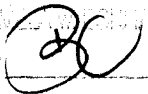


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FILED
MAR 9 2017
BY:  DEPUTY

Attorneys for Tanner Lane Ranch, LLLP

**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 2017-458

Fee Category L.3.a – \$221.00

**NOTICE OF APPEAL AND
PETITION FOR JUDICIAL REVIEW
OF FINAL AGENCY ACTION**

IN THE MATTER OF PERMIT NO. 27-7549

In the name of Tanner Lane Ranch, LLLP.

Petitioner, Tanner Lane Ranch, LLLP (“TLR”), by and through its counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., files this *Notice of Appeal and Petition for Judicial Review of Final Agency Action* challenging a final decision by the Idaho Department of Water Resources, pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.

**NOTICE OF APPEAL AND
PETITION FOR JUDICIAL REVIEW
OF FINAL AGENCY ACTION**

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279 seeking judicial review of the *Amended Order Affirming Preliminary Order Voiding Permit*, issued by Hearing Officer Jeff Peppersack, the hearing officer designated by the Idaho Department of Water Resources (the “Department”) dated February 1, 2017, and served on February 2, 2017.

2. On September 3, 1991, James S. Johnston and Paul Fankhauser filed Application for Permit No. 27-7549 with the Department, seeking a permit to divert 9.60 cfs from ground water for irrigation of 480 acres near Blackfoot, Idaho.

3. The application was approved by the Department and Permit 27-7549 was issued on April 7, 1992. The permit authorized the construction of two ground water wells, one located in the NENE of Section 33, T02S, R36E, and one located in the SENW of the same section. The 480-acre place of use was located within Section 33, T02S, R36E. Proof of beneficial use was due on or before May 3, 1993.

4. On February 10, 1993, Johnston and Fankhauser filed a *Request for Extension of Time* in which to provide proof of beneficial use. The request stated that three phase power had not been brought to the property but the land had been cleared and leveled. Johnston and Fankhauser asked for a one-year extension. The request was approved and the deadline for filing proof of beneficial use was extended to May 1, 1994.

5. On July 16, 1993, Johnston filed an *Application for Amendment of a Permit*, seeking to change the points of diversion and place of use for Permit 27-7549. The amendment was approved by the Department on August 23, 1993. The amended points of diversion were

located in the NENE of Section 34, T02S, R36E and the SENW of Section 26, T02S, R36E. The amended place of use was located within Sections 26 and 27, T02S, R36E.

6. On April 29, 1994, Johnston and Chris Drakos filed another *Request for Extension of Time*, seeking a five-month extension for the proof due date. The request stated that power would not be brought to the property until August 1994.

7. The April 1994 *Request for Extension of Time* was denied by the Department. The order stated that the Department was not authorized to grant a second extension of time. The deadline for filing proof of beneficial use remained set as May 1, 1994. The Department's position for granting extensions of time at this time is different than the Department's position today, which generally allows for multiple extensions of time to be granted up to a maximum development period of ten (10) years. Had the Department then followed the Department's policy now and allowed extensions up to a maximum of ten (10) years, the proof of beneficial use due date would have been May 3, 2003.

8. Johnston and Drakos filed proof of beneficial use for Permit 27-7549 on June 17, 1994, 47 days after proof was due. The proof of beneficial use included an affirmation that the permit holders had completed all development that would occur under the permit. Both understood that development was complete if the wells were drilled and available for diversion of water.

9. On August 11, 1994, the Department received an assignment of permit stating that Johnston had assigned his interest in Permit 27-7549 to Lambert Produce Co. Inc. (Chris Drakos, president). The assignment did not discuss Fankhauser's interest in the permit.

10. On May 17, 2007, Fankhauser sent a letter to the Department stating that he did not have a property interest in any pending applications within the Eastern Snake Plain Aquifer. The Department responded to Fankhauser, noting that he would be removed as a co-owner of Permit 27-7549.

