

07/2008

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FEB 20 2015

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

DEPT OF WATER RESOURCES
SOUTHERN REGION

NOTICE OF PROTEST

This form may be used to file a protest with the department under sections 42-108B, 42-203A, 42-203C, 42-211, and 42-222, Idaho Code. The department will also accept a timely protest not completed on this form if it contains the same information.

- 1. Matter being protested Application 47-17633 filed by Mary White - Ostrander / Terry White
- 2. Name of protestant Jerry Dockstader / Debra Dockstader on behalf of
MudCreek water users
- 3. Protestant's Representative for service (If different than protestant)

- 4. Service mailing address 1152 Hidden Lake Ln, Buhl, ID 83316
- 5. Service telephone no 208 329-0239 Email Address: docs2fish@hotmail.com
208 420-9537
- 6. Basis of protest (including statement of facts and law upon which the protest is based)

Please See Attachment "Notice of Protest" dated 17 February 2015

(additional pages may be attached to describe nature of the protest)

- 7. What would resolve your protest? Denial of Application

I hereby, acknowledge that if I, or my designated representative, fails to appear at any regularly scheduled conference or hearing in the matter of which I have been notified at the address above, the department may issue a notice of proposed default against me in this matter for failure to appear. I also verify that I have served a copy of this protest upon the applicant.

Signed this 17th day of February, 20 15.

Jerry Dockstader
Protestant

Protestant's Representative

47-17633

NOTE:

A protestant is required to timely file a protest with the department together with a \$25.00 protest fee for each application being protested in order for the protestant to be considered a full party by the department. In addition, the department's Rule of Procedure, IDAPA 37.01.01203, requires a protestant to send a copy of a protest to the applicant.

INSTRUCTIONS

1. The matter being protested must be clearly identified. A typical matter is identified by the application number such as "Application for Permit No. 47-17633 in the name of White" or "Application for Transfer No. _____ in the name of _____."
2. Show the name of the protestant. Only one (1) protestant may be shown per protest form. If this protest form is signed by more than one person, the hearing officer will consider the first signer as the official protestant and the representative for service of documents.
3. If the protestant is represented by an attorney or other authorized representative, show the representative's name. The department then will serve documents on the representative and upon the protestant if specifically requested.
4. Show the address where the department is to serve the documents. This should be the address of the authorized representative unless the protestant does not designate a representative.
5. Show the telephone number of the authorized representative unless the protestant does not designate a service representative.
6. Specifically describe the nature of the protest.
7. Describe the relief being sought by the protestant.

FOR DEPARTMENT USE ONLY

Received by DM Date 2/26/2015 Time 11:40 am
\$25.00 fee Received by DM # 5034563 Date 2/20/2015

17 February 2015

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To: State of Idaho Dept. of Water Resources

FEB 20 2015

From: Jerry Dockstader and Debra Dockstader
Mud Creek Water Users Representatives

DEPT OF WATER RESOURCES
SOUTHERN REGION

Re: Application 47-17633
Mary D White-Ostrander/Terry G White
Request for transfer 25 cfs Mud Creek water to run White hydro power plant

NOTICE OF PROTEST

6. Basis of protest:

(a) Code 42-903 of Idaho Statutes pertaining to Canals & Laterals: There does not exist any head-gates nor measuring devices to render possible and practicable measurement and control of water to be delivered.

(Photo Attached Exhibit "A")

(b) Code 42-1202 Violation: *Exhibit "D" and "E"*

Mud Creek Water Users protested a previous request filed by the Whites under Application No. 47- 7989. An agreement was reached and a contract signed the 9th April 1985. Article 10 - "Specific Maintenance Covenant" wherein the Whites agree to "repair and put and keep in good order the diversion dam in Mud Creek, the concrete ditch and other irrigation facilities of the Association located on the property of White, up to the siphon located at the north end of the farmable ground. All of said work shall be accomplished by White without the cost to the Association." The Whites do not keep the concrete ditch in good repair and have not done so since the contract was signed. *(photo Attached Exhibit "C")*

Please see attached photos of the condition of concrete ditch. The concrete ditch is the main ditch that delivers water to five head-gates and then distributed to individual water users from the 5 head-gates. (See 'c' below)

