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APR 03 2008

DEPARTMENT OF
WATER RESOURCES

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April 1, 2008

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State of Idaho
Department of Fish & Game
PO Box 25
Boise, ID 83707

Idaho Fish & Game - Region 5 ^{Department of Water Resources}
1345 Barton Rd.
Pocatello, ID 83204-1847

David J. Barber
Deputy Attorney General
PO Box 44449
Boise, ID 83711-4449

Director David R. Tuthill 
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

RE: Waste of Water by State of Idaho, Department of Fish & Game, Water Right No.
35-8624, and Trespass on Property Owned by Larry Phillips.

Dear Gentlemen:

The purpose of this letter is to inform you that the Idaho Department of Fish & Game appears to be wasting Idaho water. I have been contacted by Mr. Larry Phillips, who owns property directly north of the place of use for Water Right No. 35-8624. He has contacted us to review the water right owned by the Fish & Game, and requests that the use of this water right be investigated for the following reasons.

First, based upon Mr. Phillips' observations, he has noted that the well used to divert water pursuant to Water Right No. 35-8624 diverts in excess of the 731.2 acre feet per year allowed to be diverted under this right. As we understand it, the water is diverted in the NWNWNW, T5S., R31E., Sec. 24. The water then flows in a southeasterly direction to create habitat for fish and wildlife. The total volume that has been diverted historically under this right is not exactly known by Mr. Phillips, however, it is believed to be much more than the 731.2 acre feet allowed per year. We request the Department of Water Resources investigate what appears to be an illegal use under this water right.

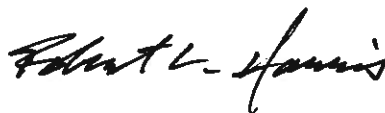
Secondly, the use of this particular water right has, and continues, to flood property owned by Mr. Phillips just north of the point of diversion. As we understand it, water runs back through a culvert onto a low lying pasture owned by Mr. Phillips. The constant presence of water has rendered the property unusable for Mr. Phillips' purposes, and we request that reasonable

measures be taken to ensure water does not trespass onto Mr. Phillips' property. The presence of this water creates a nuisance for two reasons. First, and perhaps most obvious, it floods the land which makes it unusable for Mr. Phillips. Secondly, the constant presence of water, and the stagnancy of the water, has allowed mosquitoes to propagate in large numbers. Mr. Phillips believes that a number of his horses, which have died due to West Nile Virus, were infected by mosquitoes that came from the stagnant water on both his property and property owned by Fish & Game.

Lastly, Idaho law prohibits the wasting of state of waters. All waters appropriated must be put to a beneficial use under Idaho Code § 42-104. Further, the Department has a legal authority to stop such waste. *See eg.* Idaho Code §§ 42-604, 42-1701B and 42-1805(9). Mr. Phillips requests the Department of Water Resources to order the cessation of water deliveries under Water Right No. 35-8624 unless and until the issues described above are addressed. While this request is in the form of a letter, it is our hope this matter can be resolved short of any formal litigation. Nevertheless, if we do not receive a response promptly, Mr. Phillips may consider pursuing legal actions to prevent the inappropriate use of water under this particular water right. While this request is in the form a letter, please consider this request for a declaratory ruling, if that is necessary.

We appreciate your prompt attention to this matter. We hope to discuss this matter very soon. If you have any questions, please let me know.

Sincerely,



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

c: Larry Phillips