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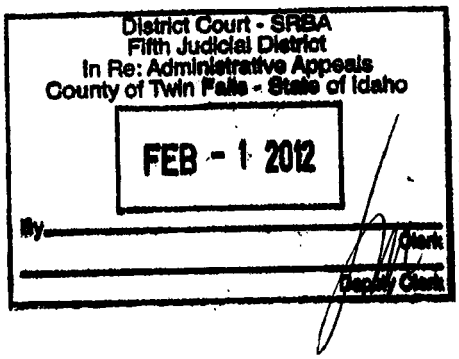

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN B. KUGLER Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN, in his official capacity as Interim Director of the Idaho Department of Water Resources Respondents. IN THE MATTER OF PERMIT TO APPROPRIATE WATER NO. 35-8359 IN THE NAME OF JOHN B. & DIANE K. KUGLER	**Case No. CV-WA-2011-15672** **RESPONDENTS' BRIEF**

RESPONDENTS' BRIEF

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

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I. STATEMENT OF THE CASE

This is a proceeding for judicial review of a final agency order issued on July 18, 2011, by Gary Spackman, Interim Director ("Director") of the Idaho Department of Water Resources ("Department" or "IDWR"). Petitioner John B. Kugler ("Kugler" or "Petitioner") disagrees with the Department's determination to suspend further work on and development of his water right permit number 35-8359.

II. ISSUES PRESENTED ON JUDICIAL REVIEW

The Department suggests the issues presented are the following:

1. Whether the Director's Final Order is consistent with constitutional and statutory provisions?
2. Whether the Director's Final Order is made upon lawful procedure?
3. Whether the Director's Final Order is supported by substantial evidence in the record?
4. And whether the Director abused his discretion in allowing the testimony of agency staff during an administrative hearing?

III. FACTUAL AND PROCEDURAL BACKGROUND

On October 4, 1984, Kugler and his wife filed an application to appropriate water with the Department, seeking 6 cubic feet per second ("cfs") of groundwater for irrigation. (R. 1-4.) The proposed point of diversion is in the trust water area. (R. 5, 169; 6/14/11 Tr. 23:20-24:3.)

The trust area derives from litigation between Idaho Power and the State of Idaho, resulting in the Swan Falls Agreement. (6/14/11 Tr. 15:16-16:15.) It represents that certain geographical area which includes flows of Snake River surface water and its tributaries including ground water between Swan Falls and Milner Dam that are in excess of the minimum stream flows as measured at the Murphy Gage, encompassing what is known as the Eastern Snake River Plain Aquifer ("ESPA").[1] (R. 177; 6/14/11 Tr. 15:21-25, 16:16-17:2.)

Between May 16, 1986 and September 30, 2009, instead of diverting water to beneficial use for irrigation, Kugler enrolled his land in the Conservation Reserve Program ("CRP") to grow grasses for wildlife and soil stabilization. (R. 42-43, 56-58; 1/21/09 Tr. 11:4-10, 12:1-24, 18:5-13, 33:17-19.) No well was constructed on the property, no power run to the land, and no development of diversion works or irrigation system had occurred. (1/21/09 Tr. 10:2-12:13, 14:5-16, 17:13-22, 21:6-12.) IDWR began processing permit applications for the trust water area towards the end of the 1980s. (6/14/11 Tr. 19:1-8.) On July 27, 1990, the Department issued permit number 35-8359 to the Kuglers. (R. 18-19.) On June 6, 1991, the Kuglers assigned the entire interest in permit number 35-8359 to the Northwest Farm Credit Services, ACA ("Farm Credit Services"). (R. 20.)

On November 9, 1994, the Department issued an Order for Temporary Stay of Development and Notice of Formal Proceedings ("Temporary Stay Order") which applied to those permits within the trust water area for which no proof of beneficial use had been filed with

[1] A map of the Trust Area is appended to IDWR's Water Appropriation Rules at IDAPA 37.03.08 (Attachment A to Appendix A).

