

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

June 29, 2007

Robert L. Harris
Holden Kidwell Hahn & Crapo, PLLC
1000 Riverwalk Drive Ste 200
P.O. Box 50130
Idaho Falls, ID 83405-0130

RE: Mud Lake Water Users Inc. Pump Diversion Near Rays Lake

Dear Rob:

Thank you for your letter dated May 29, 2007, which explains Mud Lake Water Users Inc.'s (MLWU) position regarding MLWU's pump diversion near Rays Lake. I have had the opportunity to discuss your letter with the Idaho Department of Water Resources (Department) and examine further the issues involving the pump. From the Department's standpoint there are two issues. The first issue is whether MLWU must file for a change in point of diversion before using the pump to divert Camas Creek water over MLWU's headgate in Camas Creek. The second issue is whether MLWU is entitled to recover water that has leaked through the headgate on Camas Creek. In this letter, I review the history of the system as the Department currently understands it. This information is taken from my conversations with counsel for MLWU and the Department's conversations with representatives with MLWU. I then examine each of these issues in turn.

HISTORY

MLWU holds a number of decreed surface water rights for irrigation from Mud Lake. *See e.g.* Water Right Nos. 31-6, 31-34, and 31-35. MLWU also holds a number of water rights to pump ground water into Mud Lake to meet its irrigation needs. *See e.g.* Water Right Nos. 31-336B and 31-337B. 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 at issue 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.

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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 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. See Ltr from Robert L. Harris to Garrick L. Baxter, *Mud Lake Water Users, Inc.-Pump Diversion Near Ray's Lake and SRBA Claim No. 31-11951 2* (May 29, 2007).

Second, MLWU claims that the pump also recovers water that has leaked through the headgate. See Ltr from Robert L. Harris at 2. 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.

ANALYSIS

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.

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 Camas Creek water 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).

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 its surface water rights from Mud Lake up to the pump above 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. Although MLWU's original installation of the headgate is itself appears legally questionable¹, once MLWU began pumping water out of Camas Creek and over the headgate in the 1990s, they were required by Idaho Code §§

¹ MLWU's original installation of the headgate effectively cut off the flow of water filling at least one senior surface water right from Mud Lake for part of the year. See Water Right No. 31-5 (Level Canal Co. Inc.). Normally, an appropriator is not entitled to obstruct a stream to the injury of others. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Idaho App. 1988). However, no down stream senior water right holders have complained to the Department regarding the structure.

42-108 and 42-222 to apply to the Department for a change in point of diversion. 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 if it wishes to continue to use the pump to divert Camas Creek water over the headgate.

In the letter from Robert L. Harris dated May 29, 2007, MLWU seems to suggest that because it is simply diverting water over a short distance to get around its headgate, the pump isn't a true point of diversion. While it is a relatively short distance that MLWU diverts 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 by MLWU is not a distinction recognized by the statute. The pump is diverting water that is then injected back to Camas Creek, then rediverted from Mud Lake and put to beneficial use by MLWU. This practice of diversion, injection, and rediversion is a common practice of Idaho irrigators and recognized in many water rights. *See e.g.* Water Right No. 31-11430.

Moreover, 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 effectively 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.

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. MLWU, through its counsel, has suggested that they are entitled to recover the seepage water from Camas Creek pursuant to Idaho Code § 42-105. Ltr from Robert L. Harris at 2. Idaho Code § 42-105 provides, in relevant part:

The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed, but in reclaiming the water so mingled, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage.

As discussed above, Camas creek is currently dry. Thus, Idaho Code § 42-105 cannot apply as the ground water diverted at the Bybee well field as is not mingled with water in the "natural waterway". MLWU's must look to other sources of law for authority to recover the groundwater that seeps through the headgate. My review of Idaho case law suggests there is such authority.

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 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 Court in *Sebern* explained that possession is not limited to actual possession:

[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 presented here, 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 and is clearly identifiable, MLWU should legally be able to recover the water by pumping the water over the headgate.

Even if MLWU is entitled to recover ground water that has leaked through the headgate, the Department believes that it is still necessary for the pump to be added as a point of re-diversion to MLWU's ground water rights from the Bybee Well Field because the pump is located in a natural channel. Again, the Department is vested with authority

to oversee water distribution in Idaho. It is important that pumps in natural channels be recorded so that the Department can properly regulate water use.

Finally, the Department realizes that at some point in the future, Camas Creek might not dry up before it reaches the headgate and that the ground water that leaks through the headgate and Camas Creek water may intermingle. If MLWU adds the pump as a point of diversion for its surface water rights and adds the pump as a point of re-diversion to its ground water rights, the Department sees no reason why the pump cannot be operated as to allow MLWU to recover the ground water and divert surface water over the headgate at the same time.

CONCLUSION

MLWU must apply for a change in point of diversion pursuant to Idaho Code §§ 42-108 and 42-222 if it wishes to divert Camas Creek water through its pump. MLWU is entitled to recover water that has leaked through the headgate so long as it adds the pump as a point of re-diversion to its ground water rights.

