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Attorneys for the Mud Lake Water Users

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 73951 (in the
name of Mud Lake Water Users, Inc.)

**AFFIDAVIT OF
ROBERT L. HARRIS**

STATE OF IDAHO)
) ss.
County of Bonneville)

I, Robert L. Harris, do solemnly swear (or affirm) that the testimony given in this sworn statement is the truth, the whole truth, and nothing but the truth, that it is made on my personal knowledge, and that I would so testify in open court if called upon to do so.

And being so sworn I depose and say:

1. I am an attorney licensed to practice law in the state of Idaho. I am a member of the firm of HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C., and represent Mud Lake Water Users, Inc., in the above mentioned matter.

RECEIVED
OCT 23 2008

Department of Water Resources
Eastern Region

COPY

2. Attached hereto are true and correct copies of the following documents referenced in the Memorandum in Support of Motion for Declaratory Ruling:

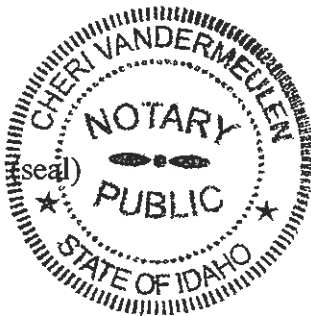
- a. Exhibit A: Copy of Correspondence dated May 15, 2007, from Garrick L. Baxter of the Idaho Department of Water Resources to Kent W. Foster and Robert L. Harris.
- b. Exhibit B: Copy of GIS Map prepared by Robert L. Harris.
- c. Exhibit C: Copy of Correspondence dated July 18, 2006, from Tim Luke of the Idaho Department of Water Resources to Greg Shenton, Watermaster of Water District 31.
- d. Exhibit D: Copy of Idaho Department of Water Resources pamphlet "A Water Users Information Guide, Idaho Water Rights A Primer".
- e. Exhibit E: Copy of definitions from the Idaho Department of Water Resources web page:

<http://www.idwr.idaho.gov/water/srba/definitions.htm>.

DATED this 22nd day of October, 2008.

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

SUBSCRIBED AND SWORN TO before me this 22nd day of October, 2008.



Cheri Vandermeulen
Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: July 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below, by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 22nd day of October, 2008.

DOCUMENT SERVED: AFFIDAVIT OF ATTORNEY ROBERT L. HARRIS

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Gary Spackman, Hearing Officer
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098
Gary.Spackman@idwr.idaho.gov

(☒) *First Class Mail*
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Box 85
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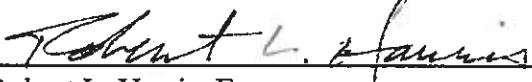
(☒) *First Class Mail*
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(☐) *Facsimile*
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Mesa, AZ 85207

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US Fish & Wildlife Service
Attn: James Crammond
911 NE 11th Ave., 2W-EN
Portland, OR 97232

(☒) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Overnight Mail*


Robert L. Harris, Esq.
Holden, Kidwell, Hahn & Crapo, PLLC

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Exhibit A



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

May 15, 2007

Kent W. Foster
Robert L. Harris
Holden Kidwell
1000 Riverwalk Drive, Ste. 200
PO Box 50130
Idaho Falls, ID 83405-0130

Re: Mud Lake Water Users Inc.'s Pump Diversion near Rays Lake and
SRBA Claim No. 31-11951

Dear Kent and Rob,

I have had the opportunity to discuss the issue of the Mud Lake Water Users Inc. (MLWU) diversion pump near Rays Lake with the Idaho Department of Water Resources (Department). The purpose of this letter is to relay to you the Department's position on this matter.

First, I will outline the facts as I understand them regarding MLWU's pump diversion near Rays Lake:

- In the years that it appears that Mud Lake will not fill completely with surface water, MLWU pumps ground water into Mud Lake to meet its irrigation needs.
- One place that MLWU pumps ground water for Mud Lake is at the Bybee Well Field. The Bybee Well Field is located on Camas Creek between Rays Lake and Mud Lake. See attached USGS Topographical Map provided by Rob Harris.
- Ground water is pumped at the Bybee Well Field and then discharged into Camas Creek. The water then flows into Mud Lake.
- Over 35 years ago, MLWU installed a head gate (also sometimes referred to as a dike) on Camas Creek near the outflow of Rays Lake. The head gate is located near the Bybee Well Field.