the Department, including permit number 35-8359. (R. 24-27; 6/14/11 Tr. 27:1-13.) The Temporary Stay Order references a 1992 moratorium order and an Amended Moratorium Order of 1993 that cites various calls by senior surface and ground water right holders against junior ground water right holders and drought conditions that exacerbated water shortages in the trust water area. (R. 24, 169.) The moratorium orders were issued in response to those drought conditions resulting in decreased stream flows and a corresponding increase in ground water reliance. (6/14/11 Tr. 25:2-13.) The maintenance of minimum stream flows, particularly at the Weiser Gage, "was becoming difficult to accomplish." (6/14/11 Tr. 25:11-13.) The moratorium orders served to ensure IDWR was not "exacerbating the problem by issuing new water right approvals." (6/14/11 Tr. 25:8-17.) The Amended Moratorium Order carved out the "non-trust water area," those areas tributary to the Snake River upstream from Milner Dam.[2] (6/14/11 Tr. 18:14-16, 25:18-24.)

The Temporary Stay Order required the permit holders to (1) file proof of beneficial use, (2) submit evidence of substantial investment that would merit granting additional time to develop the permit, or (3) request an indefinite stay in development. (R. 26-27.) Permit holders had until February 1, 1995 to respond to the Temporary Stay Order. (R. 26.) For those who requested an indefinite stay, the Temporary Stay Order specifically warned that the conditions requiring the order may never be alleviated. (R. 27.) Further, it clarified, "Upon approval of any

[2] The non-trust areas were later subject to a separate moratorium order, but it expired and there is no moratorium in that area currently although there have been delivery calls made by surface water users against ground water appropriators. (6/14/11 Tr. 26:5-14.) IDWR has concluded there is not water available for new appropriations without jeopardizing existing water right holders so those seeking new diversions in the non-trust area would likely need to demonstrate to the Department either there is water available or that they could mitigate for potential injury. (6/14/11 Tr. 26:15-25.)

such stay, no further development is to occur until such time as the department has issued an extension of time setting a date for completion of the project." (R. 27.)

On March 3, 1995, Farm Credit Services assigned the permit, jointly to itself and to Kugler. (R. 37.) On March 30, 1995, Farm Services Credit responded to the Temporary Stay Order by requesting an indefinite stay of development. (R. 41-44.) On April 4, 1995, the Department issued an order granting an indefinite stay in development because the land was enrolled in CRP. (R. 46-48.) That order further conditioned that additional work to develop the water right was not authorized until the department specifically granted a resumption of work, the department retained the right to rescind or modify the indefinite stay if the Eastern Snake River Plain moratorium is modified or rescinded, and the indefinite stay expired on December 31, 1997.[3] (R. 46-48.)

Between April 30, 1995, and September 30, 2007, the Department sought proof of beneficial use and Kugler and/or Farm Credit Services responded with requests for extensions of time. (R. 53, 60, 65-66, 73.) In one instance, Kugler/Farm Credit Services submitted the request for extension of time to file proof of beneficial use 55 days past the deadline. (R. 53.) Pursuant to I.C. § 42-217, the Department advanced the priority date on his permit to November 28, 1984. (R. 54.) On November 1, 2007, the Kuglers responded to the Department's latest notice that proof of beneficial use was due by requesting an extension of time until December 1, 2010. (R. 73.)

[3] Neither the Temporary Stay Order nor the April 4, 1995 order stayed the need to submit proof of beneficial use.

Instead, on December 6, 2007, the Department issued an Order Continuing Indefinite Stay in Development Period, concluding the moratorium order was still in effect and the conditions that culminated in the Temporary Stay Order continued so the Department prohibited additional work by the permit holder until the Department specifically authorized resumption of work.[4] (R. 74-76.) On December 21, 2007, Kugler filed a petition for reconsideration and sought a hearing. (R. 78.) Gary Spackman, the current interim director of IDWR, was assigned as hearing officer.[5] On January 28, 2008, Farm Credit Services assigned its interest in permit number 35-8359 to Kugler. (R. 81, 84.)

On January 21, 2009, the Department held a hearing on the Order Continuing Indefinite Stay in Development Period. (R. 97-101.) On March 23, 2009, the hearing officer signed the Preliminary Order Suspending Action and Prohibiting Development ("Preliminary Order"). (R. 103-08.) On April 6, 2009, the Department received Kugler's Petition for Reconsideration. (R. 109.) On April 24, 2009, the hearing officer issued his order denying said petition. (R. 113-14.)