(c) Code 42-240 and Code 42-105 Violations: *And Code 43-320*

Blair Combe, is the initiator and co-signer of the authorization dated January 6, 2014* to allow the Whites additional Mud Creek Water. First he has a conflict of interest in the matter because he rents the farm ground from the Whites where Mud Creek's concrete deliver ditch bisects/splits a field in half. Mr. Combe stands first in line to own the farm, fish facilities and hydro power plant in the near future. He first appeared at the March 2014 annual member's meeting for the sole purpose of being elected to the Board. His first action as a Board member was this attempt at increasing water shares for the White's power plant. The Board of Directors and members have been in conflict with Mr Combe due to his running Twin Falls Canal Co. water into the concrete ditch from the west field then placing large siphon tubes into the concrete ditch and siphoning water at his will onto the east field. The Whites due not own Mud Creek water shares for irrigating farm land, only Twin Falls Canal Co. There is no way to measure what is going in and what is coming out. The Whites have not filed for an approval to exchange or appropriate water per Idaho Statute 42-105. The run-off from Twin Falls Canal water into the concrete ditch causes erosion of the sides of the ditch. Please see attached photo taken February 18, 2015 where the east side of concrete ditch has caved in. Sand and any chemicals used in the field are also a problem. Members take shovels, hoes and rakes and clean out the sand and moss each year prior to water being turned in. *(photo Attached Exhibit "c")*

* this must have been signed January 6, 2015, because Blair Combe was not a Board member January 6, 2014

Directors have taken the siphon tubes out of Mud Creeks concrete ditch every year because it diminishes water to the Mud Creek members. But Mr. Combe continues the practice. Two days ago a member went up to measure the amount of water coming over the Mud Creeks dam. Mr. Combe told him "No one is going to be measuring the water!" I include the comment here to show the attitude and intentions of Mr. Combe to take all the Mud Creek water he wishes to use for the irrigation of the White farm ground.

The members concerns could have been addressed at the annual meeting held February 17, 2015. Two of the Board members that signed the agreement to give more water to the Whites are being replaced. The transaction appears to have been rushed through due to the reasons behind the Board members being replaced.

Conclusion:

Mary White-Ostrander, Terry White and Blair Combe (the White's representative), have not acted in good faith on an existing contract. Without measuring devices in place and a trust-worthy water manager aka ditch-rider, the potential for abuse and theft of water is very high and very likely. The Mud Creek Water users are already experiencing undue stress and anxiety caused by a recent break in the dam and the condition of the concrete delivery ditch. Barker, Rosholt and Simpson, attorneys have been involved with these issues from the beginning and should at least be consulted as to the future ramifications should the Whites sell the hydro power plant and any other unforeseeable events.

7. Based on Mud Creek water users history with the Whites and condition of the dam and concrete ditch, there may not be a resolution.



Idaho Statutes

[Printer Friendly Version](#)

TITLE 43 IRRIGATION DISTRICTS

CHAPTER 3 POWERS AND DUTIES OF BOARD OF DIRECTORS

43-320. OFFICERS MUST NOT BE INTERESTED IN CONTRACTS. No director or any other officer named in this title shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom; and for any violation of this provision such officers shall be deemed guilty of a misdemeanor, and such conviction shall work a forfeiture of his office, and he shall be punished by a fine not exceeding \$500, or by imprisonment in the county jail not to exceed six (6) months, or by both such fine and imprisonment.

History:

[(43-320) 1903, p. 150, sec. 39; reen. R.C. & C.L., sec. 2390; C.S., sec. 4353; I.C.A., sec. 42-315.]

How current is this law?

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Attachment to Protest
against 47-17633
(from Dockstader)

Exhibit "A"

02-17-2015



6(a)

This is the only head-gate And it delivers the water into the MudCreek concrete delivery ditch. There is no measurement device. Water has to go through the fish ponds - through the head-gate into a pipe. Water travels 50'-60' under ground before dumps into MudCreek concrete ditch.