11. In April 2014, the Department processed another assignment of permit, wherein ownership of Permit 27-7549 was conveyed by Lambert Produce Co. Inc. to TLR. TLR is now the sole owner of the permit.

12. The Department's records include well driller's reports for the two wells drilled under Permit 27-7549. According to the well driller's reports, the first well (located in the SWSE of Section 27, T02S, R36E) was completed on April 28, 1994, and the second well (located in the NENE of Section 34, T02S, R36E) was completed on May 25, 1994.

13. On June 2 and 3, 1994, Agricultural Services, Inc. conducted pump tests for the two ground water wells. Each well produced 5,000 gallons per minute within 6 hours of beginning the pump tests. In combination, the wells could produce 10,000 gallons per minute (22.30 cfs) under open discharge pumping conditions. Because these pump tests were conducted within months of the completion of the wells, they provide persuasive evidence of the capacity of the wells that were constructed near the time of the proof due date.

14. The water right file for 27-7549 includes a copy of a letter from Idaho Power to Drakos stating that Drakos will not be supplied power until after July 1, 1994. The pump tests from June 1994 were conducted with portable diesel or propane powered pumps.

15. In November 1999, the Department attempted to conduct a field exam for Permit 27-7549. The examiner, Department employee Keith Wilson, summarized what he found in a

Beneficial Use Field Report and took photographs of what was present, both of which are available in the Department's files. There is no documentation from the Beneficial Use Field Report of any measurements or other analysis performed by the Department of the place of use. However, based on a subsequent letter, measurements were taken but later discarded.

16. During the field visit, Mr. Wilson did not inform TLR's representative, Chris Drakos, of any concerns with the development of 27-7549. Mr. Drakos recalls that Mr. Wilson encouraged him to continue further work on the wells and development of the water right permit, and that Mr. Wilson would come back when the system was up to capacity. Mr. Wilson never indicated that there was any problem or concern with the place or use or any lack of completed irrigation infrastructure on the property.

17. On July 27, 2000, Mr. Wilson sent a letter to Chris Drakos confirming that the measurements collected in November 1999 were unreliable. Wilson's letter stated that the Department would conduct another field exam once Drakos installed permanent electric or diesel pumps. The letter did not inform Mr. Drakos of any Department concerns with bringing the system up to capacity, specifically, that there were any problems with the wells or need to further irrigate the place of use in order to demonstrate development of the permit.

18. Relying upon the Department's position as explained by Mr. Wilson, Mr. Drakos eventually had electrical power run to the wells and center pivots, installed center pivots, and engaged in other expensive measures to develop the farmground. These costs totaled approximately Three to Four Hundred Thousand Dollars (\$300,000.00-\$400,000.00). The Department never completed an actual in-person follow-up field exam once the "system was up to capacity."

19. Aerial photography indicates that center pivots were not installed at the property until after 2004. The installation of the pivots occurred after the deadline for proof of beneficial use. This additional development (and its associated costs) would have been avoided if the Department had been diligent in completing its licensing review of Permit 27-7549 or informed Mr. Drakos that he could not engage in any further actions to develop the irrigation infrastructure.

20. Because the development period ended many years ago and no field exam was timely conducted, and further, because the property is operated very differently today than it was in 1994, it is difficult to determine the extent of beneficial use occurring during the authorized development period. It is not the permit holder's responsibility to perform the field examination or to prove development of the permit. It is the Department's responsibility to conduct a field examination and document the extent of beneficial use as set forth under Idaho law.

21. In 2013, the Department initiated a review of Permit 27-7549 to determine the extent of beneficial use occurring under the permit. The Department determined that limited beneficial use had occurred during the authorized development period (April 7, 1992 - May 1, 1994). Only one ground water well was completed prior to May 1, 1994 and that well was not test pumped by Agricultural Services, Inc. until early June 1994.