On May 7, 2009, Kugler filed an Exception and Memorandum ("Exceptions") with then-Director David R. Tuthill, suggesting the record did not support the Preliminary Order, the decision failed to address the requested extension of time to complete proof of beneficial use, the Department's actions constituted a taking, and the Department made no finding regarding potential mitigation. (R. 115-16.) On August 23, 2010, Interim Director Spackman, who

[4] The Order Continuing Indefinite Stay in Development Period (and subsequent Final Order) alleviated the potential confusion of requiring proof of beneficial use while at the same time staying development by reaffirming additional work by the permit holder is prohibited until IDWR specifically authorizes a resumption of work. (R. 74-76, 166-76.)

[5] Director Spackman was not the director when he presided over the original proceedings as hearing officer. He was appointed interim director of the Department in July of 2009.

became interim director upon the retirement of Director Tuthill, responded to the Exceptions by issuing an Order Granting Augmentation Hearing. The Order Granting Augmentation Hearing set a hearing for the limited purposes of allowing presentation of evidence regarding "the effect or injury on senior priority water rights that might be caused by development of the beneficial use proposed by Kugler... [and] mitigating circumstances that might allow the permit [holder] to pursue the development." (R. 119-22.) The Order Granting Augmentation Hearing included notice that Department staff would present evidence regarding the impact of Kugler's proposed diversion on the reaches of the Snake River both above and below Milner Dam.[6] (R. 120.)

On February 15, 2011, the Department mailed to Kugler a copy of the Request for Staff Memorandum. (R. 124-27.) On March 30, 2011, the Department mailed to Kugler a copy of the Staff Memorandum prepared in response to the Director's request. (R. 128-55.) On June 14, 2011, the Department held the augmentation hearing on Kugler's permit. (R. 167.)

At the augmentation hearing, three Department employees testified in connection with their work on the Staff Memorandum. (R. 167-68.) They testified about the Department's concern with development of the permit on trust and non-trust areas. Any development in the trust area risks jeopardizing the established minimum stream flows at the Murphy and Weiser Gages. (6/14/11 Tr. 25:2-13.) The minimum stream flow at the Murphy Gage is already precarious and the subject of much concern. (R. 146-47; 6/14/11 Tr. 23:3-10, 32:17-38:20.) "[B]ecause of that—again, the State of Idaho could be facing the need to curtail water rights to make sure those minimum stream flows are maintained." (6/14/11 Tr. 23:11-14.) Development

[6] The proposed point of diversion for Kugler's permit is three to four miles from the trust water area boundary so the Department also considered effects on the non-trust area. (6/14/11 Tr. 23:20-24:21.)

in the non-trust area also triggers concern because the non-trust area lacks available water for new development and any new development would likely injure existing vested right holders. (6/14/11 Tr. 25:18-26:25.) Another IDWR witness explained the predicted effect of diversion under Kugler's permit as shown through groundwater modeling on the ESPA. (R. 148-55; 6/14/11 Tr. 41:4-45:8.) On July 18, 2011, the Department issued its Final Order suspending further work on and development of the permit. (R. 166-76.) From that Final Order, Kugler appeals. (R. 179-80.)

IV. 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. Idaho Code § 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 the agency decision unless the Court 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); Barron v. IDWR, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67- 5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); Barron, 135 Idaho at 417, 18 P.3d at 222.

The Court should refrain from considering an issue "not supported by argument and authority in the opening brief."[7] Dawson v. Cheyovich Fam. Trust, 149 Idaho 375, 382, 234 P.3d 699, 706 (2010). See also I.A.R. 35(a)(2), 35(a)(6).

V. ARGUMENT

Kugler has failed to show how the Department erred under I.C. § 67-5279(3). The Department's action on Kugler's permit was in accordance with the Department's relevant constitutional and statutory duties and responsibilities. The Final Order is based upon substantial evidence in the record. The Department complied fully with IDAPA, including the decision to present staff testimony and documentary evidence at the augmentation hearing. Additionally, Kugler fails to show how a substantial right of his has been prejudiced by the Department's actions. The decision of the Department should therefore be affirmed.

[7] Kugler filed his brief five days late in violation of this Court's Aug. 14, 2011 Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources. IDWR asks the Court to take appropriate action. See I.R.C.P. 84(n).

