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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF LICENSE NO. 37-7842 IN THE NAME OF THE IDAHO WATER RESOURCE BOARD	**IWRB'S RESPONSE TO PETITIONERS' MOTION TO ALLOW AMENDMENTS TO THE PLEADINGS**

COMES NOW, licensee, the Idaho Water Resource Board ("IWRB"), by and through its counsel of record, hereby submits this Answer to Petitioners' Motion to Allow Amendments to the Pleadings in the above captioned matter.

Background

On September 8, 2017, William Arkoosh, the Estate of Vernon Ravenscroft, Koyle Hydro Inc., and Shorock Hydro Inc. ("Petitioners"), filed Petitioners' Motion to Allow Amendment to the Pleadings ("Motion to Amend"). On August 1, 2017, Petitioners filed a Petition for Hearing and Petition for Declaratory Ruling ("August 1st Petition"). The August 1st Petition sought a hearing on the September 2, 2010 Order Granting Extension of Time to Submit Proof of Beneficial Use, as well as declaratory "ruling on the applicability of Idaho statutes, administrative rules and orders on the subject permit." August 1st Petition at 7. On August 22, 2017, the IWRB filed a Motion to Dismiss the August 1st Petition arguing that the Petition for Hearing portion should be dismissed because it was untimely and that the Petition for Declaratory Ruling portion should be dismissed for vagueness or, in the alternative, that the Petition for Declaratory Ruling should be clarified.

Petitioners did not respond to the IWRB's Motions to Dismiss. Instead, they filed a Motion to Allow Amendment to the Pleadings ("Motion to Amend"). The Motion to Amend seeks leave from the hearing officer to amend the August 1st Petition. Specifically, the Petitioners seek to change the order from which the petition for hearing was sought from the September 2, 2010 Order Granting Extension of Time to Submit Proof of Beneficial Use, to the July 14, 2017 Preliminary Order Issuing License 37-7842. The Motion to Amend also seeks to provide clarification of the declaratory rulings sought by Petitioners. The Petitioner's clarification of the declaratory rulings sought is set forth in the First

Amended Petition for Hearing and Petition for Declaratory Ruling filed contemporaneously with the Motion to Amend.

Standard of Review

The Idaho Department of Water Resources ("IDWR") rules provide for amendment of pleadings:

> The presiding officer may allow any pleading to be amended or corrected or any omission to be supplied. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded.

IDAPA 37.01.01.305. A court has wide discretion in permitting amendment to a pleading. *Obray v. Mitchell,* 98 Idaho 533, 537, 567 P.2d 1284, 1288 (1977). In the interest of justice courts should favor liberal grants of leave to amend. *Wickstrom v. North Idaho College,* 111 Idaho 450, 453, 725 P.2d 155, 158 (1986). However, "if the amended pleading does not set out a valid claim, or if the opposing party would be prejudiced by the delay in adding the new claim, or if the opposing party has an available defense such as a statute of limitations, it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint." *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank,* 119 Idaho 171, 175, 804 P.2d 900, 904 (1990).

Argument

The Motion to Amend filed by the Petitioners conflates two issues into one motion: (1) Changing the order referenced to the July 14, 2017 Preliminary Order Issuing License 37-7842 so as to satisfy the 15-day timeframe for filing a Petition for Hearing under I.C. § 42-1701A(3), and (2) Providing clarification regarding the declaratory rulings sought by the Petitioners pursuant to IDAPA 37.01.01.400. To provide greater clarity for the hearing officer, the IWRB will discuss these two issues separately because

the issues raised in the Petition for Hearing and the Petition for Declaratory Ruling are legally distinct from one another.