- When the head gate is open and water is not being pumped from the Bybee Well Field, water will pass from Rays Lake into Camas Creek and down to Mud Lake
- However, when the Bybee Well Field is turned on and ground water from the Bybee Well Field is placed into Camas Creek, the hydraulic head of Camas Creek changes near the headgate. If left unchecked, the water pumped from the Bybee Well Field would flow both to Rays Lake and Mud Lake.
- To prevent ground water from Bybee Well Field from flowing into Rays Lake, MLWU closes the head gate when the Bybee Field is turned on. This action forces the ground water to flow into Mud Lake only.
- Water is stranded in Rays Lake when the head gate is closed.
- About 12 to 14 years ago, MLWU installed a pump on the Rays Lake side of the head gate (MLWU pump). MLWU started pumping water from the Rays Lake side of the head gate to the Mud Lake side of the head gate.
- On July 18, 2006, the Department sent Greg Shenton, Water District 31 watermaster, a letter directing Mr. Shenton to cease diversion of water through the MLWU pump because the pump was not a recorded point of diversion for a water right.
- MLWU holds water rights to surface water from Mud Lake. These rights have been partially decreed in the SRBA District Court. Neither Rays Lake nor Camas Creek are listed as sources of MLWU's surface water rights.

In response to the Department's letter of July 18, 2006, MLWU filed a motion to file a late claim in the Snake River Basin Adjudication (SRBA). The question that has arisen is whether MLWU needs a water right for its operation of the MLWU pump and if so, whether a late claim is the appropriate resolution to the matter.

After discussing the issue, it is the Department's conclusion that MLWU does need to have a water right for the pump. Once the headgates near the Bybee Well Field close, the water system is divided and the water on the Rays Lake becomes a separate source from Mud Lake. As MLWU does not have water rights from Rays Lake or even Camas Creek, any diversion from the Rays Lake side of the headgate will require a separate water right for that particular diversion.

With regards to the late notice of claim filed in the Snake River Basin Adjudication as water right 31-11951, it is the Department's position that a late claim in the SRBA is not appropriate because the pump was installed after the mandatory permit date. As such, it will be necessary for MLWU to file a new application for permit with the Department if they would like to continue to divert water from the Rays Lake side of the headgate using the MLWU pump.

Please contact me if you have any questions or want to discuss this matter further.

Sincerely,

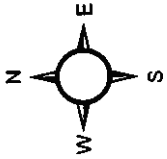
A handwritten signature in black ink, appearing to read "Garrick L. Baxter" with a stylized flourish at the end.