22. Using satellite imagery and aerial photography from the 1990s and early 2000s, the Department determined that, at most, only 25 acres were flood irrigated from the well located in the SWSE of Section 27 (the only well completed prior to May 1, 1994).

23. As part of its licensing review process, the Department discovered that TLR was irrigating more acres than are authorized under its existing water rights. On July 15, 2014, the

Department issued a Notice of Violation (E2014-656) to TLR under Idaho Code § 42-351. As part of that proceeding, the Department notified TLR that water right 27-7549 would be reduced significantly as part of the licensing process.

24. On February 13, 2014, the Department sent a draft license to TLR's attorney to review. The draft license proposed a diversion rate of 0.50 cfs and the irrigation of 25 acres. Because the ground water well was developed in a different location than was listed on the 1993 Amended Permit, another amendment would be required before License 27-7549 could be issued. The Department included an application for amendment for TLR to sign if the draft license was acceptable. TLR refused to sign the amendment.

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

26. On January 2, 2015, the Department issued a *Preliminary Order Voiding Permit*, which proposed to void Permit 27-7549.

27. On January 16, 2015, TLR filed its *Protest and Petition for Hearing*.

28. On February 18, 2015, the Department held a pre-hearing status conference, and agreed that TRL would submit proposed findings of fact, based on which the hearing officer would issue a decision without a formal hearing.

29. On March 20, 2015, TLR submitted *Proposed Findings of Fact* to the Department.

30. On August 31, 2015, the hearing officer issued an *Order Affirming Preliminary Order Voiding Permit*.

31. On September 14, 2015, TLR submitted a motion for reconsideration (titled *Petitioner's Exceptions to Order Affirming Preliminary Order Voiding Permit*), which was denied by the hearing officer on October 5, 2015.

32. On October 19, 2015, TLR filed *Petitioner's Exceptions to Order Affirming Preliminary Order Voiding Permit*, appealing the preliminary order to the Director of the Idaho Department of Water Resources (the "Director").

33. On December 14, 2015, the Director issued an *Order Granting Exceptions in Part and Remanding for Evidentiary Hearing*.

34. On November 30, 2016, the Department conducted a hearing, where the hearing officer took official notice of the Department's file for Permit 27-7549.

35. On December 16, 2016, TLR filed *Petitioner's Post-Hearing Brief*, as allowed by the hearing officer.

36. On February 2, 2017, the hearing officer issued a preliminary order, complete with a sheet entitled "Explanatory Information To Accompany A Preliminary Order," entitled *Amended Order Affirming Preliminary Order Voiding Permit* (the "Final Order").

37. After 14 days, or on February 16, 2017, the *Final Order* became a final order of the Department under the provisions of IDAPA 37.01.01.730.02.b.

38. Pursuant to Idaho Code § 67-5273(2) and IDAPA 37.01.01.730.02.d, the Associations may petition for judicial review within twenty-eight (28) days of when the preliminary order became final, which in this matter, is on or before March 16, 2017.

39. The Final Order is the subject of this *Notice of Appeal and Petition for Judicial Review of Final Agency Action*.

JURISDICTION AND VENUE

40. This petition is authorized by Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.

41. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5272.

42. Venue lies in this Court pursuant to Idaho Code § 67-5272 because the personal property at issue—Permit No. 27-7549—authorizes development of a water right for TLR’s property located in Bingham County, Idaho, and TLR’s principal place of business is also located in Bingham County, Idaho.

43. Pursuant to the Idaho Supreme Court’s Administrative Order issued on December 9, 2009, “all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District.” The Snake River Basin Adjudication District Court’s procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. TLR has attached a copy of the Snake River Basin Adjudication District Court’s *Notice of Reassignment* form for the convenience of the clerk.

44. The Department's *Amended Order Affirming Preliminary Order Voiding Permit*, dated February 1, 2017, is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

PARTIES

45. Petitioner, Tanner Lane Ranch, LLLP, is an Idaho limited liability limited partnership, with its principal place of business located in Bingham County, Idaho, and is the permit-holder of Permit No. 27-7549.