1. The Motion to Amend for Purpose of Timeliness under I.C. § 42-1701A(3)

The IWRB does not object to the Motion to Amend with regard to changing the order referenced to the July 14, 2017 Preliminary Order Issuing License 37-7842 so as to cure the timeliness issue raised in the IWRB's Motion to Dismiss the Petition for Hearing. However, if it is granted by the hearing officer, the IWRB reserves the right to respond to the substantive issues raised in the First Amended Petition for Hearing and Petition for Declaratory Ruling ("First Amended Petition") and to assert any and all defenses or arguments with regard to the First Amended Petition.

2. Motion to Amend to Provide Clarification of Declaratory Ruling Sought

The Motion to Amend seeks to amend the Petition for Declaratory Ruling to provide greater clarity regarding the declaratory rulings sought by the Petitioners. This portion of the Motion to Amend should be denied and the IWRB's Motion to Dismiss Petition for Declaratory Ruling should be granted. The Motion to Amend should be denied because the First Amended Petition does not set out a valid claim for declaratory ruling. *Black Canyon Racquetball Club, Inc.,* 119 Idaho at 175, 804 P.2d at 904. ("If the amended pleading does not set out a valid claim . . . it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint."). The IWRB's Motion to Dismiss Petition for Declaratory Ruling should be granted because the declaratory rulings sought in the First Amended Petition fails to state a valid claim upon which relief may be granted.

The declaratory rulings sought in the First Amended Petition are not valid because they (1) do not fall within the scope of what may be addressed in an action for declaratory ruling, and (2) are an attempt to collaterally attack administrative orders which should have been addressed under the statutory procedures and rules set forth in I.C. § 67-5201 *et. seq.*, I.C. § 42-201 *et. seq.*, and IDAPA 37.01.01.

a. The Declaratory Rulings Sought are not Within the Scope of a Declaratory Ruling Action

The Idaho Administrative Procedure Act provides for the administrative issuance of declaratory rulings. Idaho Code Section 67-5232 states that any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency. IDWR's rules also provide an opportunity for any person to seek a declaratory ruling. To do so that person should file a petition for declaratory ruling with the agency. IDAPA 37.01.01.400. The petition must: "state the declaratory ruling that the petitioner seeks; and indicate the statute, order, rule, or other controlling law, and the factual allegations upon which the petitioner relies to support the petition." IDAPA 37.01.01.400.01.a–c.

The IWRB's research did not find case law which elucidates the nature of declaratory rulings by administrative agencies. However, Courts have an analogous power to issue declaratory judgments which can provide persuasive evidence of the purposes and limitations of actions for declaratory rulings. Courts may issue declaratory judgments to "declare rights, status, and other legal relations, whether or not further relief is or could be claimed." I.C. § 10-1201. The purpose of a declaratory judgment is to provide an additional procedural remedy for the determination of existing rights or titles

without proof of a wrong committed by one party against the other. 20 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD HE COOPER, FEDERAL PRACTICE AND PROCEDURE § 106. (2017) This enables parties between whom an actual controversy exists, or is inevitable, to have issues speedily determined when doing so would prevent unnecessary injury caused by delay or ordinary judicial proceedings. *Id.*

The First Amended Petition seeks a declaratory ruling under IDAPA 37.01.01.400 as to "the *applicability* of any statutory provision, or any rule administered by the agency, as well as any rule issued by the agency." First Amended Petition at 7 (emphasis added). It goes on to list three specific declaratory rulings that are sought by the Petitioners:

1. A declaratory ruling "as to the applicability of Idaho Code § 42-202 to the evidence before the department regarding License No. 37-07842 and seek the Director's determination that the subject application was deficient. . . ."

2. A declaratory ruling "as to the applicability of Idaho Code § 42-217 and Idaho Code 42-219 to the evidence before the Department regarding License No. 37-07842 and seek the Director's determination that water was not put to beneficial use in the time period allowed under the permit. . . ."

3. A declaratory ruling "as to the applicability of Idaho Code § 42-218a to the evidence before the Department regarding License No. 37-07842 and seek the Director's determination that the priority date for License No. 37-07842 was not accurately advanced following lapse and reinstatement."