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DEPT OF WATER RESOURCES
SOUTHERN REGION

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Exhibit "B"

02-17-2005



After the water goes through Whites fish ponds -
dumps into pipe - goes 50'-60' underground
And dumps out here* in the concrete ditch

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DEPT OF WATER RESOURCES
SOUTHERN REGION

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Mud Creek concrete main delivery ditch

02-17-2015



Exhibit C" 6.(b)

Damage caused by Blair Combe, renter of Whites farm ground. Allows Twin Falls Canal water to run directly into Mud Creek's concrete main delivery ditch. Then uses large siphon tubes to take water from concrete ditch to water field on opposite side.

47-17633

↑
Protest

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DEPT OF WATER RESOURCES
SOUTHERN REGION

AGREEMENT

THIS AGREEMENT, made and entered into this 9th day of April, 1985, by and between the MUD CREEK WATERUSERS' ASSOCIATION, INC., a non-profit Idaho irrigation corporation, organized and existing under the laws of the State of Idaho, hereinafter "Association", and TERRY WHITE and MARY WHITE, husband and wife, of Twin Falls County, Idaho, hereinafter "White";

W I T N E S S E T H

WHEREAS, the Association owns, operates, and maintains certain rights-of-way upon which is constructed an irrigation water distribution system which diverts from Mud Creek and serves certain individually owned properties in Melon Valley north of Buhl, Idaho, part of which system traverses the property of White; and

WHEREAS, the Association's members own 7.32 c/f/s of perfected water rights from Mud Creek and said waters represented thereby are diverted for irrigation and other uses at the Association's diversion dam on Mud Creek into and through the Association's system between March 1 and November 15 of each year by Association landowners in Sections 28, 21, and 22, of Township Nine (9) South, Range Fourteen (14) E.B.M., Twin Falls County, Idaho; and

WHEREAS, White has filed to non-consumptively use the water owned by the Association landowners and proposes to construct and place into operation facilities for fish propagation on a constant basis and for power generation with the Association's water when the same is not being used by the Association in the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of Section 28, Township 9 South, Range 14 East, Boise Meridian, Twin Falls County, Idaho; and

WHEREAS, White has filed Water Rights Application No. 47-7989 for a water permit authorizing the additional use of said water which application has been protested by the Association; and

WHEREAS, White desires that the protest be dismissed and the Association is willing to withdraw said protest as consideration for the execution of this Agreement; and

WHEREAS, these parties wish to delineate their Agreement in writing;

[Redacted signature]

[Redacted signature]

Protest:
47-17633

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, and other good and valuable consideration, the parties agree as follows:

1. Dismissal of Protest. The Association herein agrees to withdraw their protest of Water Application No. 47-7989 which White has filed for additional use of Association's 7.32 c/f/s of water.

2. Joint Use of Facilities. The parties agree to the joint use of facilities to be constructed by White so that White may use and divert from the Association's ditch and use all of the Association's water for the propagation of fish, and to generate power with the water which is over and above Association's rights between March 1 and November 15, and to use the facilities to be constructed to convey water from Mud Creek for said fish propagation and power between November 15 and March 1 of the non-irrigation season in accordance with the plan attached hereto as Exhibit "A".

3. Warranty As To Conveyance Capacity. White covenants and warrants that the facilities to be constructed by White in Section 28, Township 9 South, Range 14 E.B.M., Twin Falls County, Idaho, in accordance with Exhibit "A" hereto shall carry the 7.32 c/f/s of the Association's water, and White further covenants that between March 1 and November 15 that the Association's rights shall be conveyed, delivered and measured to the Association at the northeast boundary of White's property, and White's use of the water for trout propagation and power purposes shall be conditional upon the delivery of said 7.32 c/f/s at such point between March 1st and November 15th. The trout facilities and the power facilities shall be owned by White. All facilities critical for the delivery of the Association's water, including the ditch facilities and right-of-way shall be owned by the Association in perpetuity.

4. Priority for Irrigation Water. It is understood and agreed by the parties that the irrigation water rights are prior in time to those rights for fish propagation or hydroelectric generation. It is understood and agreed that those water rights for irrigation are a priority and preferred use of water. It is further understood and agreed that Association does not, by the terms of this Agreement guarantee any future delivery or supply of water to White for his uses in any specific amount or volume. It is the understanding of the parties hereto, that the construction, operation, and maintenance of the facilities shall in no way interfere with the flow of irrigation waters, and it is further understood between the parties that the passage of irrigation waters through the facilities shall take priority over any activities of White with respect to the facilities.