1. The Department acted in conformity with its statutory and constitutional authority.

IDWR has clear authority to grant, condition, deny, or suspend action on a water rights permit. See, e.g., I.C. § 42, ch 2; § 42-1805(7). Kugler cites no authority to the contrary, nor does he allege any good faith extension of current law. He fails to cite any of the record in support of his issues raised on appeal. He is simply dissatisfied with the sound determination of the Department. Because the Department acted within the scope of its authority, Kugler has no basis for relief.

A. IDWR is charged with reviewing permits in the broader context of administering waters of the State.

Kugler misunderstands both the Department's responsibilities and Idaho water law, in general. Thus a brief summary of both helps provide clarifying context.

In Idaho, water rights are usufructuary. See Washington County Irr. Dist. v. Talboy, 55 Idaho 382, 388, 43 P.2d 943, 945 (1935). The State of Idaho allows beneficial use of unappropriated public waters "subject to the regulations and control of the State in the manner prescribed by law." ID. CONST. art. XV, § 1. All waters of the state in their natural channels are the property of the State, including ground water. I.C. §§ 42-101, 42-226. IDWR is the state entity vested with responsibility to review applications for appropriation. See I.C. § 42, ch 2. The Director may reject permit applications, grant them for a lesser amount than applied for, or condition the permits. I.C. § 42-203A(5).

When reviewing permit applications for trust water, IDWR shall specifically consider whether the proposed use, individually or collectively, would significantly reduce the amount of trust water available to Idaho Power under the Swan Falls Agreement, and if so, whether that proposed reduction is in the public interest. See I.C. § 42-203C. Trust water is defined in IDWR's Water Appropriation Rules as:

> [t]hat portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code.

IDAPA 37.03.08.010.17. The Department must safeguard the minimum stream flows in connection with approval for development in the trust water area. See I.C. § 42-203C, IDAPA 37.03.08.030, 37.03.08.035. (6/14/11 Tr. 19:24-20:13.)

The Director is also guided by chapter 18 of Title 42, Idaho Code. Specifically, the Director shall have the power and duty, "[a]fter notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights and to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violations of minimum flow provisions of the state water plan." I.C. § 42-1805(7). Related to this appeal, the state water plan establishes a zero cfs minimum stream flow at Milner and a 3900 cfs minimum stream flow between April and October at the Murphy gage. IDAPA 37.03.08.030.01(c). See also I.C. § 42-1507 (acknowledging Snake River minimum stream flows set by the Idaho Water Resource Board). The

statutory directive is clear – protecting minimum stream flows is of great importance. See I.C. § 42-1501.

The Department's actions on Kugler's permit conform to this backdrop of broad responsibilities.

B. IDWR properly exercised its authority on the Kugler permit.

1. Kugler cannot use this proceeding to collaterally attack the conditions in permit number 35-8359.

On July 27, 1990, the Department issued permit number 35-8359 to the Kuglers. (R. 18-19.) Idaho Code and the Department's Water Appropriation Rules expressly allow the Director to condition approval of permits. I.C. § 42-203A(5); IDAPA 37.03.08.050. The Permit Approval Notice for permit number 35-8359 and the permit itself highlight the conditions of IDWR's permit approval. The second sentence of the Permit Approval Notice states, "We direct your attention to the conditions of approval on the final page." (R. 16.) On page one of the permit, an all-capitals, underlined heading entitled "CONDITIONS/REMARKS" is followed by eight enumerated conditions or remarks. (R. 18.) Condition number 7 on the permit specifies that the Department retained jurisdiction of the permit and/or the license to change, add or remove requirements as appropriate. (R. 18.) That condition is well-grounded in the statutory duties of the Department. See I.C. § 42-204. Condition number 5 highlights the sensitive physical area in which Kugler proposed to divert, putting him on notice that the Department would carefully examine any license issued pursuant to the permit to reassess the use of trust

water thus ensuring existing vested right holders were not injured and otherwise to protect the public interest. (R. 18.)