First Amended Petition at 7–8.

A declaratory judgment should be refused where the questions presented "should be the subject of judicial investigation in a regular action" and "may be maintained only for the purpose of determining and declaring fixed legal rights where it will accomplish some useful purpose." *Ennis v. Casey*, 72 Idaho 181, 185–186, 238 P.2d 435, 438 (1951). The declaratory rulings sought by Petitioners do not seek to determine the rights, status, or other legal relations between parties to this case. They involve factual

determinations that were the subject of the above-captioned proceeding during the application and permit stage. As discussed below, these factual determinations have already been decided and are no longer reviewable.

In addition, issuing the declaratory rulings sought by the Petitioners would not accomplish any useful purpose. It would not clarify fixed legal rights of the Petitioners, clarify the legal relations between the parties, or provide a determination of whether a rule or statute was applicable in the instant proceeding. *See Ennis*, 72 Idaho at 185–186, 238 P.2d at 438. It is undisputed that I.C. §§ 42-202, 42-217, 42-219, and 42-218a were applicable in this proceeding. They would be applicable to any party seeking a water right under the procedures set forth in Idaho Code Title 42 Chapter 2. Providing a declaratory ruling to that effect would not serve any useful purpose.

What the declaratory rulings sought by the Petitioners truly seek is a retrospective determination by the Director that the listed code sections were applied incorrectly in this proceeding. Those issues could have been addressed through the normal statutory procedures set forth in Idaho Code Title 42 Chapter 2 and Title 67 Chapter 52. *Ennis*, 72 Idaho at 185, 238 P.2d at 438 (action for declaratory ruling inappropriate when the issues could be determined in a regular suit.). As discussed more fully below, the Petitioners failed to bring these factual issues before IDWR within the timeframes set forth by statute and cannot now use an action for declaratory ruling to readdress what has already been finally decided. Thus, the declaratory rulings sought by the Petitioners do not fall within the limited scope of what may be brought in an action for declaratory ruling. Because the declaratory rulings sought by the Petitioners are not proper for an action for declaratory ruling, they do not present a valid claim and the Motion to Amend should be denied.

b. The Declaratory Rulings Sought by Petitioners are a Collateral Attack on Previously Issued Orders

The declaratory rulings sought by Petitioners are not valid because they constitute a collateral attack on previously issued orders, the timeframe for appeal of which has long since passed. Actions for declaratory judgment are not intended "as substitute for statutory procedures and administrative remedies must be exhausted." *Regan v. Kootenai Cty.*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004). An order or judgment "may not be collaterally attacked by means of a declaratory judgment action." *Carter v. State Dept. of Health and Welfare*, 103 Idaho 701, 702, 652 P.2d 649, 650 (1982). The proper method for contesting an agency decision is by appeal. *Id.*

i. Petitioners Seek to Collaterally Attack the June 2, 1987 Order Approving Application for Permit 37-7842.

The first declaratory ruling sought by Petitioners seeks "the Director's determination that the subject application was deficient." The Petitioners cite I.C. §§ 42-202(1) and 42-202(4) in support of this proposition. These sections deal with what must be submitted with an application to IDWR. The determination of whether an application is acceptable is determined by IDWR when it is filed. If the application is not acceptable to IDWR it will be returned to the applicant until it contains all the information necessary under I.C. § 42-202. Once the application is acceptable, IDWR will publish notice of it under I.C. § 42-203A. At that point, any person concerned with the application "may, within the time allowed in the notice of application, file . . . a written protest . . . against approval of such application." I.C. § 42-203A(4). A hearing must be held on the protests. I.C. § 42-203A(5). The Director is required to issue a final order after the hearing. IDAPA 37.01.01.740. Any "party who is aggrieved by a final decision or order

of the director is entitled to judicial review" under the procedures set forth in Idaho Code Title 67, Chapter 52. Appeal of a final decision of the Director must be filed within "fourteen (14) days of the service date of that order." I.C. § 67-5246.