Garrick L. Baxter
Deputy Attorney General
Idaho Department of Water Resources

cc. Tim Luke
Lyle Swank
Ernie Carlsen
Don Shaff
Carter Fritschle

Exhibit B

MUD LAKE WATER USERS DIKE



Prepared by:
Robert L. Harris
October 20, 2008
2006 NAIP Aerial Photo

Legend

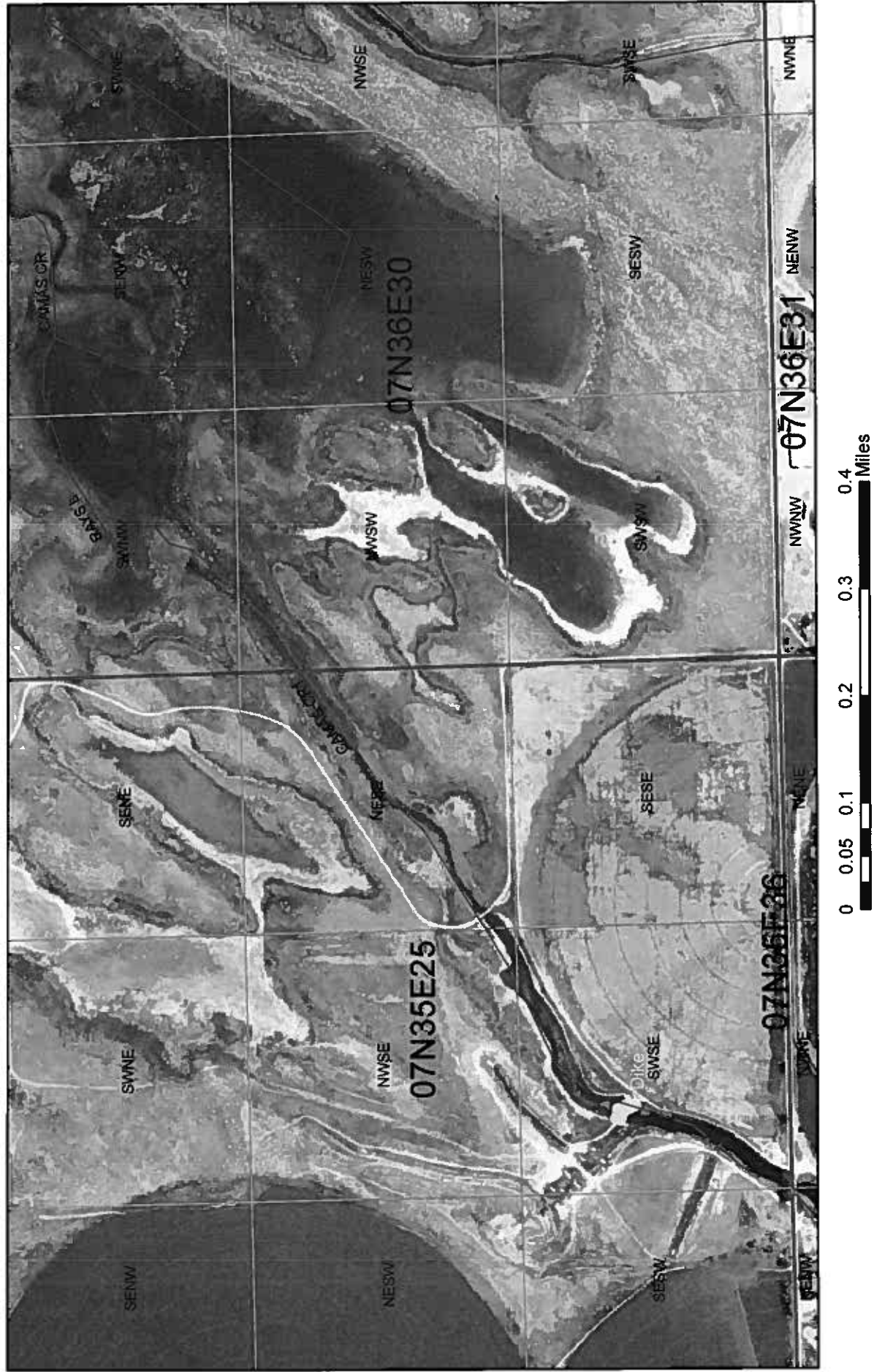


Exhibit C



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov

JAMES E. RISCH
Governor

KARL J. DREHER
Director

July 18, 2006

Greg Shenton
Watermaster, Water District 31
PO Box 33
Dubois, Idaho 83423

Re: Mud Lake Water Users Inc. Pump Diversion from Rays Lake

Dear Greg,

On July 17, 2006 I spoke to you about the Mud Lake Water Users Inc. ("MLWU") diversion pump from Rays Lake located just upstream of the Rays Lake dike in the NWSWSE of Section 25, T7N, R35E. I had received an inquiry regarding the legal status of this pump from a holder of water rights listing Rays Lake as a source of water. It has come to my attention that this MLWU pump is not a recorded point of diversion under any water rights owned by MLWUA or any other water user. Neither Rays Lake nor Camas Creek is listed as a source of water under any MLWUA water rights. I understood from you that the pump diverts water around the dike since water in Rays Lake does not flow to Mud Lake once the head gates in the Rays Lake dike are closed. It is also my understanding that the Rays Lake head gates are closed when the MLWUA ground water wells are pumped into Camas Creek in order to prevent the ground water from flowing into Rays Lake. I further understood from you that Camas Creek currently is not flowing into Rays Lake. I also understood from you that the MLWUA Rays Lake pump was installed only about ten to twelve years ago, and that there is not necessarily a historical practice for diverting the water around the dike beyond the last ten to twelve years.

