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RECEIVED
OCT 28 2009
Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO

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

**MLWU PETITION FOR
RECONSIDERATION AND
MEMORANDUM IN SUPPORT**

I. INTRODUCTION

Mud Lake Water Users, Inc. ("MLWU"), by and through its counsel of record, Robert L. Harris of HOLDEN, KIDWELL, HAHN & CRAPO, PLLC, hereby submits this *Petition for Reconsideration and Memorandum in Support*. MLWU previously submitted a Petition for Reconsideration on October 2, 2009 to preserve its ability to petition for reconsideration once MLWU has an opportunity to review the Idaho Department of Water Resources' *Preliminary Order Approving in Part and Denying in Part Application for Transfer* dated September 18, 2009 (hereinafter, "*Preliminary Order*"). Now that MLWU's board has had an opportunity to review the *Preliminary Order*, and discuss it with Water District 31 watermaster Greg Shenton, MLWU believes that portions of the *Preliminary Order* need to be clarified or changed as set forth below.

II. BACKGROUND

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. 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. Thus, water flows from Camas Creek and Ray's 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. The dike prevents water from flowing up the Camas Creek channel into Ray's 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. As set forth in the Affidavit of Ronald D. Carlson previously filed in this matter, 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 had to Don Shenton over a decade earlier.

After Mr. Carlson's retirement, on July 18, 2006, IDWR sent a letter to Greg Shenton instructing him to cease any further diversion through the MLWU pump as the pump was not an

authorized point of diversion. This position was 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. MLWU filed an application for transfer in 2007, but maintained its position that no such transfer was necessary. The transfer was filed with the understanding that the additional point of diversion would be an authorized point of diversion to allow water to be diverted over the dike to fill water rights in Mud Lake.

After publication of the transfer, it was protested by the United States Fish and Wildlife Service ("USFWS"), Perry Woodard, Sid Ashcraft, and Lyle Shupe. In working to resolve the protests, MLWU and the USFWS agreed to a minimum pumping level of 13.4 as measured on a staff gage at the new Rays Lake bridge, which bridge is located just inside the boundary of the Camas National Wildlife Refuge. MLWU as unable to resolve its differences with Woodard and Shupe prior to the hearing, which was ultimately held on January 27, 2009. Sid Ashcraft failed to attend any of the meetings in the matter, and was dismissed as a party.

III. ARGUMENT

- A. Nothing in this *Petition for Reconsideration* should be construed to alter or amend MLWU's previous agreement with the USFWS for the minimum pumping level of 13.4 measured at the staff gage on the new Rays Lake Bridge.**

As discussed in the above background section, MLWU and the USFWS agreed to a minimum pumping level of 13.4 as measured on a staff gage at the New Ray's Lake bridge, which bridge is located just inside the boundary of the Camas National Wildlife Refuge. Nothing in this petition

attempts to alter or amend that agreement in any way. No matter the outcome of this petition, the condition contained in the *Preliminary Order* shall remain in full force and effect. The condition currently reads as follows, and MLWU requests that it remain the same:

Diversion of water at the point of diversion in the NW1/4SW1/4SE1/4, Section 25, Township 7 North, Range 35 East, BM may only draw down the water in Camas Creek to a level of 13.4 measured on the New Rays Lake staff gage located in the Camas Creek Wildlife Refuge at the Rays Lake Bridge in the SW1/4NE1/4SE1/4, Section 25, Township 7 North, Range 35 East, BM.

B. The Preliminary Order did not address testimony from Ronald D. Carlson and Greg Shenton regarding their opinion that the transfer was not necessary, as the dike pump had already been approved by IDWR when it was installed in 1994.

On October 24, 2008, prior to the hearing on this matter, MLWU filed a *Petition for Declaratory Ruling* supported by the Affidavit of Ronald D. Carlson, the former Eastern Region Manager of IDWR. The *Petition for Declaratory Ruling* sought an order from the Hearing Officer that the filing of a transfer was unnecessary. The *Petition for Declaratory Ruling* was ultimately denied by the Hearing Officer on January 7, 2009. However, MLWU still presented testimony and evidence at the hearing from Ronald D. Carlson regarding the dike pump, his authorization, and the historic operation of the pump.