The Petitioners did not file a protest to Application for Permit 37-7842. Therefore, they waived their right to participate in the Application for Permit 37-7842 portion of the administrative proceeding so as to raise the issue of the insufficiency of the application. Because they did not participate as protestants, they also could not seek appeal or review of the Director's decision to approve the permit under a I.C. § 42-1701A(4) and I.C. § 67-5246. Even if the review offered by I.C. § 42-1701A(4) and I.C. § 67-5246 were available to the Petitioners, the time period of exercising those remedies has long since passed. The Director issued an order approving Application for Permit 37-7842 on June 2, 1982. Under I.C. § 67-5246, Petitioners would have had to file a motion to reconsider the final order within 14 days of the service date of that order. Clearly, more than 14 days have passed since the June 2, 1982 order approving Application for Permit 37-7842 was issued.

Even as non-protestants to the Application for Permit 37-7842, Petitioners still had an opportunity to contest the sufficiency of the application. In the event no protest is filed to an application, "the director . . . may forthwith approve the application." *Id.* Then "any person" aggrieved by that decision may file for a petition for hearing pursuant to I.C. § 42-1701A(3). The request for a petition for hearing must be made "within fifteen (15) days after receipt of a written notice of the action issued by the director, or receipt of actual notice." I.C. § 42-1701A(3).

Petitioners failed to take any action, as non-protestants to Application for Permit 37-7842, to seek a hearing on of the Director's June 2, 1982 order approving the application pursuant to I.C. § 42-1701A(3). As non-parties to the matter, Petitioners could have brought a petition for hearing seeking review of the Director's June 2, 1982 order on the grounds that the application was insufficient for failing to comply with I.C. § 42-202. However, such a petition for hearing needed to be filed within 15 days of written or actual notice of the June 2, 1982 order.

The record indicates that the Petitioners had actual or written notice of the June 2, 1982 order, at the latest, by September 21, 2010. That was the date on which the Petitioners filed their Petition for Hearing and Petition for Declaratory Ruling ("September 21, 2010 Petition for Hearing"). The September 21, 2010 Petition for Hearing states: "The application was approved on June 2, 1982." September 21, 2010 Petition at 2. Thus, the Petitioners must have had written or actual notice of the June 2, 1987 order approving Application for Permit 37-7842, at the latest, at the time they filed the September 21, 2010 Petition for Hearing. To be timely under I.C. § 42-1701A(3), the Petitioners should have filed a petition for hearing of the June 2, 1982 order within 15 days after the September 21, 2010 Petition was filed. Clearly, more than 15 days have passed since the Petitioners received written or actual notice of the June 2, 1982 order on September 21, 2010.

In short, Petitioners failed to exhaust their administrative remedies with regard to the June 2, 1982 order approving Application for Permit 37-7842 and are now time barred from seeking review of that order and disputing the sufficiency of the application. They cannot use an action for declaratory ruling to try to circumvent

the timeframes for review set forth in I.C. §§ 42-1701A(3), 42-1701A(4), and 67-5246. *See Regan*, 140 Idaho 721 at 725, 100 P.3d at 619 (actions for declaratory judgment are not intended "as substitute for statutory procedures and administrative remedies must be exhausted."); *Carter*, 103 Idaho at 702, 652 P.2d at 650 (an order or judgment "may not be collaterally attacked by means of a declaratory judgment action."). Therefore, this portion of their petition for declaratory ruling does not state a valid claim. The Motion to Amend should be denied and the IWRB's Motion to Dismiss should be granted.

ii. **Petitioners Seek to Collaterally Attack the July 29, 1992 Order Accepting Proof of Beneficial Use.**

The second declaratory ruling sought by Petitioners seeks "the Director's determination that water was not put to beneficial use in the time period allowed under the permit." First Amended Petition at 7. Petitioners cite I.C. §§ 42-217 and 42-219 in support of this request. These two sections deal with two separate processes (1) filing of proof of beneficial use within the timeframes allowed by the permit (I.C. § 42-217), and (2) examination of the proof for purpose of licensing (I.C. § 42-219).