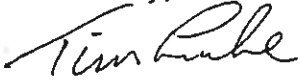
IDWR is concerned that the MLWUA pump is not a recorded diversion on any valid water right. IDWR recognizes that Rays Lake and Camas Creek are tributary to Mud Lake. In the absence of any recorded point of diversion from Rays Lake, water from Rays Lake and Camas Creek should flow naturally to Mud Lake through the outlet gates of the Rays Lake dike. The necessity to close the gates on the dike to check the ground water flow into Camas Creek below the dike does not create authority to install a diversion pump in Rays Lake above the dike.

Via this letter, IDWR directs you to cease further diversion of water from Rays Lake through the MLWU pump described above by noon, July 21, 2006. No further diversion of water should occur at this pump after noon on July 21, 2006 unless specifically authorized by IDWR. The MLWU Rays Lake pump must be recorded as a point of diversion on a valid water right or water rights in order for it to be used in the future. MLWUA may wish to consider filing a water right transfer in order to add the pump as a valid point of diversion under its existing surface water rights. Alternatively, MLWU may also wish to consider filing a late claim in the Snake River Basin Adjudication ("SRBA") to obtain a right for any historical practice of

diverting water from Rays Lake. MLWU should consult with their attorney to consider the most appropriate approach to resolve this matter.

Please contact me directly at 208-287-4959 if you have questions or concerns regarding this direction.

Sincerely,



Tim Luke
Manager, Water Distribution

cc: Mud Lake Water Users Inc.
IDWR Eastern Region
Gary Spackman, IDWR Water Allocations
Candice McHugh, Idaho Attorney Generals Office
Perry Woodard

N:\Water Districts by Basin\Basin 31\WD 31\Correspondence\Shenton-RaysLkPump071806.doc

Exhibit D

You may need a new water right for an existing use of water if a water right was not properly established for the existing use. (For example, if a use of surface water was initiated after 1971 without applying to IDWR for a permit.) A new water right is also needed for a new use of water. If you wish to establish a new water right, then there are certain procedures you will need to follow.

First, an application for a permit must be filed with IDWR. Application forms are available from IDWR. The information that must be included in the application is described by statute and in rules and regulations of IDWR.

IDWR is required to publish notice of the application, and other persons may file protests to the application with IDWR. If protests are filed, then IDWR must hold a hearing, if protests cannot be resolved.

IDWR must then review the application (including any hearing record), and if the application meets the requirements of the statute and the Rules and Regulations, a permit is issued. The permit describes the appropriation to be made and the deadline within which the appropriation must be completed.

Prior to the end of the period in which the appropriation must be completed, IDWR sends the permit holder a notice that the deadline is approaching and that the permit holder must submit proof of beneficial use. "Proof of beneficial use" is a form sent to the permit holder by IDWR, that the permit holder fills out and returns to IDWR. In the proof form, the permit holder states that she has completed her appropriation.

After filing the proof form, a field examination must be made. The permit holder may request that the field examination be made by IDWR, in which case an examination fee is required to be paid to IDWR at the time proof is filed. The permit holder may instead have the field examination completed by a certified field examiner not associated with IDWR, in which case the field examiner submits a report to IDWR after the examination is completed and prior to the proof due date. The purpose of the field examination is to ensure that water is in fact being used as described in the permit. If so, the IDWR issues a license that describes the appropriation that has been completed.

What is a claim?

There are two different types of filings that are often called "claims". The first is a "statutory claim" that was filed with IDWR to make a record of an existing beneficial use right. In 1978, a statute was enacted requiring persons with beneficial use rights (other than water rights used solely for domestic purposes as defined above) to record their water rights with IDWR. The purpose of the statute was to provide some means to make records of water rights for which there were previously no records. However, these records are merely affidavits of the water users, and do not result in a license, decree, or other confirmation of the water right.

The other type of claim is a "notice of claim" to a water right that is filed with IDWR in water rights adjudications. An adjudication is a court action for the determination of existing water rights, which results in a decree that confirms and defines each water right. (The

application/permit/license procedure described above is for purposes of establishing new water rights.) When an adjudication of a particular source is commenced, IDWR is required to notify the water users of the commencement of the adjudication, and notify the water users that they are required to file notices of claims for the water rights with IDWR. IDWR then investigates the notices of claims and prepares a report that is filed with the court. Claimants of water rights are notified of the filing of the report, and objections to the report may be filed with the court by anyone who disagrees with the findings in the report. If no objection is filed to a water right described in the report, then the court determines the water right after a hearing and decrees the water right. A general adjudication of the Snake River Basin in Idaho is currently ongoing. Information about the Snake River Basin Adjudication (SRBA) is available on the IDWR website.