Kugler, in his brief, describes permit number 35-8359 as "without restrictions as to term or other conditions..." (Petitioner's Br. at 2.) He is plainly mistaken. The Director, in accordance with his authorities under Idaho Code and the rules of the Department, conditioned this permit. The order approving the permit was issued on July 27, 1990 and was a final order of the Department. (R. 18-19.) Kugler did not appeal the permit as provided under I.C. § 67-5279(2). Any attempt by Kugler to challenge the conditions of the permit now is an improper collateral attack on a previously issued final order. See Mosman v. Mathison, 90 Idaho 76, 84-85, 408 P.2d 450, 454-55 (1965).

Moreover, the Department did not alter Kugler's permit application. Kugler states the permit contained in the record was "obviously fabricated in 1990" and describes the permit later as "fabricated." (Petitioner's Br. at 4, 6.) The Department takes issue with any insinuation of impropriety. There is nothing in the record to suggest the Department changed his permit application. As the record shows, the Department complied with its statutory duties by reviewing his application and granting the permit with explicit conditions. (R. 18-19.)

Kugler vaguely wonders whether the 1984 statutes control "the requirements for appropriation of water" under his permit. (Petitioner's Br. at 4.) This is a non-starter. The topical amendments to the only statute he cites, I.C. § 42-204, are not relevant in that under any

version of section 204, throughout the application for permit and permit's existence, the substantive requirements remain the same.[8]

2. The Director is explicitly authorized to suspend further action on permits.

The Director's Final Order is well grounded in his specific statutory duties regarding continued development of work on permits. After notice, the Director has the duty to "suspend the issuance or further action on permits or applications as necessary to protect existing vested rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan." I.C. § 42-1805(7). See also IDAPA 37.03.08.055.02.

Because Kugler does not contend he lacks notice as to the Final Order, the only question here is whether the record supports the Director's conclusions. There is substantial evidence in the record buttressing the Director's conclusion that suspension is necessary to protect existing water rights and to prevent violations of the minimum stream flow provisions in the state water plan. "The moratorium was issued to protect existing water rights due to effects of drought, reduced recharge and increased demands on the ESPA." (R. 74.) The Temporary Stay Order

[8] Any relevant versions of section 204 would be the following: as amended in 1982, 1986 and finally in 1989. In the 1982 version, S.B. No. 1246 sought to enlarge the time in which a permit holder had to commence work to divert water from 60 days after the permit was issued to one year after such date. Act of Mar. 15, 1982, No. 1246, § 1, 1982 Id. Sess. Laws 122-24. It also provided for notification of such proposed enlargement of time to holders of existing permits, but because Kugler did not file his application until after 1982, this change is irrelevant. Id. In 1986, H.B. 369 made several changes to Title 42, three of which affected section 204. Again those changes did not affect the requirement relevant to Kugler's permit. Instead, they concerned deletion of a requirement for permit for a 200,000 acre-feet ("AF") reservoir, added a paragraph on a 10,000 AF reservoir, and deleted the paragraph requiring notice to existing permit holders of the 1982 amendment. Act of Mar. 17, 1986, No. 369, § 3, 1986 Id. Sess. Laws 765-68. Ironically, H.B. 369 added I.C. § 42-311 specifying when and how the Director can cancel a permit for failure or refusal to comply with any conditions of the permit. The amendments of 1989 merely cleaned up the language of the un-numbered second paragraph and the paragraph following section 204(5). Act of Mar. 27, 1989, No. 1064, § 1, 1989 Id. Sess. Laws 223-26.

acknowledged threats to senior water right holders in the trust water area. (R. 24.) The Order Continuing Indefinite Stay in Development Period reaffirmed the moratorium and noted the conditions leading to the Temporary Stay Order still existed. (R. 75.) The modeled depletions of trust water from Kugler's proposed pumping, 0.07 cfs or 49.37 acre-feet/year ("afy"), will reduce the total stream flow measured at Murphy and could cause the failure to meet that minimum stream flow. (R. 146-49; 6/14/11 Tr. 32:23-37:16, 43:10-45:4.) The predicted consumption from Kugler's proposed use above Milner (the non-trust area) is 0.68 cfs or 490.47 afy. (R 148-49; 6/14/11 Tr. 43:10-24.) Those projected depletions would reduce the quantity of water available to existing vested water right holders. (6/14/11 Tr. 25:18-26:25.) Based on this, the Director correctly concluded that Kugler's proposed diversion threatens existing vested water right holders and might jeopardize the maintenance of the minimum flow at the Murphy Gage. (R. 179-80.)