46. Respondent, Idaho Department of Water Resources, is an executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701, *et seq.*, with its state office located at 322 E. Front Street, Boise, Ada County, Idaho.

STATEMENT OF INITIAL ISSUES

47. Petitioner intends to assert the following initial issues on judicial review:
- a. Whether the Department's *Final Order* and the orders thereby affirmed were made in violation of constitutional or statutory provisions.
 - b. Whether the Department's *Final Order* and the orders thereby affirmed were made upon unlawful procedure.
 - c. Whether the Department's *Final Order* and the orders thereby affirmed were made without the support of substantial evidence on the record as a whole.
 - d. Whether the Department's *Final Order* and the orders thereby affirmed were arbitrary, capricious, or an abuse of discretion.
 - e. Whether the Department's actions prejudiced a substantial right of TLR.

- f. Whether the Department is mandated by statute to perform an actual in-person field examination as part of the water right licensing process.
- g. Whether in performing the field examination, the Department is required to take the system as it finds it, even if post-proof development occurred between the time proof was submitted and the time the in-person field exam is performed.
- h. Whether the Department is barred from voiding 27-7549 because of equitable principles, specifically promissory estoppel, equitable estoppel, quasi-estoppel, and/or laches.

AGENCY RECORD

48. Judicial Review is sought of the Department's *Amended Order Affirming Preliminary Order Voiding Permit*, dated February 1, 2017.

49. The Department held a hearing in this matter on November 30, 2016, which was recorded, and the recording should be made a part of the agency record in this matter. The person who has a digital copy of the hearing is Sharla Cox, Idaho Department of Water Resources, 900 North Skyline Drive, Suite A, Idaho Falls, ID 83402-1718, Telephone: (208) 525-7161, Facsimile: (208) 525-7177, Email: sharla.cox@idwr.idaho.gov. Counsel for TLR hereby certifies that TLR contacted Ms. Cox to verify that she has the recording. In accordance with I.R.C.P. 84(g), TLR has contacted M&M Court Reporting at the direction of the agency clerk to obtain an estimate of the cost to prepare the transcript. The estimated cost is Two Hundred Dollars (\$200.00), and TLR certifies that a check has been sent to M&M Court Reporting, 101 S. Capitol Blvd., Suite 503, Boise, ID 83702 on March 8, 2017, as the estimated

cost for preparing the transcript in this matter, and will pay the actual cost of the transcript if it is determined to be more than the estimated cost.

50. Petitioner anticipates it can reach a stipulation regarding the agency record with the Respondent and any intervenors, and will pay its necessary share of the fee for preparation of the record at such time.

51. Service of this Petition for Judicial Review has been made on the Respondents as they exist at the time of the filing of this Petition.

Dated this 8th day of March 2017.



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

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March 2017, I served a copy of the following described pleading or document on the parties listed below by the indicated method.

Document Served: NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION

Attorneys and/or Individuals Served:

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Courtesy Copy:
Snake River Basin Adjudication District Court
of the Fifth Judicial District
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Mail
 Hand Delivery
 Facsimile
 Courthouse Box
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Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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**IN THE DISTRICT COURT OF THE SEVENTH 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 _____

NOTICE OF REASSIGNMENT

IN THE MATTER OF PERMIT NO. 27-7549

In the name of Tanner Lane Ranch, LLLP.

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this _____ day of March 2017.

CLERK OF THE COURT

By: _____
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the NOTICE OF REASSIGNMENT on the attorneys and/or individuals listed below, by the method indicated, on this _____ day of March 2017.

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Courtesy Copy:
Snake River Basin Adjudication District Court
of the Fifth Judicial District
P.O. Box 2707
Twin Falls, Idaho 83303-2707

- Mail
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- Facsimile
- Courthouse Box

CLERK OF THE COURT

By: _____
Deputy Clerk