Other kinds of water "rights"

Some persons have a right to receive water that is not an "appropriation". For example, some persons have the right to receive water that is represented by shares in a ditch company. In such cases, the ditch company has the appropriation, and the water users have a right to receive water from the ditch company.

Other examples are persons who receive water from a city, an irrigation district, or a water utility company (such as United Water of Idaho). Again, the water user may have a right to receive water from the city, district, or utility, (usually contingent upon payment of a fee), but does not have an appropriation.

Idaho Department of Water Resources
322 E Front Street

PO Box 83720

Boise ID 83720-0098

(208) 287-4800

1-800-451-4129

<http://www.idwr.idaho.gov>

IDWR 8-2007/500/76003

DMS Revised - August 2007

A Water Users Information Guide



IDAHO

WATER RIGHTS

A PRIMER

What is a water right?

The constitution and statutes of the State of Idaho declare all the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state and ground waters of the state, to be public waters.

The constitution and statutes of the State of Idaho guarantee the right to appropriate the public waters of the State of Idaho. When a private right to the use of public waters is established by appropriation, a water right is established that is a real property right much like property rights in land. The constitution and statutes of the state of Idaho protect private property rights, including water rights.

A water right is the right to divert the public waters of the state of Idaho and put them to a beneficial use, in accordance with one's priority date.

A priority date is the date the water right was established. How this date is determined is described in the section below. The priority date is important because the priority date determines who gets water when there is a shortage. If there is not enough to satisfy all of the water rights, then the oldest (or senior) water rights are satisfied first and so on in order until there is no water left. It is the new (or junior) water rights that do not get water when there is not enough to satisfy all the water rights.

Beneficial uses include such uses as domestic use, irrigation, stockwatering, manufacturing, mining, hydropower, municipal use, aquaculture, recreation, fish and wildlife, among others. The amount of the water right is the amount of water put to beneficial use. Due to the beneficial use requirement, a water right (or a portion of a water right) may be lost if it is not used for a continuous five-year period.

A diversion is a structure used to divert the water from its natural source. Typical diversion structures include pumps, headgates, ditches, pipelines, and dams or some combination. A diversion is generally required to establish a water right. The Idaho Water Resource Board is authorized to acquire water rights without diversions. These water rights are called "instream flow" water rights, and are typically authorized for purposes of protecting some public interest in a natural stream or lake, such as recreation, wildlife, or natural beauty. A water right may also be acquired to water livestock directly from the stream, which is called an "instream livestock" water right.

Water law in Idaho is based on the appropriation doctrine, because water rights in Idaho are based upon diversion and beneficial use of water. The appropriation doctrine has also been called "first in time is first in right", because the priority date determines who gets water when there is not enough to go around. The water right is said to have "appropriated" water.

You may also have heard of something called "riparian rights". In some states, an owner of land has the right to make a "reasonable use" of ground water underneath her land, or water naturally flowing on, through, or along the borders of her land. A riparian right to make use of the water is not limited by priority date and it cannot be lost by non-use. Idaho law does not recognize a "riparian right" to divert and use water.

A water right under the law of the state of Idaho can be established only by appropriation, and once established, it can be lost if it is not used.

How is a water right established?

Surface Water

Prior to May 20, 1971, there were two ways in which a right to surface water could be established. The first was to simply divert water and apply it to beneficial use. These water rights are called "beneficial use", "historic use" or "constitutional" water rights. The priority date for a water right established by this method is the date water was first put to beneficial use.

The second way to establish a water right to surface water was to comply with the statutory method in effect at the time the water right was established. The current statutory method is an application/permit/license procedure that is described further below. The priority date for a water right established by this method is the date of filing the application with IDWR, and this priority date is shown on the license that is issued when the process is completed. Prior to 1903, Idaho had a "posted notice" statute, which provided for posting of a notice at the point of diversion and recording the notice at the county recorder's office, followed by actual diversion and beneficial use of water, among other things. If the statutory requirements were met then the priority date for a water right established under the posted notice statute was the date of posting the notice. Water rights established under the old statutory method are called "Posted Notice" water rights, but are considered beneficial use rights because they are not confirmed by a license or decree.