In the Order Granting Augmentation Hearing, the Director offered Kugler a way to pursue development of the right, seeking specifically evidence of potential mitigating effects in the augmentation hearing. (R. 120.) Kugler offered no evidence of potential mitigation that might allow for the simulated depletions. (R. 174; 1/21/09 Tr. 6:21; 6/14/11 Tr. 6:11-7:7, 47:7-9.) Accordingly, the Director is justified in ordering further development of Kugler's permit be suspended.

C. Kugler's permit is not a contract.

Kugler contends his permit is a "contract subject to the law as it existed in 1984." (Petitioner's Br. at 4.) Kugler misapprehends Idaho water law.[9]

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 point where a permit is obtained.*" In re Idaho Power Co., 151 Idaho 266, __, 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)). Moreover, unlike a contract or a vested right, the Department has express authority to prohibit development under a permit.[10] See I.C. § 42-1805(7) (specifying the Director may suspend further action on permits to protect existing vested water rights, ensure compliance with chapter 2, title 42, Idaho Code, or to prevent violations of the state water board's minimum stream flows).

There is no dispute that while Kugler had a permit, he did not complete construction of a well and has not applied that ground water to a beneficial use. (R. 169; 1/21/09 Tr. 10:2-12:13,

[9] The relevant law (I.C. § 42-204) mentioned in Kugler's brief as it existed in 1984 is addressed supra in Part 1.B.1.
[10] Kugler's citation to Bennett v. Twin Falls North Side Land & Water Co., 27 Idaho 643, 150 P. 336 (1915) is relevant here, but not in support of his position. "The state has power and authority to direct and control the appropriation of such waters, *and, when the requirements of the statute are complied with, the right gained by an appropriator is a right to the use of the water.*" Id. at 640-51, 150 P. at 339 (emphasis added). Kugler has not complied with the statutory requirements necessary to acquire a right.

14:5-16, 17:13-22, 21:6-12.) Therefore, as matters of both fact and law, he has not "appropriated" public waters of the state. See Speer, 16 Idaho at 716, 102 P. at 368. "[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 Co., 151 Idaho at __, 255 P.3d at 1161. Kugler's contentions otherwise run contrary to well-established law and the plain language of I.C. § 42-1805(7).

D. The Department's actions on the permit do not constitute a taking.

Similarly, the Department's decision to suspend action and prohibit development on Kugler's permit is not a constitutional taking. While it is true that neither the State nor the federal government can take private property for public use without just compensation, U.S. CONST., amends. V & XIV; ID. CONST. art. I, § 14, a property owner "cannot maintain an inverse condemnation action unless there has actually been a taking of his or her property." KMST, LLC. v. County of Ada, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003). To be a taking, the regulatory action must either be an actual physical invasion or a regulation that "denies all economically beneficial or productive use of land." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). See Moon v. N. Idaho Farmers Ass'n, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004) (stating no taking under Idaho Constitution for "less than a total deprivation of use or denial of access").

Kugler's contentions fail for multiple reasons.[11] Kugler cites no evidence in the record substantiating a taking of property. The Final Order is simply not a physical invasion of property. And the Final Order is not a complete deprivation of all economical beneficial use. Kugler acquired the land as a dry farm. (R. 168; 1/21/09 Tr. 9:14-20, 19:20-20:1.) Nothing in the record suggests it is not still dry farm-able. Kugler successfully enrolled his potential place of use in the CRP. (R. 56-58, 168; 1/21/09 Tr. 11:4-10, 12:1-24, 18:5-13, 33:17-19.) He acknowledged receipt of revenue for its placement. (1/21/09 Tr. 18:5-13.) Nothing in the record suggests he could not still enjoy that economical beneficial use. Therefore there is no taking.

Moreover, Kugler's attempted conversion of his appeal on water right permit to an appeal of a well drilling permit is improper. Kugler suggests in his Notice of Appeal, Petition for Review, and Petitioner's Brief that he should be granted a well drilling permit, noting "regulatory action can qualify as a 'per se' taking when the regulation completely deprives an owner of any economically beneficial use of property."[12] (Petitioner's Br. at 6.) First and foremost, there is no taking because there was no physical invasion and the land still has economical beneficial use. Second, as to a well drilling permit, this issue is not ripe for appeal.

