

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
Idaho State Bar Number 7018

Attorneys for Mud Lake Water Users, Inc.

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.)

**MEMORANDUM IN SUPPORT OF
MOTION FOR
DECLARATORY RULING**

Mud Lake Water Users, Inc. ("MLWU"), by and through their counsel, Robert L. Harris of Holden, Kidwell, Hahn and Crapo, PLLC, pursuant to Rule 400 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01.400) hereby submits this Memorandum in Support of Motion for Declaratory Ruling. The motion for declaratory ruling relates to whether or not MLWU is required under Idaho law to file an application for transfer with regards to its water rights in order to utilize a pump which recovers water from leaking headgates in MLWU's dike, and

RECEIVED
OCT 23 2008

Department of Water Resources
Eastern Region

MEMORANDUM IN SUPPORT MOTION FOR DECLARATORY RULING- Page 1

COPY

which pumps stranded Camas Creek surface water from behind the dike that would proceed downstream if the dike were not present.

I. INTRODUCTION.¹

MLWU possesses a number of water rights which allow it to divert surface water stored in Mud Lake. MLWU also possesses a number of ground water rights pursuant to which ground water is diverted into the Camas Creek channel and transported to Mud Lake for distribution to MLWU's shareholders.

MLWU's ground water is pumped in a location known as the Bybee well field. Diverted ground water is placed in a small side channel, which joins the main channel of Camas Creek. The topology of the area where MLWU pumps is ground water is very flat, with only a slight grade towards Mud Lake. Consequently, once ground water joins the main channel of Camas Creek, water could flow either down the Camas Creek channel towards Mud Lake, or could flow up the Camas Creek channel towards Ray's Lake. The direction of flow, of course, depends on the hydraulic head at an given time.

In order to ensure that the diverted ground water finds its way to MLWU's desired location, many years ago, MLWU constructed a dike in the Camas Creek channel. The location of the dike is depicted in the GIS attached as Exhibit B to the Harris Affidavit. Large tubes with closeable headgates were installed in the dike in order to allow Camas Creek water—which is tributary to Mud Lake— to flow through the dike when ground water is not being diverted from the nearby Bybee well field. The Bybee well field is visible on Exhibit B. Thus, water flows from Camas Creek and Ray's

¹ The information in this section is taken from the recitation of facts found in the letter from Garrick Baxter, Deputy Attorney General, Idaho Department of Water Resources, dated May 15, 2007, which is attached to the Affidavit of Robert L. Harris ("Harris Affidavit") as Exhibit A. Information is also taken from the affidavit of Ronald D. Carlson.

Lake through the dike towards Mud Lake. When surface water flows from Camas Creek are not present, MLWU closes the dike headgates and begins pumping ground water into the Camas Creek channel to fill Mud Lake

Even when the headgates are closed, there is some leakage through the headgates to the upstream side of the dike. Additionally, there are at times small amounts of surface water in the Camas Creek channel that becomes stranded behind the dike.

In approximately 1994, MLWU installed a pump at the dike to move the stranded surface water and the ground water leakage over the dike to its desired location in Mud Lake. Before installing the pump, MLWU first met with Ronald D. Carlson, the then Regional Manager of the Eastern Region Office of IDWR.² Mr. Carlson personally authorized the installation of the pump on the MLWU dike which is now at issue in Transfer No. 73951. It was his opinion then, and remains today, that the Department had neither responsibility nor approval authority for this pump, and therefore, it was not necessary for MLWU to file an application for transfer. Mr. Carlson viewed the installation of the pump as simply a modification of the MLWU diversion works on Camas Creek and did not represent a change in any of the elements of their water rights. Further, Mr. Carlson advised Don Shenton, the watermaster for Water District 31, that the Department had no oversight or approval responsibilities should MLWU decide that they needed to install a pump to move stranded water over the dike to fill their water rights.

Prior to Mr. Carlson's retirement as Regional Manager and Snake River Watermaster in 2006, he again went out and looked at the MLWU dike and expressed the same opinion then that he

² The portions of this section referring to Mr. Carlson are taken from the Affidavit of Ronald D. Carlson.

had to Don Shenton over a decade earlier. Mr. Carlson believes that Tim Luke was there at that time, and believes it was his communication with Greg Shenton that precipitated the visit.

