

January 7, 2009

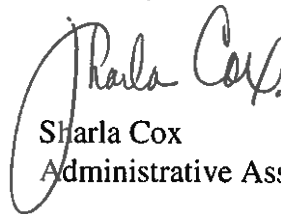
RE: In the Matter of the Motion for Declaratory Ruling
filed by Mud Lake Water Users Association

Dear Interested Parties:

Enclosed is an Order Requiring Mud Lake Water Users Association to file an application for transfer to add a point of diversion. This order is being issued as an interlocutory order pursuant to Rule 710 of the Idaho Department of Water Resource's Rules of Procedures.

If you have any questions regarding the enclosed order, please contact Mr. Carlsen or myself at (208) 525-7161.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharla Cox". The signature is written in a cursive style with a large, looping initial "S".

Sharla Cox
Administrative Assistant

Enclosure

cc: Service list

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN AND FOR THE STATE OF IDAHO

IN THE MATTER OF THE MOTION FOR)
DECLARATORY RULING FILED BY)
MUD LAKE WATER USERS ASSOCIATION)
_____)

**ORDER REQUIRING MUD LAKE
WATER USERS ASSOCIATION TO
FILE AN APPLICATION FOR
TRANSFER TO ADD A POINT OF
DIVERSION**

Mud Lake Water User's Association ("MLWU") filed a Motion for Declaratory Ruling pursuant to Rule 400 of the Idaho Department of Water Resources' ("Department") Rules of Procedure (IDAPA 37.01.01.400).

For purposes of brevity, the hearing officer accepts, in general, the statement of facts as set forth in the "Introduction" section, pages 2-5, of Mud Lake Association's Memorandum in Support of Motion for Declaratory Ruling, and incorporates the facts of the operation of the Camas Creek obstruction into this declaratory ruling, except the assertions about authority of Ron Carlson to issue a decision on behalf of the Department, and assumptions about whether all Camas Creek water upstream of the obstruction is water that would have flowed into Mud Lake.

The issue presented is "whether or not MLWU is required under Idaho law to file an application for transfer with regards to its water rights in order to utilize a pump which recovers water from leaking headgates in MLWU's dike, and which pumps . . . Camas surface water from behind the dike . . ."

MLWU raises three legal arguments:

1. When a question about the legality of a pump behind the dike was posed to a regional manager for the Department, does a verbal response from the regional manager that a water right is not required qualify as a decision or order by the Department that would carry the finality of an administrative decision, and, if so, would principles of res judicata prevent a subsequent conflicting determination by the Department?

2. If a water user places an obstruction in a natural channel that is the inlet to an on-stream storage reservoir, and ground water and surface water impounded in the reservoir leaks through the obstruction in the upstream direction into the natural channel, and additional natural flow water flows down the natural channel, but cannot flow into the reservoir because of the obstruction, what, if any, authorization is required from the Department to pump the leaked ground water and natural flow surface water from the upstream side of the channel into the reservoir?

Res Judicata

Counsel for MLWU cites *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Idaho App., 2004), which describes the various forms of general agency in a business relationship, and attempts to apply these principles of agency to the decision making authority of the Department. The legal tenants of agency in a business relationship that bind the principal when the principal's agent acts on behalf of the principal do not apply to the relationships between a government entity, government employee, and member of the public. This is particularly true when a government entity is acting within its sovereign function.

Decisions that bind the Department are issued in writing as either recommended, preliminary, or final orders. Title 67, Chapter 52 of the Idaho Code (Administrative Procedures Act) and the Department's Rules of Procedure describe what the agency must do to afford appropriate due process to an applicant seeking a decision from the Department and to others who have a legitimate interest in the matter before the Department. Adherence to these defined legal processes result in a final decision by the Department that would justify invoking the doctrine of res judicata.

