of judicial review provisions in section 67-5279. In other words, evidence may be received only if it is likely to contribute to the court's determination of

[8] Astorquia has not alleged any irregularities in Department procedure.
[9] Astorquia makes a vague allusion that the pump curve was not available but curiously offers no support for that assertion. (Petitioner's Br. at 4-5.) It is difficult to believe a pump curve could not have been obtained earlier given the field examination occurred in 2005 during which time Judd Astorquia raised the issue of quantity. (R. 116-18.)

the validity of the agency action under one or more of the standards set forth in section 67-5279." I.C. § 67-5276, cmt. 3 (1993).

Here, IDWR considered the field exam measurements, the pump design, Judd Astorquia's recollection of an energy audit, a generous theoretical system efficiency, and internal records on a decline in relevant groundwater. (R. 118-25, 372-81, 387-98.) Thus, the licensed quantity is supported by substantial evidence in the record and should not be disturbed.

IV. IDWR requests attorney's fees and costs incurred by responding to this appeal.

IDWR rarely seeks attorney's fees and costs in judicial reviews of its administrative decisions. However, Astorquia's appeal compels IDWR to do so in this case because the appeal lacks a reasonable basis in fact or law.

The Court shall award attorney's fees and expenses in any proceeding involving a state agency and a person if the Court finds the "nonprevailing party acted without a reasonable basis in fact or law." I.C. § 12-117(1). See also Halvorson v. N. Latah County Highway Dist., 151 Idaho 196, 208-09, 254 P.3d 497, 509-10 (2011) (awarding fees to the state agency where property owners' claims lacked a reasonable basis in fact or law). As defined by I.C. § 12-117(4)(a) and (c), IDWR is a state agency and Astorquia is a person.

Astorquia's entire appeal is groundless. His challenge to the 1981 Order has no basis in law or fact. As discussed above, his disagreement with a three year extension is time-barred and is within the discretion of IDWR according to I.C. § 42-204(5); there is no indication he would have complied with a five year extension, and he could have filed for additional extensions. He failed to show IDWR erred with respect to I.C. § 67-5279(3) either in the 1981 Order or the Amended Preliminary Order. He does not demonstrate any substantial right of his has been prejudiced.

His request for a stay is contrary to Idaho law. As detailed above, the SRBA Court does not allow collateral attacks on licensed rights; only IDWR can determine the priority date of a license; and a stay is not proper relief for a party seeking judicial review pursuant to I.C. § 67-5279(3).

Similarly, his request for remand ignores well settled law. As discussed above, Astorquia has not attempted to satisfy the standard remand procedure provided by I.C. § 67-5276.

In his appeal, Astorquia does not cite the record in support of any contention. The few legal authorities he cites are misguided, at best.

For all of the above reasons, the Court should rule that by his appeal Astorquia acted without a reasonable basis in fact or law and award attorney's fees and costs to IDWR.

CONCLUSION

Astorquia's appeal begins and ends with IDWR's 1981 Order. Because he failed to timely contest it, he is bound to the consequences of that inaction. Even if he could still contest it, IDWR's order granting a three year extension of time in which to submit proof of beneficial use on his permit is supported by statute. The Amended Preliminary Order is statutorily based, supported by substantial evidence in the record, and not arbitrary, capricious or an abuse of discretion. Astorquia has completely failed to demonstrate IDWR erred in a manner specified in I.C. § 67-5279(3) or that a substantial right of his has been prejudiced. This matter should not be stayed pending resolution of his subcase in the SRBA. His request for remand should be summarily denied for failure to satisfy the criteria of I.C. § 67-5276. For the aforementioned

reasons, the Court should affirm IDWR's Amended Preliminary Order and award attorney's fees and costs to IDWR.

DATED this 14th day of February, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2013, I caused a true and correct copy of the foregoing *Respondent IDWR's Response Brief* to be filed with the Court and served on the following parties by the indicated methods:

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