Mr. Carlson's position in making the decision that no water right was needed to authorize the pump was that if there is water in the river to fill a right that is in priority it is the water right holder's responsibility to do whatever it takes to divert water that is available in that source. Mr. Carlson explained to Tim Luke that not only had he in his official capacity as Regional Manager determined that the Department had not administrative or regulatory authority, Mr. Carlson explained how the situation was directly analogous to dozens of diversions in Water District 1 that periodically have to be lengthened or reinforced.

After Mr. Carlson's retirement, on July 18, 2006, Mr. Luke, as Manager of the Water Distribution section of IDWR, sent a letter to Greg Shenton instructing him to cease any further diversion through the MLWU pump as the pump "is not a recorded point of diversion under any water rights owned by MLWU[] or any other water user" and that "[t]he 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."³ This position was completely contrary to the Department's previous decision on this issue.

Faced with curtailment, and in order to resolve the issue, in good faith, MLWU agreed to file an application for transfer, but did so under protest with the understanding that MLWU could challenge the Department's new and contrary position on this matter. In response to Mr. Luke's letter, MLWU filed an application for transfer in 2007, but maintained its position that no such transfer was necessary. After publication, the transfer was protested by the United States Fish and

³ Exhibit C at page 1.

Wildlife Service, Perry Woodard, Sid Ashcraft, and Lyle Shupe. A hearing on this matter is currently scheduled for January 27, 2009.

II. ARGUMENT.

- A. The decision that a transfer was not necessary for the pump was already decided by an agent of IDWR who had authority to make such decisions, and is therefore, binding upon IDWR. Consequently, the decision that the pump does not need to be an authorized point of diversion has already been decided, and therefore, IDWR's demand for the transfer application is barred by *res judicata*.**

As discussed above, Mr. Ronald Carlson, the Eastern Region Manager of IDWR, personally viewed the MLWU dike with Don Shenton in 1994 at MLWU's request and informed MLWU that it did not need to file an application for transfer. As contained in Mr. Carlson's affidavit, before installing the pump, MLWU first met with Mr. Carlson, the then Regional Manager of the Eastern Region Office of IDWR. Mr. Carlson personally authorized the installation of the pump on the MLWU dike which now at issue in Transfer No. 73951. It was his opinion then, and remains today, that the Department had neither responsibility nor approval authority for this pump, and therefore, it was not necessary for MLWU to file an application for transfer.

Mr. Carlson viewed the installation of the pump as simply a modification of the MLWU diversion works on Camas Creek and did not represent a change in any of the elements of their water rights. Further, Mr. Carlson advised Don Shenton, the watermaster for Water District 31, that the Department had no oversight or approval responsibilities should MLWU decide that they needed to install a pump to move stranded water over the dike to fill their water rights. In short, the decision with regards to the pump had already been made by IDWR.

Prior to Mr. Carlson's retirement as Regional Manager and Snake River Watermaster in May of 2006, he again went out and looked at the MLWU dike and expressed the same opinion then that he had to Don Shenton a over a decade earlier.

Mr. Carlson's position was that if there is water in the river to fill a right that is in priority it is the water right holder's responsibility to do whatever it takes to divert water that is available in that source. Mr. Carlson explained to Tim Luke that not only had he in his official capacity as Regional Manager determined that the Department had not administrative or regulatory authority, Mr. Carlson explained how the situation was directly analogous to dozens of diversions in Water District 1 that periodically have to be lengthened or reinforced.

Because Mr. Carlson had authority to make a decision with regards to the pump, and made a decision that no pump was needed, IDWR has already made a determination on this issue, and cannot now change its position. The matter had been decided as between MLWU and the Department.

With regards to agency law in Idaho:

The three types of agencies are: express authority, implied authority, and apparent authority. Both express and implied authority are forms of actual authority. Express authority refers to that authority which the principal has explicitly granted the agent to act in the principal's name. Implied authority refers to that authority "which is necessary, usual, and proper to accomplish or perform" the express authority delegated to the agent by the principal.