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[11] To the extent Kugler listed Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 P. 81 (1908) in his brief to support his argument as to a takings, that citation is hollow. Knowles is factually distinguishable on multiple grounds. It concerned an irrigation district's powers and authorities, not those of the Department. Knowles' predecessor-in-interest secured by contract a water right for his property, as opposed to here where Kugler has no contract with IDWR and no water right.

[12] If Kugler meant to cite Casitas Municipal Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008) for this proposition, it was for naught. Like Knowles, Casitas offers no support for Kugler's arguments because of the critical factual differences between that case and his. Kugler has no contract with the Department like Casitas did with the Bureau of Reclamation. IDWR's actions did not include a "permanent physical invasion of [his] property," nor did IDWR's actions completely deprive him of all economical beneficial use. See id. at 1289. Cf. Lucas, 505 U.S. at 1020-32 (remanding for consideration of the state's public interest where the South Carolina trial court found an anti-erosion law deprived Lucas of any reasonable economical use of his lots, rendering his real property valueless).

There is no evidence in the record he filed an application for well drilling permit pursuant to I.C. § 42-235, no evidence the Department denied an application for well drilling permit via intermediate or final order, and no evidence Kugler sought a hearing with the Director on a well drilling permit pursuant to I.C. § 42-237e. He wisely does not allege the Department lacks authority to require drilling permits or regulate well drillers. See generally I.C. §§ 42-235, 42-238; IDAPA 37.03.09 & 37.03.10. Regardless, Kugler cannot appeal until he exhausts his administrative remedies.[13] See I.C. § 67-5271.

2. The Department's administrative hearings and Final Order were made upon lawful procedure, based on substantial evidence and did not constitute an abuse of discretion.

A. Department's actions concerning the Final Order were procedurally proper & based upon substantial evidence.

The Department's scheduling of Kugler's matters was proper. In April 2009, Kugler timely filed a Petition for Reconsideration of the Department's Preliminary Order (issued March 2009). (R. 109.) See generally I.C. § 67-5243. The Department timely denied the Petition for Reconsideration pursuant to I.C. § 67-5243(3). (R. 113-14.) After Kugler timely filed his Exceptions in May 2009, the Department had three options: issue a final order, remand the matter for additional hearings, or hold additional hearings. See I.C. § 67-5244. In August of 2010, the Department properly determined an additional hearing of limited scope was needed. (R. 119-22.) The Department attempted to schedule the augmentation hearing in October or November of 2010, but was unable to find agreeable dates until June of 2011. (R. 120-21, 158-

[13] Even if Kugler had complied with the requirements for judicial review of this issue, this Court could not grant his request for relief. See I.C. § 67-5279(3). Accordingly, his arguments and request(s) for relief relating to a well drilling permit should be stricken and/or denied. See infra Part 3.

63.) The augmentation hearing was held on June 14, 2011. (R. 167.) The Final Order was timely issued pursuant to I.C. § 67-5245(6). There is no timeframe specified in IDAPA for holding additional hearings. To the extent there was any perceived delay, Kugler does not argue he was prejudiced or injured. Neither does he cite to the record for examples showing prejudice or injury because of the timing.

The conduct at the augmentation hearing was procedurally proper.[14] The hearing officer may recognize technical or scientific facts within the agency's specialized knowledge. I.C. § 67-5251(4). To do so, the parties must be notified of the specific facts or materials, "including any staff memoranda." Id. Notice must be provided before or during the hearing. Id. And the parties must be allowed a timely and meaningful opportunity to contest the material, including via cross-examination of the agency witness(es). Id. Agency staff may appear at the hearing, introduce evidence, state positions, and otherwise participate fully. IDAPA 37.01.01.157, 37.01.01.602.

In the Order Granting Augmentation Hearing of August 2010, the Department first gave notice of the anticipated request to staff to present evidence on the effects of Kugler's proposed diversion on the reaches of the Snake River both above and below Milner Dam. (R. 120.) In February 2011, the Department mailed a copy of the Request for Staff Memorandum to Kugler. (R. 124-27.) In March 2011, the Department mailed a copy of the Staff Memorandum to Kugler. (R. 128-55.) At the augmentation hearing, Kugler had the opportunity to contest the Staff

[14] Kugler does not contend the proceedings at the first hearing failed to comply with statutory procedural requirements.