At the time MLWU raised the issue with the regional manager in Idaho Falls, the regional manager did not issue an order. There were no findings of fact or conclusions of law. The determination by the regional manager did not contain the procedural notice required by the Administrative Procedures Act for recommended or preliminary orders. Other individuals or entities did not have an opportunity to participate in the decision making process. A verbal determination by the regional manager of IDWR is not res judicata on the issue of whether or not a transfer is required.

Is Authorization for the Recapture Pump Required?

Water leaks from Mud Lake through the gates of the obstruction in Camas Creek into the channel of Camas Creek and commingles in Camas Creek with some natural flow in Camas Creek. When water leaks from Mud Lake back into the Camas Creek channel and commingles with the natural flow, MLWU lose control of the water and it becomes part of the public water supply.

MLWU also argues that the pump merely pumps water naturally flowing in Camas Creek that would have flowed into Mud Lake but for the obstruction. The obstruction, however, maintains higher water levels in Mud Lake than would have historically have been maintained were the obstruction not there. The higher water levels in Mud Lake may be a result of both or either surface water flowing to the lake during high runoff or ground water pumped to the lake. If the obstruction were not in place, the "stranded" Camas Creek flow may have been retained in the channel upstream of the obstruction location as part of the natural backwaters of Mud Lake, may have maintained water levels in an upstream holding area named Ray's Lake, and may not have flowed into Mud Lake at all. The argument by MLWU that the pump would lift water to Mud Lake that would have flowed to Mud Lake is an assumed fact not in the record and could very well be a disputed issue of fact in the upcoming contested case hearing.

MLWU argues that pumping from behind the obstruction to the Mud Lake side of the obstruction is not a beneficial use, and no water right is required. The pump on the back side of the obstruction recaptures water that was lost through the gates of the obstruction or captures water that

cannot flow into Mud Lake because of the obstruction. MLWU offers no independent purpose for dewatering the backside of the obstruction with the pump. MLWU wants to capture or recapture the water because it has value when it becomes part of the water held in Mud Lake and can be redirected for irrigation on the Mud Lake side of the obstruction. The boundaries superimposed by MLWU attempting to limit administrative review of the physical activity to the pump, the obstruction, and the pump discharge to Mud Lake ignores the total operation and purpose of the pump back. The pump back assists with the beneficial use of water held in Mud Lake.

Idaho Code §§ 42-108 and 42-222 require that MLWU obtain approval from the Department for the additional point of diversion.

ORDER

IT IS HEREBY ORDERED that, MLWU must file an application for transfer with the Department to provide for appropriate due process and issuance of a final decision on whether a pump on the upstream side of the MLWU's obstruction in Camas Creek can be added as a point of diversion to the water rights for MLWU and operated for the purpose lifting leaked ground water and natural flow surface water from the upstream side of the obstruction and discharging it into the backwaters of Mud Lake.

IT IS FURTHER ORDERED that this is an Interlocutory Order.

Dated this 7th day of January, 2009.



Ernest Carlsen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January, 2009, a true and correct copy of the document described below was served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document Served: Order Requiring Mud Lake Water Users Association to file an Application for Transfer

Robert L. Harris, Esq.
Holden Kidwell, Hahn & Crapo, P.L.L.C.
P.O. Box 50130
Idaho Falls, ID 83405

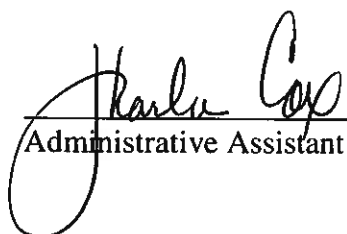
Lyle R. Shupe
2296 E. 1940 N.
Hamer, ID 83425

Perry Woodard
Box 85
Hamer, ID 83425

Sid Ashcraft
2504 N. Lennox
Mesa, AZ 85207

US Fish and Wildlife Service
Attn: James Crammond
911 NE 11th Ave., 2W-EN
Portland, OR 97232

Barbara Scott-Brier
U.S. Department of the Interior
Office of the Regional Solicitor
805 S.W. Broadway, Suite 600
Portland, OR 97205


Administrative Assistant