(i) Proof of Beneficial Use under I.C. § 42-217

Idaho Code Section 42-217 provides procedures for the filing of proof of beneficial use "on or before the date set for the beneficial use of" the waters appropriated under the permit. It sets forth what the proof of beneficial use filing must include and the proof investigation that must be conducted by IDWR. I.C. § 42-217. In the instant proceeding, the Permit 37-7842 was approved on June 2, 1982. Proof of beneficial use was due June 1, 1987. On June 1, 1987, IDWR received a request to extend the time to

submit proof of beneficial use. On October 4, 1989, IDWR approved the request and extended the date on which proof of beneficial use must be submitted to June 1, 1992.

On June 1, 1992, Applicants failed to submit proof of beneficial use and the permit lapsed. On July 27, 1992, Applicants filed proof of beneficial use with IDWR. On July 29, 1992, the Director issued an Order of Reinstatement for Permit 37-7842.[1] The Order of Reinstatement states: "the permit holder has provided a reasonable showing why the permit should be reinstated by submitting proof of beneficial use on July 27, 1992." Therefore, on July 29, 1992 the Director found that the proof of beneficial use submitted by the permitee for Permit 37-7842 was acceptable under I.C. § 42-217. If it had been unacceptable, the Director would not have reinstated the permit.

The appropriate remedy for Petitioners to contest the June 29, 1992 Reinstatement Order which approved the proof of beneficial use filed for Permit 37-7842 was to file a Petition for Hearing under I.C. § 42-1701A(3). Idaho Code Section 42-1701A(3) provides that "any person" aggrieved by a decision of the Director may file a petition for hearing. The request for a petition for hearing must be made "within fifteen (15) days after receipt of a written notice of the action issued by the director, or receipt of actual notice." I.C. § 42-1701A(3). The Petitioners did not participate in the administrative

[1] A second Reinstatement Order was issued by the Director on December 1, 1993. This second order was issued for both 37-7842 and its sister Permit 01-07054. The Permit backfiles indicate that there was some confusion as to whether the proof of beneficial use filed on July 27, 1992 applied to just Permit 37-7842 or both Permit 37-6842 and 01-0754. Eventually, it was clarified that the July 27, 1992 proof of beneficial use applied to both permits. It appears the December 1, 1993 Reinstatement Order was issued to make it clear that 01-0754 was also being reinstated. Issuance of the December 1, 1993 Reinstatement Order does not alter the analysis below. Even using the December 1, 1993 date, timeframes for review or appeal from this order have passed.

process with regard to the filing of proof of beneficial use, they did not contest the July 27, 1992 proof of beneficial use as being inadequate under I.C. § 42-217, and they did not file for a Petition for Hearing from the June 29, 1992 Order of Reinstatement.

The record indicates that the Petitioners had actual or written notice of the July 29, 1992 order, at the latest, by September 21, 2010. That was the date on which the Petitioners filed their Petition for Hearing and Petition for Declaratory Ruling ("September 21, 2010 Petition for Hearing"). The September 21, 2010 Petition for hearing states: "The Department entered its order reinstating the permit and advancing the priority date to August 25, 1990 [sic] on the 29th day of July, 1992." September 21, 2010 Petition at 3. Thus, the Petitioners must have received written or actual notice of the July 29, 1992 Order of Reinstatement, at the latest, at the time they filed the September 21, 2010 Petition for Hearing. To be timely under I.C. § 42-1701A(3), the Petitioners should have filed a petition for hearing of the July 29, 1992 order within 15 days after the September 21, 2010 Petition was filed. Clearly, more than 15 days have passed since the Petitioners received written or actual notice of the July 29, 1992 order on September 21, 2010.