...

Apparent authority differs from express and implied authority in that it is not based on the words and conduct of the principal toward the agent, but on the principal's words and conduct toward a third party. Consequently, apparent authority cannot arise from the acts and statements of the agent alone; it must be based upon the

principal's words and conduct.⁴

Mr. Carlson, as Eastern Region Manager of IDWR, certainly had express authority to act on behalf of IDWR in deciding when a transfer was necessary. Mr. Carlson acted on the Department's behalf on thousands of matters during his tenure. In exercising that authority, Mr. Carlson made a determination that it was not necessary for MLWU to file an application for transfer.

Unfortunately, months after Mr. Carlson's retirement, another representative from IDWR ordered the pump to cease diverting water, a decision contrary to Mr. Carlson's. Faced with curtailment, and in order to resolve the issue, in good faith, MLWU agreed to file an application for transfer, but did so under protest with the understanding that MLWU could challenge the Department's new and contrary position on this matter, which it is now doing with the Motion for Declaratory Judgment.

The issue as to the pump has already been decided by IDWR, and the Department's attempt to newly address this issue is barred by *res judicata*. "The doctrine of *res judicata* ordinarily extends to decisions by administrative agencies."⁵ The doctrine of *res judicata* "bars the presentation of the claim in a subsequent lawsuit between the same parties or their privies."⁶ Furthermore,

the doctrine of *res judicata* serves three important purposes: First, it '[preserves] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results.' Second, it serves the public interest in protecting the courts against the burdens of repetitious

4 Nelson v. Anderson Lumber Co. 140 Idaho 702, 708, 99 P.3d 1092, 1098 (Idaho App.,2004).

5 Pence v. Idaho State Horse Racing Com'n 109 Idaho 112, 115, 705 P.2d 1067, 1070 (Idaho App.,1985).

6 Andrus v. Nicholson 186 P.3d 630, 633 (Idaho,2008).

litigation; and third, it advances the private interest in repose from the harassment of repetitive claims.⁷

With the Department's newly-changed position on the pump, MLWU is now obligated to once again address an issue that has already been decided. The previous IDWR decision with regards to the pump involved the same parties and the same claim, and therefore, the Department's new demand to have the pump listed under a water right is barred by *res judicata*.

If the hearing officer so finds, then he would be preserving the respect a previous decision should be given, would serve the public interest by protecting water users from repetitious litigation, and would advance the private interest of preventing harassment of repetitive claims on issues already decided.

Further, it is well established in Idaho that a persons rights are determined by the rules and regulations in place at the time an issue is addressed, particularly in the context of when and if a authorization for an action is needed. In the context of zoning ordinances, the Idaho Supreme Court has held:

It is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit. *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley Co.*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999) (citing *South Fork Coalition v. Board of Comm'rs*, 117 Idaho 857, 860-61, 792 P.2d 882, 885-86 (1990)). The rationale behind the rule is "that to permit retroactive application of an ordinance would allow a zoning authority to change or enact a zoning law merely to defeat an application, which would result in giving immediate effect to a future or proposed zoning ordinance before that ordinance was properly enacted." *Id.* at 555, 976 P.2d at 481 (citing *South Fork Coalition*, 117 Idaho at 861, 792 P.2d at 886).⁸

⁷ Waller v. State, Dept. of Health and Welfare (Idaho,2008).

⁸ Chishom v. Twin Falls County, 139 Idaho 131, 134-35, 75 P.3d 185, 188-89 (2003).

In this situation, the same principles apply. MLWU should not be subjected to changing IDWR positions because of new and differing opinions within the Department. The issue has been decided once, and that should be the end of the matter. If the hearing officer finds otherwise, it seems that any past Department action could then be subject to revisitation by the Department in the future, which would upset already well-settled expectations on water rights issues from the water user community.

Because the pump issue has already been decided, the Department's demand that an application for transfer be filed to allow the pump to be used is barred by *res judicata*.