While its previous preemptive petition was denied, MLWU again requested that the Hearing Officer address the issue of whether a transfer was necessary given the unique factual situation in this case, and the previous authorization from the Eastern Region Manager of IDWR. Nothing in the *Preliminary Order* addresses the evidence presented by Mr. Carlson and Mr. Greg Shenton regarding the dike pump, its operation, and previous authorization, and whether based on this evidence, the Hearing Officer's position has changed or remains the same as set forth in his decision

on the *Petition for Declaratory Ruling*. We respectfully request that the Hearing Officer reconsider this issue in light on the evidence presented at the hearing, and set forth his decision in writing on this matter in a revised *Preliminary Order*.

- C. To the extent the transfer was necessary, and therefore, in the alternative to the above, the *Preliminary Order* needs to be amended to clarify that the volume limitation of 738 acre-feet and the acreage limitation of 160 acres contained in Water Right No. 31-65 does not apply to water pumped over the dike.**

When MLWU was first informed that it must file an application for transfer to add the dike pump as a point of diversion, counsel for MLWU met with IDWR personnel to determine which water rights should be listed in the transfer application. Ultimately it was determined that MLWU should seek to add the dike pump to a surface water right out of a Camas Creek water right (31-65) and a ground water right (MLWU listed two ground water rights, 31-329 and 31-331). It was further determined that MLWU would not need to include all of its numerous water rights in the transfer application.

The *Preliminary Order* approved the transfer application as to Water Right No. 31-65, the surface water right that lists Camas Creek as the place of use, but denied as to the ground water rights. As to Water Right No. 31-65, the conditions of this water right as they were decreed in the Snake River Basin Adjudication limit the water right to the diversion of 738 acre-feet and the irrigation of 160 acres. On the face of the *Preliminary Order*, it is not clear if these limitations apply to the water diverted over the dike. In other words, the issue is whether water pumped over the dike is accounted against MLWU once the water is in Mud Lake. If so, the effective limitation would be 369 acre-feet of usable water because MLWU would be accounted as using 369 acre-feet to get the water over the dike, and then when the water is diverted for actual irrigation use, the 369 would also

be counted against MLWU under Water Right No. 31-65, for a total of 768 acre-feet. However, the actual amount applied to irrigation beneficial use would be 369 acre-feet.

MLWU has understood that the transfer filing for these water rights was necessary, from the Department's view, to simply add the dike pump as a point of diversion to a water right to allow the pump to be used, but that it would not be counted against any volume or acre limitation of any water right once the stranded water pumped over the dike is stored in Mud Lake. It appeared that the Department's concern was that this arrangement would impact other water users, and thus, the transfer application needed to be filed and advertised. This was done to allow individuals that were potentially impacted to protest if they objected to the operation of the dike pump, and some entities and individuals did.

Once the protests were received, MLWU worked to resolve their concerns. Ultimately, the USFWS and MLWU agreed to a minimum pumping level, and additionally, MLWU checked to see if the minimum pumping level would impact the pump owned by Perry Woodard. As noted in the *Preliminary Order*, the evidence showed that a level of 12.8 as measured on the staff gage, there was twenty inches of water above the bottom of the Woodard pump casing.¹ Thus, at the minimum agreed-to level of 13.4, there would be over two feet of water above the bottom of the Woodard pump casing, which would adequately protect his supplemental water right.

Further, MLWU took elevation readings with a sensitive GPS device to determine whether they could resolve Mr. Shupe's concerns relative to water levels in Sandhole Lake. The evidence presented at the hearing demonstrated that the outlet for Sandhole Lake was five feet higher than the

¹ Preliminary Order at 6 (¶ 23).

13.4 level, and therefore, the water flowing from Sandhole Lake was not affected by operation of the dike pump.² Thus, the pumping level of 13.4 would likewise protect Shupe.

Thus, it appears clearly that the agreed-to level of 13.4 will adequately protect all who protested MLWU's application, and this condition is a product of the transfer being advertised to satisfy the Department's concerns relative to the pump. This is a limitation on MLWU's ability to run the dike pump, and we perceived it to be the only limitation relative to operation of the dike pump. However, MLWU is concerned that without language clarifying how water pumped over the dike is accounted for, the approval could be interpreted in a manner contrary to MLWU's intentions for filing the transfer.