-E-

5. Limitation of Uses. White agrees that the use of the waters under Permit No. 47-7989 shall be only for the additional uses of the propagation of fish and power generation.

6. No Warranty. The Association makes no representation or warranty of title, expressed or implied, on the part of the Association as to any land, improvements, rights-of-way, easements, rights or interest therein of any character whatsoever. Nothing herein shall be construed as a conveyance of any water or real property right of the Association in any manner other than as a permission for the additional use of such water based on the conditions of this Agreement.

7. No Interruption of Irrigation Water. White will do all construction work in a manner as will not interrupt or interfere with the Association's delivery of water through said canals or ditches, including the irrigation season of 1985. In the event of such interference or interruption, White will save and hold harmless the Association, or any of its stockholders/waterusers, as against all claims including claims from third parties for any damage, loss (including crop loss), or expenses occasioned by any claim or claims arising out of flooding or out of any interruption or interference with the flow of irrigation or drainage water, including any attorney's fees incurred by the Association.

8. Agent of White. It is understood and agreed that any contractor or contractors employed by White shall be the agent of White and not an independent contractor and White shall be liable as principal therefore. All construction work shall be done and performed in accordance with good construction practices, it being expressly understood and agreed that the Association may designate a person or agent to consult with White in the performance of such construction work, and such person or agent's discretion shall be final as to the construction of irrigation facilities. White covenants that the 15 inch pipe contemplated for the diversion to Association lands below the White property is adequate to carry 7.32 c/f/s of the Association's water plus any other water for which there is a right in said ditch.

9. No Interference. White warrants that the proposed construction shall be so designed and installed, so that the use of the facilities by the Association shall not be interfered with nor shall the Association's delivery of water to its stockholders/waterusers be interfered with at any time or lessened by reason of White's co-use of said facility.

10. Specific Maintenance Covenant. White agrees as a part of the consideration hereof, to repair and put and keep in good order the diversion dam in Mud Creek, the concrete ditch, and other irrigation facilities of the Association located on the property of White, up to the siphon located at the north end of the farmable ground. All of said work shall be accomplished by White without cost to the Association.

11. Potential Release of Flood Claims. As additional consideration for the use of the Association's facilities, White hereby releases claims for any damage which may occur to the property of White up to the siphon by reason of the existence of said facilities on the property of White. White also acknowledges that any drainage or seepage problems that result on the lands of White or on the lands adjacent to those of White which are caused by the impoundment of water by White shall be the responsibility of White and White herein waives any claim for seepage damages to their own premises.

12. Indemnification and Insurance. White does further agree to indemnify and save harmless the Association for and against all claims, suits, damages, losses, expenses, attorney's fees, or any other costs in any manner resulting from or arising out of the construction herein contemplated or the maintenance, renewal, operation, repair or use of the facilities of White to the siphon including damages to crops resulting from interference by reason of the operation of the facility by White. White agrees to maintain liability insurance of \$300,000.00 for personal injury and \$100,000.00 for property damage and shall name the Association as an additional insured under the loss payable clause of said policy. Delivery of a copy of said insurance policy shall be a condition precedent to this Agreement becoming effective.

13. Hold Harmless on Water Quality. It is understood and agreed that all water pollution problems which might result for the Association by reason of the operation of White shall be the responsibility of White and White agrees to hold the Association harmless for any action taken by any federal, state or local agency to regulate or eliminate pollution, to obtain a permit therefore, or to eliminate such pollution as determined necessary by any governmental agency with jurisdiction.

It is further understood that if by reason of fish propagation, a mousing problem arises, White agrees to treat the water or solve the problem through the use of chemicals or other acceptable means. The Association President or a quorum of Directors shall monitor and inform White of the excess moss build-up.

14. Abandonment. The abandonment of any facilities by White shall not constitute an abandonment of the rights of the Association hereunder, and if the operation of the facilities after said abandonment impairs the rights of the Association to obtain their water, the Association may make said corrections to the facility to insure delivery at the expense of White or his successor.

15. Option of First Refusal. White grants an option of first refusal to the Association for the purchase of said real property and fish propagation facilities if White elects to sell said property. Said option shall be construed as applied to either forty (40) or eighty (80) acres, whichever is being sold, including said facilities.