- B. Because the water pumped over the dike is (1) ground water leakage already diverted pursuant to Idaho law, and (2) stranded surface water which would make its way to Mud Lake but for the dike, it is not necessary for MLWU to have the pump listed as an authorized point of diversion.**

Once water is diverted, it is then owned by the diverter subject to the water's application to beneficial use.⁹ Thus, the ground water which is already diverted by MLWU which leaks through the headgates in the dike it is no longer in the public supply, and can thereafter be controlled by the diverter. Because some of the water which leaks through the headgates is recovered water, it does not require a water right for recovery. The Department's position that the pump requires a water right to allow the diversion to be authorized when it recovers already diverted water is contrary to Idaho law, and is inconsistent with past IDWR policy.

⁹ Washington County Irr. Dist. v. Talboy, 55 Idaho 382, 43 P.2d 943 (1935).

Furthermore, as we understand Idaho law, Idaho Code § 42-105 allows natural channels to be used essentially as canals in order to deliver water to water right holders. MLWU does so with its ground water diverted from its wells. The dike assists in that endeavor.

As to the surface water stranded behind the dike, if the dike were not present, this surface water would make its way down to Mud Lake, where Mud Lake Water Users would thereafter divert for irrigation. In terms of water diversion, the dike does not divert water, but only serves to ensure that the diverted ground water goes towards Mud Lake, its desired location. Thus, the dike itself is not a point of diversion, and any pump which moves surface water over the dike is likewise not a point of diversion. As such, IDWR's position that the pump is a point of diversion is erroneous.

C. In the alternative to Paragraph II.B. above, water pumped by the MLWU pump is not applied to any beneficial use, and therefore, a water right is not required for its use as the pumped water is not applied to a beneficial use.

When the pump is operated, water is not diverted directly from the pump to any of MLWU shareholders' lands or water delivery facilities. Water is simply pumped over the dike and into the Camas Creek channel to continue down to Mud Lake.

Water diverted pursuant to a water right requires diversion from a natural source **for a beneficial use**. Pumping water over a creek obstruction is not the diversion of water for an application to beneficial use. In the recent *Joyce Livestock* case, the court reiterated the point multiple times that a water right required the application of water for beneficial use, particularly in the context of a constitutional water rights as set forth is the following lengthy quotation from that case:

The two essentials for obtaining a water right under the constitutional method were typically diversion and application to a beneficial use. *State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). As we stated in *Morgan v. Udy*, 58 Idaho 670, 680,

79 P.2d 295, 299 (1938), “In other words, in this state one may have a valid appropriation though only a temporary and revocable way of conveyance for his water; diversion and application to a beneficial use being the two essentials.” The statement in *Morgan v. Udy* is consistent with the history of obtaining water rights prior to the adoption of our Constitution.

The first act passed by the territorial legislature concerning the appropriation of water was in 1881. *Kirk v. Bartholomew*, 3 Idaho 367, 369-70, 29 P. 40, 41 (1892). That act, compiled at Idaho Revised Statutes §§ 3155 *et seq.* (1887), provided a statutory procedure for obtaining a water right. The person first posted a written notice at the point of diversion and then, within sixty days, commenced construction of the diversion works. If the person diligently prosecuted that construction work to completion, the priority date of the water right would relate back to the date the notice was posted. The act also included a provision recognizing the validity of water rights that had been acquired prior to 1881 by diverting the water and applying it to a beneficial use, stating that such diversion and application to a beneficial use “shall be taken to have secured the right to the waters claimed.” ^{FN2} The territorial legislature did not indicate that there was an additional intent element to obtaining valid water rights under the constitutional method.

“The right to appropriate unappropriated water is guaranteed by article XV, section 3 of the Idaho Constitution.” *Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982). “Prior to adoption of a mandatory permit system in 1971 this constitutional declaration was construed as authorizing a person to appropriate the water of a stream simply by ‘actually diverting the water and applying it to a beneficial use.’” *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996) (quoting from *Sand Point Water & Light Co. v. Panhandle Dev. Co.*, 11 Idaho 405, 413, 83 P. 347, 349 (1905)). As we stated in *Cantlin v. Carter*, 88 Idaho 179, 186, 397 P.2d 761, 765 (1964), “By actually diverting and applying water to a beneficial use, a legal appropriation is made.” Likewise, in *Furey v. Taylor*, 22 Idaho 605, 127 P. 676, 678 (1912), we said, “[T]he appellant having made an appropriation of 350 inches from the water flowing in Pass creek by actually diverting the water and applying the same to a beneficial use, such appropriation was legal and clearly authorized by section 3, art. 15, of the Constitution.”