Memorandum and cross-examine the agency witnesses. (06/14/11 Tr. 9:14-21, 28:6-32:3, 37:20-38:20, 45:13-15.)

Throughout the entire administrative proceeding, Kugler chose to present no evidence of mitigation. (R. 174; 6/14/11 Tr. 6:11-7:7, 47:7-9.) The only evidence in the record as to the injurious effect of Kugler's proposed diversion was presented by the Department. (R. 146-55, 167-68, 174-75; 6/14/11 Tr. 25:2-13, 25:18-26:25, 32:17-38:20, 41:4-45:8.) It is undisputed that diversion pursuant to Kugler's permit would reduce the quantity of water available to Snake River surface water right holders above Milner Dam, deplete flows in the Snake River below Milner Dam, and threaten minimum stream flows at the Murphy Gage. (R. 146-55, 173-74; 06/14/11 Tr. 25:2-13, 25:18-26:25, 32:17-38:20, 41:4-45:8.) Given the Director's well-defined statutory duties, see supra Parts 1.A. and 1.B.2., he properly determined Kugler's permit should be suspended and further development prohibited.

B. The Director did not abuse his discretion in receiving the Staff Memorandum into evidence and seeking the testimony of agency staff.

Kugler suggests the Director's decision at the augmentation hearing to recognize the Staff Memorandum and testimony in support of staff's findings as to potential injury resulting from Kugler's proposed diversion somehow constitutes abuse of discretion. (Petitioner's Br. at 2, 5.) Again, Kugler cites no authority in support of his contention and wholly fails to cite the record to any extent. Because the Director had clear authority to seek the Staff Memorandum and admit it into evidence, see supra Part 2.A., he did not abuse his discretion by doing so.

3. **Kugler is not entitled to continue work on his permit, including drilling a well.**

To the extent Kugler attempted to fashion the present appeal to seek review of the Department's action on a well drilling permit, his actions are premature, at best. He has not sought a well drillers permit pursuant to I.C. § 42-235, the Department has not denied an application by him for well drilling permit, and he has not exhausted his administrative remedies respecting a well drilling permit. See supra Part 1.D. It appears he is improperly trying to bootstrap an argument about a well drilling permit to arguments concerning a water right permit.

Kugler asks this Court to direct the Department to issue a well drilling permit to him. (Petitioner's Br. at 6.) On appeal, this Court may either affirm the Department's Final Order, or set it aside, in whole or in part, and remand for further proceedings as necessary. I.C. § 67-5279(3). Even if the well drilling permit issue were properly before this Court, the Court could not order the Department to issue a well drilling permit to Kugler. The Department has properly suspended development of the water right permit. The Final Order is clear: "Additional work by the permit holder in developing a water right under terms of the permit is not authorized until the Department, by order, specifically authorizes resumption of work." (R. 175.)

4. **Substantial rights of Kugler have not been prejudiced by the Final Order.**

No substantial right of Kugler has been prejudiced. The standard of review for judicial appeals of administrative decisions provides that notwithstanding shortcomings in the decision, the "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67-5279(4). Kugler fails to demonstrate any of his substantial rights have been prejudiced. Not only is a water right permit not real property or a vested right, see supra

Part 1.C., but the Director acted pursuant to his authority delineated in I.C. § 42-1805(7) with the issuance of the Final Order. Thus, Kugler's substantial rights have not been prejudiced by the Final Order.

VI. CONCLUSION

Both the law and the record in this case support the actions taken by the Department. The Department's decisions rest squarely within statutory and constitutional authority. The Department's decisions were made pursuant to lawful procedure, supported by substantial evidence in the record, and not a result of an abuse of discretion. Based on the foregoing, the Department respectfully requests that this Court affirm the Final Order suspending further work on and development of permit number 35-8359.

RESPECTFULLY SUBMITTED this 1st day of February, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 15 day of February, 2012.

Document Served: RESPONDENTS' BRIEF

Persons Served:

Original to: SRBA Court 253 3rd Ave. North P.O. Box 2707 Twin Falls, ID 83303-2707 Facsimile: (208) 736-2121	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email
John B. Kugler 2913 Galleon Ct. NE Tacoma, WA 98422	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email

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