Additionally, to the extent the volume limitations apply to water diverted over the dike, it may interfere with the watermaster's historic practices in delivering and distributing water from Mud Lake.

Attached at Exhibits A and B to this memorandum is a list from Greg Shenton, the watermaster for Water District 31. The list shows water rights that are allowed to be stored in Mud Lake. As we understand the list, Mud Lake can be physically full at the beginning of the season, but not every water right will be filled. Thus, at the beginning of the irrigation season, if Mud Lake is full, Water Right No. 31-65 will therefore have a full 738 acre-feet allocated to it. Once that water is used, then other rights that are junior in priority in Mud Lake are filled.

If the conditions of 31-65 are interpreted such that the volume limitations apply to water diverted over the dike, then the historic watermaster allocation process will be totally disrupted. He

² *Id.* at 7.

will not know how much of the 738 should be allocated to the already-full Mud Lake, or how much of the volume will be “used” diverting water over the dike.

Furthermore, water diverted over the dike has not historically been allocated to a specific water right. Instead, it goes to fill all water rights in Mud Lake proportionately, and the volume diverted each year can range from zero (0) acre-feet diverted, to perhaps thousands of acre-feet. The average is probably around 400-500 acre-feet, as stated in the *Preliminary Order*, but the amount can fluctuate greatly. Tying the dike pump to a volume limitation on a specific water right will substantially disrupt the watermaster’s historic distribution of water, which has been in place for decades. Therefore, clarifying remarks must be made in the transfer approval to ensure that the volume limitations on Water Right No. 31-65 do not apply to the amounts diverted over the dike pump.

In short, there should be no limitation on the volume diverted over the dike within the water right *except for* the minimum pumping level of 13.4 established by agreement between MLWU and USFWS. A clarifying remark substantially in the form of the following condition should be included:

Diversion of water from the following point of diversion, known locally as the “dike pump,” shall not be accounted against the water right holder for volume diverted under this water right, nor limited to the irrigation of only 160 acres under this water right, as pumping of water from the dike pump moves stranded water over a dike in the Camas Creek channel to continue down to Mud Lake for storage and eventual distribution to all water rights holders in Mud Lake.

D. The *Preliminary Order* should have approved the transfer for Water Rights Nos. 31-329 and 31-331.

D. The Preliminary Order should have approved the transfer for Water Rights Nos. 31-329 and 31-331.

Water Rights Nos. 31-329 and 31-331 are MLWU ground water rights. Testimony at the hearing was that there is some leakage through the gates in the dike from the ground water. However, the hearing officer held the following:

Because there is no way for the watermaster to control the leakage or measure the ground water before it mixes with the surface water, any ground water leaking through the gates is recognized as simply contributing to the volume of water stranded on the upstream side of the dike. Therefore, adding the pump as a point of diversion or rediversion on the ground water rights is not appropriate.

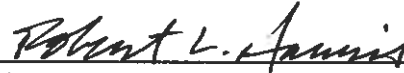
To the extent the hearing officer includes a condition as proposed in the above section, then reconsideration of the transfer denial as to Water Rights Nos. 31-329 and 31-331 is not necessary. This would be MLWU's first preference. This is because the stranded water—which has a mixed variety of ground and surface water—would not be accounted against any volume limitation for MLWU or other water users, but would only be limited by the minimum pumping level.

However, to the extent water pumped over the dike is accounted against MLWU, then there must be some consideration for how much of the water pumped over the dike is actually ground water, and that it should not be accounted against MLWU against their volume limitation. The ground water has already been diverted and accounted against the ground water right, and should not be accounted against the surface right as well. This would result in a double accounting of the water right. While it may not be possible to exactly measure the amount of leakage through the headgates, it is still possible for the watermaster to estimate leakage, and to properly account for it.

For these reasons, the hearing officer should reconsider the transfer denial of these two ground water rights, to the extent the additional condition proposed in the above section is denied.

DATED this 27th day of October, 2008⁹.

HOLDEN, KIDWELL, HAHN & CRAPO, PLLC


Robert L. Harris, Esq.
Attorneys 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 27th day of October, 2009.