The district court held that there must be an “intent to appropriate” in order to have obtained a water right under the constitutional method. It is not clear what the district court meant by an intent to appropriate. The court could have meant an intent to obtain a water right that would be recognized and protected under the law, or it could have meant an intent to apply the water to a beneficial use. We have not required either intent in order to obtain a water right under the constitutional method of appropriation.

The district court read *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980), as requiring three elements for a valid appropriation under the constitutional method: (1) intent to appropriate, (2) physical diversion from a natural watercourse, and (3) application of the water to a beneficial use. That case involved a dispute between two appropriators, and the issue being addressed was whether the actions of one of them were sufficient to constitute diverting water from a spring. When addressing that issue, we stated:

First, Hidden Springs argues that the water constituting Spring A was never successfully diverted by Hagerman, and therefore could not have been included in the 1906 decree. Based on the record, we do not find this argument persuasive. Diversion is a prerequisite to appropriation of water, along with the application of such water to a beneficial use, but diversion as such has not been defined. For example: "The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use." *Sarret v. Hunter*, 32 Idaho 536, 541, 185 P. 1072, 1074 (1919). "It is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply it to some beneficial use, existing at the time or contemplated in the future, followed by diversion from the natural channel by means of a ditch, canal, or other structure and also an active application of the water, within a reasonable time, to a beneficial use." 78 Am.Jur.2d Waters § 321 (1975) (footnotes omitted). I.C. § 42-101 provides that the "waters of the state, when flowing in their natural channels," are subject to appropriation. *See also Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920). It is Hidden Springs' contention that the diversion necessary for appropriation must be from the natural source of the water, and that here the spring field is the natural source, including both Spring A and the springs from which the water first emerged. Since the water never left the spring field, Hidden Springs argues the water was never diverted. In considering this contention, we rely upon those cases which refer to diversion from the natural channel of the water, making it sufficient, for establishing diversion, that the water flows in a different channel than it would have done absent intervention by the appropriator.

Here, there can be no dispute that Hagerman did divert the water from its natural channel; instead of running downhill directly into the creek, the water entered a pipe and traveled approximately one-half mile before the water here in dispute was lost as seepage and re-emerged as Spring A. There can be no question but that had Hagerman made use of the water at the point of the seepage loss, it would have been considered diverted for purposes of appropriation. 101 Idaho at 679-80, 619 P.2d at 1132-33. The district court read our quotation from *American Jurisprudence Second* as adding the requirement that an appropriator must intend to apply the water to some beneficial use. The appropriator's intent was not even an issue in the *Hidden Springs* case. Had we intended to add intent as a required element, we would not have included the quotation from *Sarret v. Hunter* stating, "The test of a valid appropriation of water is its diversion from the natural source and its application to

a beneficial use.” There is no mention in that quotation of also having an intent to apply the water to a beneficial use.

Application to a beneficial use was necessary to obtain the water right under the constitutional method of appropriation. You could certainly infer that a person who diverts water and applies it to a beneficial purpose intended to do so. In such case, however, the intent is shown by the person's actions. In order for that person to have obtained a water right under the constitutional method of appropriation, there did not also have to be evidence showing that when the person applied the water to a beneficial use, he or she intended to do so.

We have mentioned an intent to apply water to a beneficial use when discussing the permit method of appropriation. For example, in *Sarret v. Hunter*, 32 Idaho 536, 541-42, 185 P. 1072, 1074 (1919) (citation omitted), we stated:

In determining whether a valid appropriation of water has been made, or the respective priorities of contending appropriators, the law does not concern itself with disputes relative to the title to the lands for which it is claimed the water was appropriated. The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use. When one diverts water hitherto unappropriated and applies it to a beneficial use, his appropriation is complete, and he acquires a right to the use of such water, which is at least coextensive with his possession, and so when one makes application for a permit to divert and appropriate water, the query is, not upon whose lands does he intend to apply it, but upon what lands he intends to apply it, and to what use does he expect to put it when so applied. His right to possession, or the character of his occupancy as between claimants to the right to the use of the public waters of the state, is not in issue.

An intent to apply the water to a beneficial use was relevant when making an application for a permit. At the time *Sarret v. Hunter* was decided, that application was made to the state engineer. The application for the permit had to set forth “the nature of the proposed use.” Rev. Codes of Idaho § 3253 (1908). The engineer could issue a permit if the application “contemplate[d] the application of water to a beneficial use.” Rev. Codes of Idaho § 3254 (1908). If the application did not indicate an intent to apply the water to a beneficial use, the state engineer would not issue a permit. If a permit was issued, the applicant then had to timely complete the diversion works and apply the water to a beneficial use. “After the holder of a permit has fulfilled all the requirements of the statute, and made proof to the state engineer that he has put the water to the beneficial use for which the diversion was intended, he is entitled to a license from the state engineer confirming such use.” *Basinger v. Taylor*, 30 Idaho 289, 297, 164 P. 522, 524 (1917). It was the license, not the permit, that granted the water right, but the priority date related back to the date the permit

was issued. *Id.*; *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915).

Under the constitutional method of appropriation, a water user could make a valid appropriation without a permit by diverting the water and putting it to beneficial use. *State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000). Because no diversion is required in order to obtain a water right for stock watering under the constitutional method, *Id.*, Joyce Livestock's predecessors could obtain water rights for stock watering simply by applying the water to a beneficial use, which they did by watering their stock.¹⁰

Because the water pumped by the pump is not pumped for an application for beneficial use, but is only to get stranded water and leaked ground water over a dike, there is no need for a water right to authorize the pump as a point of diversion for this purpose. Consequently, there is no need for an application for transfer.

Attached to the Harris Affidavit at Exhibits D and E are Department documents explaining and defining water rights elements, including point of diversion and beneficial use. In IDWR's water rights primer pamphlet, it states that "[a] diversion is a structure used to divert the water from its natural source" and "[t]he amount of the water right is the amount of beneficial use." As stated above, the pump does not divert water from Camas Creek to property for irrigation or any other beneficial use. It simply pumps water over an obstruction. This is not a recognized beneficial use under Idaho law.

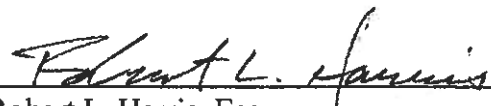
III. CONCLUSION.

For the reasons set forth above, the hearing officer should enter a declaratory judgement that MLWU is not required to file an application for transfer to have the pump listed as an authorized point of diversion under its water rights.

¹⁰ *Joyce Livestock Co. v. U.S.* 156 P.3d 502, 509 -512 (Idaho,2007)

DATED this 22nd day of October, 2008.

HOLDEN, KIDWELL, HAHN & CRAPO, PLLC


Robert L. Harris, Esq.
Attorney for Mud Lake Water Users, Inc.

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: MEMORANDUM IN SUPPORT OF MOTION FOR DECLARATORY RULING

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*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Overnight Mail*
(☒) *Email*

Ernie Carlsen
Idaho Department of Water Resources
900 N. Skyline Dr., Ste. A
Idaho Falls, ID 83402
Ernie.Carlsen@idwr.idaho.gov

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

Lyle R. Shupe
2296 E. 1940 N.
Hamer, ID 83425

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

Perry Woodard
Box 85
Hamer, ID 83425

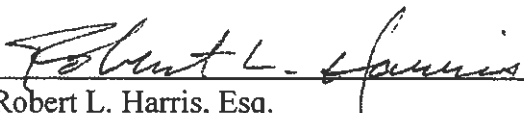
(☒) *First Class Mail*
(☐) *Hand Delivery*
(☐) *Facsimile*
(☐) *Overnight Mail*

Sid Ashcraft
2504 N. Lennox
Mesa, AZ 85207

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

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

G:\WPDATA\URLH\1047 MLWU\03, Transfer\Dec.Judgment.Memo.wpd