As of May 20, 1971, there is only one way to establish a right to surface water, and that is by following the application/permit/license procedure that is described further below. The one exception to this rule is for water rights used solely for instream watering of livestock.

Ground Water

Prior to March 25, 1963, there were two ways to establish rights to ground water, which are the same methods described above under Surface Water. As of March 25, 1963, there is only one way to establish a right to ground water, and that is by following the application/permit/license procedure that is described further below. There is one exception to this rule. A "beneficial use" right to ground water may still

be established for domestic purposes. "Domestic purposes" is defined by statute as "a) the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or (b) any other uses, if the total use does not exceed a diversion volume of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day." Domestic purposes does not include "water for multiple ownership subdivision, mobile home parks, commercial or business establishments" unless the use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

Can a water right be changed?

The point of diversion, place of use, period of use, or nature of use of a water right may be changed so long as the change meets certain conditions as described below.

After May 26, 1969, any person wishing to make a change in use of the water right must file an application for transfer with IDWR for approval of the change. IDWR may approve the proposed change if it a) will not injure other water rights, b) does not constitute an enlargement of the original water right, c) is a beneficial use, d) is consistent with the conservation of water resources within the state of Idaho, and e) is in the local public interest. IDWR may approve the change in whole, in part, or approve it subject to conditions where necessary to meet those five requirements. If the proposed change does not meet those five requirements, then the proposed change is not approved and the application for change is denied.

How do I get a water right?

If you are currently diverting the public waters of the state and putting the water to beneficial use, then you may already have a valid water right established either by the statutory method or by beneficial use.

If water was used on your property before you acquired it, and the person you acquired the property from did not "reserve" the water right in the deed conveying the property to you, and you continued the use of water, you may have acquired a valid water right along with your land. Also, some water rights (including both water rights established by the statutory method and water rights established by beneficial use) have been confirmed by a decree of a state or federal court.

IDWR keeps records of water right decrees and licenses, and these records are available for public inspection.

Exhibit E

>>[Adjudication Home Page](#)

Definitions

Terms used in the water right you receive from IDWR

Basis of Claim: The method that was used to establish your claim. Examples include prior decree, posted notice, beneficial use (historical) method, license, permit.

Dual Based Claims: In some cases, the federal government has claimed one right under two theories: a state law basis and a federal law basis. Both theories will be reported on one form for that single water right. In most cases, the priority dates are different and will be listed separately. The federal law basis is separately indicated in a box.

IDWR does not investigate or make recommendations regarding federal law based claims.

Name and Address: Your name and address should appear here. IDWR will use the most recent name and address in their records for the water right.

Place of Use: The legal location where you use your water right; generally described as 1/4 1/4 sections down to a 40-acre tract. Other legal descriptions that might be used are: government lots, block, subdivision, parcel numbers, townsite names, mining claim information, homestead entry surveys and other survey information.

Point of Diversion: The legal location where you divert water from its source; generally described as 1/4 1/4 sections down to a 40-acre tract, or smaller. Other legal descriptions that might be used are: government lots, block, subdivision, parcel numbers, townsite names, mining claim information, homestead entry surveys and other survey information. Legal locations for instream flow claims are marked with a beginning point and an ending point.

Priority Date: The date used to determine the priority of your right in relation to other rights using water from the same source.

Purpose of Use: This report only deals with claims for small domestic and/or stock water uses, such as yours.

"Domestic right" means a right to the use of water for homes, organization camps, public campgrounds, livestock, and for any other purpose in connection with these uses, including irrigation of up to one-half acre of land. "Stock water right" means a right to the use of water solely for livestock or wildlife. Period of use: The period of time during the year when you can use the water for your right.

Quantity: The amount of water recommended in either cubic feet per second (cfs) and/or the volume of water in acre feet per year (AFY). Each of these small domestic and/or stock water claims is not to exceed 13,000 gallons per day.

Right Number: Your water right is identified by a number assigned by IDWR. The first two digits identify IDWR's administrative basin number; for example, 71 or 72. If you want to see a map of all IDWR administrative basins, please select BASINS.

Source: The name and/or type of the source where you divert your water. For example: "groundwater," "unnamed spring," "Common Creek."