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Attorneys for Respondent

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF POWER**

JOHN B. KUGLER,

Petitioner,

vs.

THE STATE OF IDAHO DEPARTMENT OF  
WATER RESOURCES,

Respondent.

Case No. CV-2015-031

**MOTION TO DISMISS AND  
MEMORANDUM IN SUPPORT**

The Idaho Department of Water Resources (“IDWR”) moves this Court to dismiss this case because the petitioner has failed to timely submit an opening brief and has failed to comply with this Court’s *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* (Feb. 18, 2015) (“Procedural Order”).

Petitioner John B. Kugler (“Kugler”) filed his *Petition for Judicial Review* on February 3, 2015, in Power County. The case was reassigned to this Court on February 17, 2015, and the Court issued its *Procedural Order* the next day on February 18. According to the *Procedural Order*, “[t]he petitioner’s brief shall be filed with the clerk of the court within 35 days after lodging of the transcript and record.” *Procedural Order* at 3, ¶12. The transcript and record were lodged with the Court on April 1, 2015. Kugler’s brief was due May 6, 2015. IDWR seeks dismissal of this action because over 21 days have passed since the May 6, 2015 deadline and Kugler still has not filed a brief, nor has he filed a motion for extension of time to file a brief.

The failure to file an opening brief is grounds for dismissal of an action. *Woods v. Crouse*, 101 Idaho 764, 765, 620 P.2d 798, 799 (1980). In *Woods*, the appellant failed to file an opening brief in an appeal to the Idaho Supreme Court. *Id.* The Court dismissed the case stating:

[t]he rules of this Court require that an appellant’s brief be filed. See Idaho Appellate Rules 34 and 35. ... Absent compliance with these rules, the Court will not search the record for error. Error is never presumed on appeal and the burden of showing it is on the party alleging it.

*Id.*

Judicial review proceedings such as this one are governed by I.R.C.P. 84. I.R.C.P. 84 adopts the briefing requirements of Idaho Appellate Rules 34 and 35. I.R.C.P. 84(p) (Briefs “shall be in the form and arrangement and filed and served within the time provided by rules for appeals to the Supreme Court unless otherwise ordered by the district court...”). Moreover, the *Procedural Order* states “[f]ailure by either party to timely comply with the requirement of this *Order* or applicable provisions of the Idaho Rules of Civil Procedure or Idaho Appellate Rules, if applicable, shall be grounds for imposition of sanctions, including. . . dismissal of the appeal pursuant to I.R.C.P. 11 and

84(n) and I.A.R. 11.1 and 21.” *Procedural Order* at 4-5, ¶19. I.R.C.P. 84(n) provides that failure to timely take any step other than petition for judicial review “may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal . . . .”

Counsel for IDWR has spoken with Kugler several times concerning his *Petition for Judicial Review* and during those conversations it was conveyed to Kugler that a brief was essential and IDWR would stipulate to an extension of time to file his appellant’s brief. Despite these conversations, Kugler has not filed his brief, nor has he filed a motion for extension of time. This is a clear violation of the Idaho Rules of Civil Procedure, the Idaho Appellate Rules, and this Court’s *Procedural Order*. The Court should dismiss this case. Kugler, as petitioner, has the burden to show IDWR erred and that a substantial right of Kugler’s has been prejudiced. *See Price v. Payette County Bd. of County Comm’rs*, 131 Idaho 426, 429 (1998). As in *Woods*, without a brief that explains how IDWR erred and how a substantial right of Kugler’s has been prejudiced, Kugler has not met his burden. To proceed forward would require the Court to search the record for error without a brief, contrary to the Idaho Supreme Court’s ruling in *Woods*. Since Kugler failed to follow the Court’s *Procedural Order* requiring a brief be filed by May 6, 2015, and has not met his burden of proof, this case should be dismissed.

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DATED this 29<sup>th</sup> day of May 2015.

LAWRENCE G. WASDEN  
Attorney General

CLIVE J. STRONG  
Deputy Attorney General  
CHIEF, NATURAL RESOURCES DIVISION

A handwritten signature in black ink, appearing to read "Garrick L. Baxter", written over a horizontal line.

GARRICK L. BAXTER  
MEGHAN CARTER  
Deputy Attorneys General  
Idaho Department of Water Resources

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24<sup>th</sup> day of May 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

*Original to:*  
SRBA District Court  
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Meghan Carter  
Deputy Attorney General