DOCUMENT SERVED: MLWU PETITION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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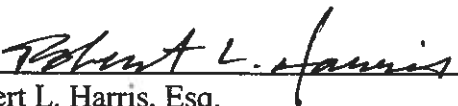
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Robert L. Harris, Esq.
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Exhibit A

Pumping Season is 123 day 1st of May to 1st Sept,

according to the decree

Name	G.H.	Cont	C.F.S.	Date	A.F.	Total A.F.
	-1	1,790			Water not Available	
Shuldberg	-0.7	2208	1.7	4/22/08	418	418
Owsley C.	-0.45	2602	1.6	10/3/10	394	394
Owsley C.	0	3340	3	10/3/10	738	1132
Level C.	0.2	3734	1.6	10/3/10	394	394
Owsley C.	0.4	4128	1.6	3/9/11	394	1526
Jackett C.	0.8	4989	3.5	3/20/11	861	861
Jackett C.	0.9	5235	1	3/29/11	246	1107
Potter	1	5432	0.8	5/1/11	187	197
Dobson	1.05	5580	0.6	5/1/11	148	148
Dobson	1.71	7302	7	4/15/12	1722	1870
Owsley C.	6.25	27179	80.8	4/15/12	19877	21403
Dobson	6.26	27228	0.2	5/1/12	49	1919
Potter	6.26	27277	0.2	5/1/12	49	246
Jackett C.	6.38	27892	2.5	6/10/12	615	1722
Owsley C.	6.45	28315	1.72	9/5/12	423	21826
Level C.	7.35	33825	22.4	9/17/12	5510	5904
Jackett C.	7.42	34071	1	9/21/12	246	1968
Owsley C.	7.5	34730	2.68	10/14/12	659	22485
Holley	7.53	34927	0.8	2/4/13	197	197
Holley	7.6	35345	1.7	2/20/13	418	615
Owsley C.	7.75	36329	4	7/21/13	984	23469
Owsley C.	7.84	36944	2.5	9/6/13	615	24084
Jackett C.	8.07	38395	5.9	10/14/13	1451	3419
Owsley C.	8.17	39133	3	10/18/13	738	24822
Holley	8.25	39551	1.7	11/12/13	418	1033
Owsley C.	8.29	39945	1.6	12/16/13	394	25216
Holley	8.33	40142	0.8	3/4/14	197	1230
Burtenshav	8.43	40782	2.6	3/18/14	640	640
Holley C.	8.49	41249	1.9	11/1/14	467	697
Holley C.	8.52	41397	0.6	11/1/14	148	1845
Owsley C.	8.55	41643	1	6/1/15	246	25462
Burtenshav	8.59	41889	1	6/1/15	246	886
Holley C.	8.62	42071	0.74	2/26/16	182	2027
Holley C.	8.66	42440	1.5	4/15/16	369	2396
Holley C.	8.74	42957	2.1	6/1/16	517	2913
Holley C.	8.8	43311	1.44	6/16/16	354	3267
Holley C.	8.88	43852	2.2	6/16/16	541	3808
Owsley C.	8.97	44452	2.44	6/16/16	600	26062
Owsley C.	10.75	62312	72.6	12/2/16	17860	43922
Owsley C.	10.79	62558	1	12/3/16	246	44168
Burtenshav	10.88	63296	3	12/3/16	738	4624
Jackett C.	10.97	64034	3	9/8/17	738	4157
Holley C.	11.03	64329	1.2	10/2/17	295	4103
Holley C.		64614	1.16	11/5/17	285	4388
Owsley C.		65008	1.6	12/10/17	394	44562
Owsley C.		65352	1.4	12/10/17	344	44906
Holley C.		65992	2.6	1/1/18	640	5028
Holley C.		66691	2.84	1/1/18	699	5727
Holley C.		66873	0.74	1/11/18	182	5909
Holley C.		67611	3	3/17/18	738	6647

North End of Lake
0 below 5 Foot
100 AF. For every
10 above 5 Foot

1 ft G.H. = 5,460

4-15-12

Discharge rate = 3,789

11:00 G.H. = 64,200

Owsley C.	68398	3.2	4/1/20	787	45693
Holley C.	68988	2.4	5/1/20	590	7237
Owsley C.	70562	6.4	4/1/21	1574	47267
Owsley C.	76712	25	5/1/21	6150	53417
Owsley C.	79074	9.6	4/1/22	2362	55779
Owsley C.	80648	6.4	4/1/23	1574	57353
Holley C.	81042	1.6	9/21/23	394	7631
Holley C.	81126	0.34	1/1/24	84	7715
Owsley C.	81323	0.8	4/1/24	197	57550
Owsley C.	99773	75	8/1/24	18450	76000
Potter	99847	0.3	4/1/26	74	246
Owsley C.	101421	6.4	8/28/26	1574	77574
Dobson	101593	0.7	4/1/27	172	2094
Dobson	101741	0.6	4/1/27	148	2239
Potter	101839	0.4	4/1/28	98	344

Totals		406.7		99039	976888
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101839
 Less 1,790
 100049

Exhibit B

name	right #	cfs	date	AF
Shuldberg		1.7	4/22/08	3.4
MLWU	168	1.6	10/3/10	3.2
MLWU	65	3	10/3/10	6
Level		1.6	10/3/10	3.2
MLWU	188	1.6	3/9/11	3.2
MLWU	134	3.5	3/20/11	7
MLWU	143	1	3/29/11	2
Burtenshaw	210	0.8	5/1/11	1.6
Dobson	206	0.6	5/1/11	1.2
Dobson	191	7	4/15/12	14
MLWU	184	80.8	4/15/12	161.6
Dobson	207	0.2	5/1/12	0.4
Burtenshaw	211	0.2	5/1/12	0.4
MLWU	135	2.5	6/10/12	5
MLWU	166	1.72	9/5/12	3.44
Level		22.4	9/17/12	44.8
MLWU	144	1	9/21/12	2
MLWU	263	2.68	10/14/12	5.36
Holley		0.8	2/4/13	1.6
Holley		1.7	2/20/13	3.4
MLWU		4	7/21/13	8
MLWU	52	2.5	9/6/13	5
MLWU	190	5.9	10/14/13	11.8
MLWU	104	3	10/18/13	6
Holley	344	1.7	11/12/13	3.4
MLWU	105	1.6	12/16/13	3.2
Holley	345	0.8	3/4/14	1.6
Burtenshaw	243	2.6	3/18/14	5.2
Holley		1.9	11/1/14	3.8
Holley		0.6	11/1/14	1.2
MLWU		1	6/1/15	2
Burtenshaw	26	1	6/1/15	2
Holley	348	0.74	2/26/16	1.48
Holley		1.5	4/15/16	3
Holley	350	2.1	6/1/16	4.2
Holley	351	1.44	6/16/16	2.88
Holley	352	2.2	6/16/16	4.4
MLWU		2.44	6/16/16	4.88
MLWU	185	72.6	12/2/16	145.2
MLWU	163	1	12/3/16	2
Burtenshaw		3	12/3/16	6
MLWU	192	3	9/8/17	6
Holley	353	1.2	10/2/17	2.4
Holley	356	1.16	11/5/17	2.32
MLWU	6	1.6	12/10/17	3.2
MLWU	169	1.4	12/10/17	2.8
Holley	357	2.6	1/1/18	5.2
Holley	358	2.84	1/1/18	5.68
Holley	359	0.74	1/11/18	1.48
Holley		3	3/17/18	6
MLWU	34	3.2	4/1/20	6.4

Holley	361		2.4	5/1/20	4.8
MLWU	35		6.4	4/1/21	12.8
MLWU	187		25	5/1/21	50
MLWU	36		9.6	4/1/22	19.2
MLWU	37		6.4	4/1/23	12.8
Holley	362		1.6	9/21/23	3.2
Holley	376		0.34	1/1/24	0.68
MLWU	38		0.8	4/1/24	1.6
MLWU	186		75	8/1/24	150
Burtenshaw			0.3	4/1/26	0.6
MLWU	363		6.4	8/28/26	12.8
Dobson	208		0.7	4/1/27	1.4
Dobson	209		0.6	4/1/27	1.2
Burtenshaw			0.4	4/1/28	0.8