In short, Petitioners failed to exhaust their administrative remedies with regard to the July 29, 1992 Order of Reinstatement, which found proof of beneficial use to be acceptable, and are now time barred from seeking review of that order. The Petitioners cannot use an action for declaratory ruling to try to circumvent the timeframes for review set forth in I.C. § 42-1701A(3). *See Regan*, 140 Idaho at 725, 100 P.3d at 619 (actions for declaratory judgment are not intended "as substitute for statutory procedures and administrative remedies must be exhausted."); *Carter*, 103

Idaho at 702, 652 P.2d at 650 (an order or judgment "may not be collaterally attacked by means of a declaratory judgment action). Therefore, this portion of their petition for declaratory ruling does not state a valid claim. The Motion to Amend must be denied and the IWRB's Motion to Dismiss should be granted.

(ii) Examination of Final Proof for Licensing under I.C. § 42-219

The Petitioners also cite to I.C. § 42-219 in support of their request that the Director make a "determination that water was not put to beneficial us in the time period allowed under the permit." Idaho Code Section 42-219 applies to issuance of a license and provides that: "upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same." I.C. § 42-219(1). The License for 37-7842 was issued on July 17, 2017. To the extent Petitioners seek a review of the License under I.C. § 42-219, the proper venue for them to do so is in the Petition for Hearing portion of this action.

The Petitioners should not circumvent the Petition for Hearing Process by seeking a declaratory ruling on the examination of final proof for purpose of licensing under I.C. § 42-219. Actions for declaratory judgment are not intended "as substitute for statutory procedures and administrative remedies must be exhausted." *Regan*, 140 Idaho at 725, 100 P.3d at 619. The proper method for contesting an agency decision is by appeal. *Id.* Thus, the proper venue for contesting the issuance of the License under I.C. § 42-219 is in the context of the Petition for Hearing. Therefore, this portion of the declaratory ruling does not state a valid claim. The Motion to Amend should be denied and the IWRB's Motion to Dismiss Petition for Declaratory Ruling should be granted.

iii. Petitioners Seek to Collaterally Attack the July 29, 1992 Order Advancing the Priority Date

The third declaratory ruling sought by Petitioners seeks "the Director's determination that the priority date for License No. 37-07842 was not accurately advanced following lapse and restatement [sic]." First Amended Petition at 8. Petitioners cite I.C. § 42-218a in support of this request. Idaho Code Section 42-218a provides for the lapsing of a permit when proof of beneficial use is not filed within the timeframe specified in the permit and sets forth procedures for reinstatement of that permit and advancement of the priority date if the lapse can be cured. If proof of beneficial use is filed within 60 days after notice of the lapse was provided to the permittee, the Director "may reinstate the permit with the priority date advanced a time equal to the number of days that said showing is subsequent to the date set for proof. I.C. § 42-218a(2). As discussed above, Permit 37-7842 lapsed and was subsequently reinstated after proof of beneficial use was filed on July 27, 1992. The July 29, 1992 Order of Reinstatement provided "that Permit No. 37-7842 be REINSTATED with an advance in priority to August 25, 1980."[2] Therefore, on July 29, 1992 the Director found that the proof of beneficial use submitted for Permit 37-7842 was acceptable and advanced the priority date pursuant to I.C. § 42-281a.

[2] The December 1, 1993 Reinstatement Order also advanced the priority date to August 25, 1992. The Analysis Sheet for Proof of Beneficial Use found in the backfile notes that the priority date was advanced 56 days, the difference between the date proof was due (June 1, 1992) and the date proof was received (July 27, 1992).

There is nothing to suggest this advancement of the priority date under I.C. § 42-218a was improper.[3] However, even if it was improper, the time for contesting it has passed and the order advancing the priority date cannot now be contested through an action for declaratory ruling. The Petitioners did not participate in the administrative process with regard to the order advancing the priority date of Permit 37-7842. Idaho Code Section 42-1701A(3) provides that "any person" aggrieved by a decision of the Director may file a petition for hearing. The request for a petition for hearing must be made "within fifteen (15) days after receipt of a written notice of the action issued by the director, or receipt of actual notice." I.C. § 42-1701A(3). However, Petitioners did not file a Petition for Hearing with regard to the July 29, 1992 order.