16. Easement and Right-of-Way Not Impaired. It is understood and agreed that nothing herein shall be deemed to impair the easement and rights-of-way of the Association for the continued full flow of water for irrigation and drainage including the contained use of the easements and rights-of-way of the Association for any purposes whatsoever as connected, or reconstruction of the Association's system.

17. Attorney's Fees. White agrees to pay the Association \$200.00 for attorney's fees in connection with this Agreement. If necessary for the Association to threaten or initiate legal action in the future to enforce its rights under this Agreement, and the Association prevails, the Association shall be entitled to reasonable attorney's fees.

18. This Agreement shall constitute a covenant running with the land for the benefit of the Association, their successors and assigns.

19. The parties hereto bind themselves, their heirs, legal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

MUD CREEK WATERUSERS' ASSOCIATION, INC.

Stanley G. Hill
President

ATTEST:

Richard Schubert
Secretary

Terry White

Mary White

STATE OF IDAHO)
) ss.
County of Twin Falls)

On this 9 day of April, 1985, before me, a Notary Public, in and for said County and State, personally appeared Robert E. Hill and Richard C. Schwabe known or identified to me to be the President and Secretary, respectively of MUD CREEK WATERUSERS' ASSOCIATION, INC., the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

James Debraight
NOTARY PUBLIC FOR IDAHO
Residing at Buhl

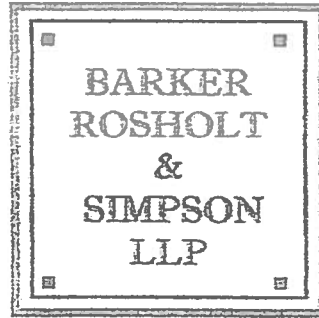
STATE OF IDAHO)
) ss.
County of Twin Falls)

On this _____ day of _____, 1985, before me, a Notary Public, in and for said County and State, personally appeared TERRY WHITE and MARY WHITE, husband and wife, known or identified to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at _____

John A. Rosholt
Albert P. Barker
John K. Simpson
Travis L. Thompson



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DEPT OF WATER RESOURCES
SOUTHERN REGION

August 30, 2004

Lila Stauffer
c/o Board of Directors
Mud Creek Water Users Association, Inc.
P.O. Box 281
Buhl, Idaho 83316

RE: April 9, 1985 Agreement with Terry White

Dear Board:

This letter responds to your request for an opinion regarding the issues associated with the Mud Creek Water Users Association's ("MCA") ditch crossing Terry White's property.

Breach of Contract:

Lila mentioned that Terry White may have taken some actions in the early 1990s, including failing to maintain and repair MCA's ditch, that resulted in a breach of the *April 9, 1985 Agreement*. The *Agreement* contains the following provision for maintenance of the diversion facilities and ditch:

10. Specific Maintenance Covenant. White agrees as a part of the consideration hereof, to repair and put and keep in good order the diversion dam in Mud Creek, the concrete ditch, and other irrigation facilities of the Association located on the property of White, up to the siphon located at the north end of the farmable ground. All of said work shall be accomplished by White without cost to the Association.

Agreement at 4.

White's duty to maintain MCA's "diversion dam in Mud Creek, the concrete ditch, and other irrigation facilities," is a continuing obligation and "covenant" that runs with the land for the benefit of MCA. Accordingly, even if White didn't maintain the ditch or make certain

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Board of Directors / Mud Creek Water Users
August 30, 2004
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repairs in the 1990s, he still has those same maintenance obligations today, as do any subsequent owners that might purchase White's property.

If MCA accused White of not taking specific actions in the 1990s, i.e. not repairing a specific part of the ditch, or replacing concrete in a specific area, or performing certain work that was required that specific year, White could argue that any breach of contract claim is barred by the statute of limitations. See Idaho Code § 5-216 (5-year limitation for actions upon written contracts).

However, since the Agreement continues from year-to-year, if White still refuses to maintain the diversion and ditch, it is my opinion that MCA would still have a breach of contract claim today that would not be barred by the statute of limitations.

I hope this opinion helps in consideration of MCA's issues associated with the White property.
Please contact me at 733-0700 if you have any further questions.

Sincerely,

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson