

MEMORANDUM

FROM: Garrick Baxter, ^{AB}Deputy Attorney General

TO: Tim Luke, Section Manager, Water Distribution Section
Lyle Swank, Regional Manager, Eastern Regional Office

CC: Ernie Carlsen, Supervisor, Eastern Adjudication Unit
Carter Fritschle, Section Manager, Technical Support Section

DATE: June 18, 2007

RE: Mud Lake Water Users Pump on Camas Creek

Questions Presented:

Question #1: Must Mud Lake Water Users Inc. (MLWU) file for a change in point of diversion before using a pump to divert water from Camas Creek, over their headgate blocking Camas Creek, and then inject the water back into Camas Creek?

Question #2: Can MLWU recover water that has leaked through a headgate on Camas Creek, a natural stream being used as a delivery system for the water right?

Conclusions:

Question #1: Yes. Pursuant to Idaho Code §§ 42-108 and 42-222, MLWU must apply to the Department to add this new point of diversion to its surface water rights before it can legally use a pump to divert water from Camas Creek.

Question #2: It depends on whether MLWU has lost control of the wastewater. In Idaho, the general rule is that an original appropriator may recover wastewater that has leaked or seeped from his delivery system, so long as the original appropriator has not lost control of the water.

Analysis:

INTRODUCTION

Recently, an issue has arisen regarding water rights held by MLWU. MLWU holds a number of decreed surface water rights for irrigation from Mud Lake. MLWU also pumps ground water into Mud Lake to meet its irrigation needs. One place that MLWU pumps ground water is at the Bybee Well Field. The Bybee Well Field is located on Camas Creek between Rays Lake and Mud Lake. Two maps depicting the area are attached hereto as Map 1 and Map 2. Ground water is pumped at the Bybee Well Field and then injected into Camas Creek. The water then flows into Mud Lake.

Over 35 years ago, MLWU installed a headgate on Camas Creek near the outflow of Rays Lake. The headgate is located near the Bybee Well Field. When the headgate is open and water is not being pumped from the Bybee Well Field, water will pass from Rays Lake into Camas Creek and down to Mud Lake. However, when the Bybee Well Field is turned on and the ground water from the Bybee Well Field is placed into Camas Creek, this changes the hydraulic head of Camas Creek near the headgate. If left unchecked, the water pumped from the Bybee Well Field would flow both to Rays Lake and Mud Lake. To prevent the water from the Bybee Well Field from flowing into Rays Lake, MLWU closes the headgate when the Bybee Well Field is turned on. This way, the ground water will only flow into Mud Lake.

About 12 to 14 years ago, MLWU installed a pump on the Rays Lake side of the headgate. MLWU started pumping water from the Rays Lake side of the headgate back to the Mud Lake side of the headgate. On July 18, 2006, Tim Luke, Section Manager for the Water Distribution Section of IDWR, sent Greg Shenton, Water Master for Water District 31, a letter directing Mr. Shenton to cease the diversion of water from Rays Lake through the MLWU pump because the pump was not a recorded point of diversion for a water right. MLWU has questioned IDWR's authority to order MLWU to cease diversions from the Rays Lake side of the headgate via the pump.

The question addressed in this memo is whether MLWU is entitled to continue the use of the pump. MLWU claims that it is entitled to continue diverting the water for two reasons. First, MLWU claims that absent the diversion, all the water backed up by the headgate would have flowed down to Mud Lake and to MLWU's point of diversion in Mud Lake. MLWU suggests that because the water would have otherwise reached Mud Lake, it is entitled to divert the water over the headgate to ensure that MLWU gets its full supply.

Second, MLWU claims that the pump also recovers water that has leaked through the headgate. Historically, when the Bybee Well Field was activated and the headgate closed, water would leak through the headgate to the Rays Lake side of the headgate because the hydraulic head of water on the Mud Lake side of the headgate was so significant. Some years, the water that leaks through collects on the Rays Lake side of the headgate and does not mix with Camas Creek water because Camas Creek has gone dry. This is what has happened this year. Pictures showing the disconnect between Rays Lake and the headgate are attached hereto and labeled as MLWU Pictures. However, in better water years, there is water flowing down Camas Creek such that the water that comes from the Bybee Well Field leaks through the headgate and intermingles with Camas Creek water. MLWU suggests that they have a right to recover any water that has leaked through the headgate, regardless of whether it mixes with Camas Creek water or not.

ANALYSIS OF QUESTION #1

As described in the introduction, once the Bybee Well Field is turned on, MLWU shuts off the flow of Camas Creek into Mud Lake by closing the headgate on Camas

Creek near the Bybee Well Field. Starting sometime in the 1990s, MLWU added a pump on the Rays Lake side of the headgate to pump Camas Creek water over the headgate that became stranded by the closing of the headgate. And while the pump appears to have been in existence before the issuance of the SRBA partial decrees, the pump was not listed as a point of diversion for any of MLWU's surface water rights. As stated above, MLWU believes that it is not required to list the pump as a point of diversion and disagrees with the letter sent by Tim Luke requiring that the water master cease diversions of water through the pump until the pump is listed as a valid point of diversion for a water right.

It is clear, under Idaho Code, that MLWU must apply to the Department for a change in point of diversion before it can legally withdraw water from Camas Creek using the pump. Idaho Code § 42-108(1) provides that a person may change the point of diversion of their water right, but must apply to the Department for approval first:

Any person desiring to make such change of point of diversion, ... shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code.

Idaho Code § 42-108 further makes clear that the change cannot take place until approved by the Department:

After the effective date of this act, no person shall be authorized to change the ... point of diversion ... unless he has first applied for and received approval of the department of water resources under the provisions of section 42-222, Idaho Code.

Idaho Code § 42-108 (emphasis added).

Idaho Code § 42-222 again restates that one must apply to the Department before changing a point of diversion:

Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, *who shall desire to change the point of diversion*, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

Idaho Code § 42-222(1)(emphasis added).

Although MLWU's original installation of the headgate is itself legally questionable¹, once MLWU decided to change its diversion and begin pumping water out of Camas Creek and over the headgate in the 1990s, they were required by Idaho Code §§ 42-108 and 42-222 to apply to the Department for a change in point of diversion. Under Idaho Code, corporations such as MLWU are persons. Furthermore, MLWU's surface water rights have ripened to decrees of the SRBA District Court. MLWU is now seeking to use the pump to divert its surface water over the headgate. By turning on the pump on the Rays Lake side of the headgate once the headgate is closed, MLWU is actually moving its point of diversion for the surface water from Mud Lake up to the headgate. The pump is essential to MLWU's ability to receive Camas Creek water into Mud Lake. Absent this diversion, MLWU would not be receiving this water. Because this critical point of diversion is not part of MLWU's SRBA decreed surface water rights, MLWU must apply for a change in point of diversion pursuant to Idaho Code §§ 42-108 and 42-222.

In response to this position, it is likely that MLWU will suggest that it is simply diverting water over a short distance to get around an obstruction and that the pump isn't a true point of diversion because MLWU injects the water back into Camas Creek. While MLWU is correct that it is a relatively short distance that they divert the water before injecting it back into Camas Creek, the pump is a point of diversion nonetheless as it physically removes Camas Creek water from the natural water course. The distinction suggested here is not a distinction recognized by the statute. As such, MLWU should still be required to file for a change in point of diversion.

Moreover, there is a strong public policy in support of the argument that MLWU should be required to apply to the Department for a change in point of diversion. The Department is vested with the responsibility to oversee water distribution in the State of Idaho. *See e.g.* Idaho Code § 42-231. A key part of the Department's ability to do its job is to have information on all points of diversion for water rights. Having undecreed points of diversion for water rights makes the Department's job difficult because it can't recognize what is a valid point of diversions for a water right and what is an illegal diversion of water.

¹ MLWU's original installation of the headgate is legally questionable as it effectively cut off the flow of water filling at least one senior surface water right from Mud Lake for part of the year. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Idaho App. 1988) (An upstream appropriator is not entitled to wrongfully obstruct stream). However, it appears that the senior surface water user has not objected to the obstruction because the senior user also pumps ground water into Mud Lake and the headgate apparently benefits the senior. The question has also been raised whether MLWU's headgate in Camas Creek violates the Stream Channel Alteration Act. It does not violate the Stream Channel Alteration Act because the headgate was apparently installed in the 1950s and the Stream Channel Alteration Act was not enacted until 1971. The Act cannot be applied retroactively. *Randall v. Ganz*, 96 Idaho 785, 788, 537 P.2d 65, 68 (1975) (The Act is not applicable to a jetty that was installed in summer of 1960 because the act was passed in 1971).

ANALYSIS OF QUESTION #2

The second question raised is whether MLWU can use the pump in question to recover ground water pumped from the Bybee Well Field that leaks from the Mud Lake side of the headgate to the Rays Lake side of the headgate.

Generally, where water is intentionally emptied into a natural stream for the purpose of conducting it to another point, the stream being used simply as a conduit in lieu of an artificial canal, it is held that water may be recaptured from the stream. See Idaho Code § 42-105. However, when water leaks or seeps from that section of the natural stream being used to deliver the water, a question of control arises.

Generally, the original appropriator of water can use and reuse water so long as it is within the appropriator's control. See *Milner Low Lift Irr. Dist. v. Eagen*, 49 Idaho 184, 286 P. 608 (1930). However, once water has passed out of the control of the user, it is subject to recapture and appropriation by others. At what point does an appropriator lose control of the water? In some states, the question of control focuses on whether or not the water is still within the boundaries of the original appropriator's land. P.M. Dwyer, *Right of Appropriator of Water to Recapture Water Which Has Escaped or Is Otherwise No Longer Within His Immediate Possession*, 89 ALR 210 (2006). For example, the Utah Supreme Court has stated:

Under ordinary circumstances, the original appropriator of water can use and reuse the water so long as it is within the appropriator's control. But once the water has passed to the land of another and out of the control of the user, it is subject to recapture and appropriation by others.

In re Uintah Basin, 133 P.3d 410, 424 (Utah 2006) (citations omitted).

However, the Idaho Supreme Court has taken what appears to be a broader view of control over water and does not limit itself to just the boundaries of the original appropriator's land. In the case *Sebern v. Moore*, the Idaho Supreme Court examined the issue of recovery of waste water and stated:

[S]urface water and seepage water may be appropriated...subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use.

Sebern v. Moore, 44 Idaho 410, 418, 258 P. 176, 178 (1927).

In discussing the ability of the original appropriator to recapture the wastewater, the Sebern court explained that possession is not limited to actual possession much less possession within the boundaries of the original appropriator's land:

[The original appropriator's] control is not dependent upon continuous actual possession, and in the absence of abandonment or forfeiture of his right to its use, he may assert his right, which is not affected by his once having applied it to a beneficial use. (*United States v. Haga*, 276 Fed. 41 cited with approval in *Ide v. United States*, 263 U.S. 497, 44 Sup. Ct. 182, 68 L.ed. 407).

Sebern, 44 Idaho at 418, 258 P. at 178.

The Court in *Sebern* goes on to suggest that so long as the original water is still "susceptible of being identified" wastewater may be reclaimed by the original appropriator. *Id.*

Looking to the facts of this case, it appears that MLWU is entitled to recover the water that leaks through the headgate as long as they are able to identify their water. As stated in *Sebern*, the rights of an appropriator are not dependent upon continuous actual possession of the water. As long as the appropriator is still able to identify his water, he is entitled to recover the water, even if he does not have continuous actual possession. Applying this test to the MLWU facts, it appears that currently MLWU's ground water leaks through the headgate and gets stranded on the Rays Lake side of the headgate. Thus, as it appears that the ground water has not yet mixed with other water, MLWU should legally be able to recover the water by pumping the water over the headgate.

A question that arises is whether MLWU will need to add its pump as a point of recovery and injection to be able to recover the water through the pump. On one hand, the Department can argue that there is a strong public policy that recovery pumps should be documented because, as argued above, tracking pumps and diversions is an important part of the Department's job. On the other hand, there does not appear to be any statutory or case law requirement that a person recovering water list the point of recovery on a water right. Furthermore, it is my understanding that MLWU has numerous collection areas along its distribution system that collect leakage that MLWU then pumps back into its canals. The pumping of the water that has leaked through the headgate appears to be analogous to the other pumping sites used by MLWU. It is my understanding that IDWR does not require these other recovery sites to be listed as points of recovery for MLWU's water rights. So while the Department could try to require MLWU to list the pump as a point of recovery on one of its water rights for public policy reasons, I would not recommend that it do so. There appears to be no specific legal authority for the Department to require the listing of the points of recovery and it does not appear that the Department has consistently required such action with other recovery points.

As described in the introduction, Camas Creek currently dries up before it reaches Rays Lake. The result is that the water leaked through the headgate does not mix with other water. The tougher question will arise in the future when Camas Creek does not dry up. Should MLWU be able to recover the water that has leaked through the headgate when the water has mixed with other Camas Creek water? The *Sebern* case suggests that normally, the mixing of the wastewater with water in a natural water channel would

cause the original appropriator to lose control of the water. However, in the case of MLWU, it would appear that MLWU likely is legally entitled to some of the water from Camas Creek as MLWU holds surface water rights from Mud Lake and Camas Creek drains into Mud Lake. So the wastewater is commingling with water that is (at least in part) MLWU's water. It is not clear from the case law how this particular scenario should be handled. It could be argued that because MLWU is entitled to the Camas Creek Water, it has not lost all control of the wastewater. On the other hand, MLWU does not hold the senior surface water right out of Mud Lake, so MLWU cannot say that they control all of the water in Camas Creek. Regardless, this question should be left until MLWU seeks approval from the Department to move its point of diversion.

MLWU might also attempt to claim that it should be able to recover the water that has leaked through the headgate because of the State's overriding policy against wasting of water. While it is true that the policy against waste of irrigation water cannot be construed as to permit a junior appropriator to force a senior to continue to waste water (*Keller v. Magic Water Co.*, 92 Idaho 276, 441 P.2d 725 (1986)), it is a very different matter to construe this policy to allow a senior appropriator to chase *any* water that has escaped from their conveyance system. There must be a logical end to how far an original appropriator can chase the water, and the *Sebern* case sets that bar at the point that the water can no longer be identified.

CONCLUSION

MLWU must apply to the Department for a change in point of diversion pursuant to Idaho Code §§ 42-108 and 42-222 before pumping Camas Creek water through its pump. Furthermore, MLWU is entitled to recover water that has leaked through the headgate so long as it has not mixed with other water. I do not recommend that the Department require MLWU to add a the pump as a point of reinjection to its existing water rights before it can recover the water as there is no specific legal authority to require such action.