The record indicates that the Petitioners had actual or written notice of the July 29, 1992 order, at the latest, by September 21, 2010. That was the date on which the Petitioners filed their Petition for Hearing and Petition for Declaratory Ruling ("September 21, 2010 Petition for Hearing"). The September 21, 2010 Petition for hearing states: "The Department entered its order reinstating the permit and advancing the priority date to August 25, 1990 [sic] on the 29th day of July, 1992." September 21, 2010 Petition at 3. Thus, the Petitioners must have received written or actual notice of the July 29, 1992 order advancing the priority date, at the latest, at the time they filed the September 21, 2010 Petition for Hearing. To be timely under

[3] Calculations done by IDWR to advance the priority date of Permit 37-7842 are shown on the handwritten Analysis Sheet for Proof of Beneficial Use which is available in the backfile. Those calculations demonstrate that the priority date was properly advanced, in accordance with I.C. § 42-218A(2), from the day that acceptable proof of beneficial use was filed on July 27, 1992.

I.C. § 42-1701A(3), the Petitioners should have been filed a petition for hearing of the July 29, 1992 order within 15 days after the September 21, 2010 Petition was filed. Clearly, more than 15 days have passed since the Petitioners received written or actual notice of the July 29, 1992 order on September 21, 2010.

The Order of Reinstatement properly advanced the priority date for Permit 37-7842 under I.C. § 42-218(1). Even if it did not, the Petitioners failed to exhaust their administrative remedies with regard to the July 29, 1992 Order of Reinstatement are now time barred from seeking review of that order. The Petitioners cannot use an action for declaratory ruling to try to circumvent the timeframes for review of that order set forth in I.C. §§ 42-1701A(3). *See Regan*, 140 Idaho at 725, 100 P.3d at 619 (actions for declaratory judgment are not intended "as substitute for statutory procedures and administrative remedies must be exhausted."); *Carter,* 103 Idaho at 702, 652 P.2d at 650 (an order or judgment "may not be collaterally attacked by means of a declaratory judgment action). Therefore, this portion of their petition for declaratory ruling does not state a valid claim. The Motion to Amend should be denied and the IWRB's Motion to Dismiss Petition for Declaratory Ruling should be granted.

Conclusion

The IWRB does not object to the Motion to Amend the Petition for Hearing for the purpose of changing the order referenced to the Preliminary Order Issuing License No. 37-7842 so as to cure the timeliness issues raised in the IWRB's Motion to Dismiss Petition for Hearing. However, if approved by the hearing officer, the IWRB retains the right to assert all defenses and arguments regarding the First Amended Petition. The Motion to Amend for the purpose of providing greater clarification of the declaratory

rulings sought should be denied and the IWRB's Motion to Dismiss Petition for Declaratory Ruling should be granted because the First Amended Petition does not set forth a valid claim for declaratory ruling.

DATED this 25th day of September 2017.

ANN Y. VONDE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September 2017, I caused to be served a true and correct copy of the foregoing IWRB'S RESPONSE TO PETITIONERS' MOTION TO ALLOW AMENDMENT TO THE PLEADINGS by placing a copy thereof in the manner listed below:

1. Original to:

Director Spackman Idaho Department of Water Resources PO Box 83720 Boise ID 83720-0098	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Federal Express ☐ Email: ☐ Statehouse Mail

2. Copies to

Joseph F. James Brown & James 130 Fourth Avenue West Gooding ID 83330	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☒ Email: joe@brownjameslaw.com ☐ Statehouse Mail
Water District #37 Kevin Lakey 107 W 1st Shoshone ID 83352	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Email: ☐ Statehouse Mail

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