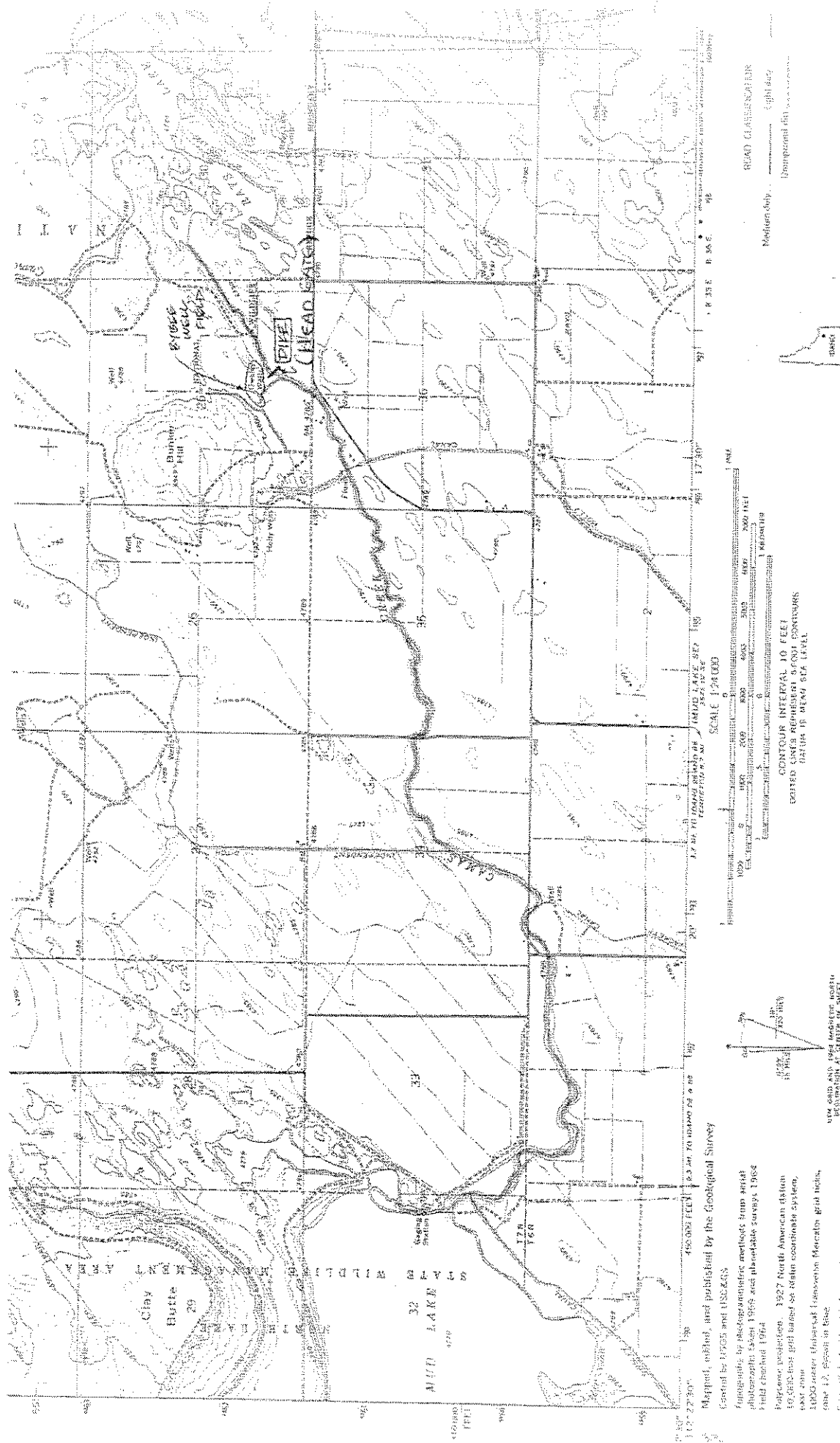
If you have any questions or concerns, please contact me at (208) 287-4811.

Sincerely,



Garrick Baxter
Deputy Attorney General
Idaho Department of Water Resources

cc: Tim Luke, Section Manager, Water Distribution Section, IDWR
Lyle Swank, Regional Manager, Eastern Regional Office, IDWR
Ernie Carlsen, Supervisor, Eastern Regional Office, IDWR
Carter Fritschle, Section Manager, Technical Support Section, IDWR



THIS MAP COMPLIES WITH NATIONAL MAP ACCURACY STANDARDS
FOR SALE BY U. S. GEOLOGICAL SURVEY, DRYDEN, COLORADO 80725, OR WASHINGTON, D. C. 20042
A FURTHER REACHING LEGENDARY MAPS AND SYMBOLS IS AVAILABLE ON REQUEST

WILLIAM J. BISHOP

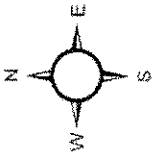
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Figure 1. The effect of the concentration of the H_2O_2 solution on the amount of the released H_2O_2 from the H_2O_2 -loaded hydrogel. The amount of the released H_2O_2 was measured by the amount of the released H_2O_2 from the H_2O_2 -loaded hydrogel. The amount of the released H_2O_2 was measured by the amount of the released H_2O_2 from the H_2O_2 -loaded hydrogel.

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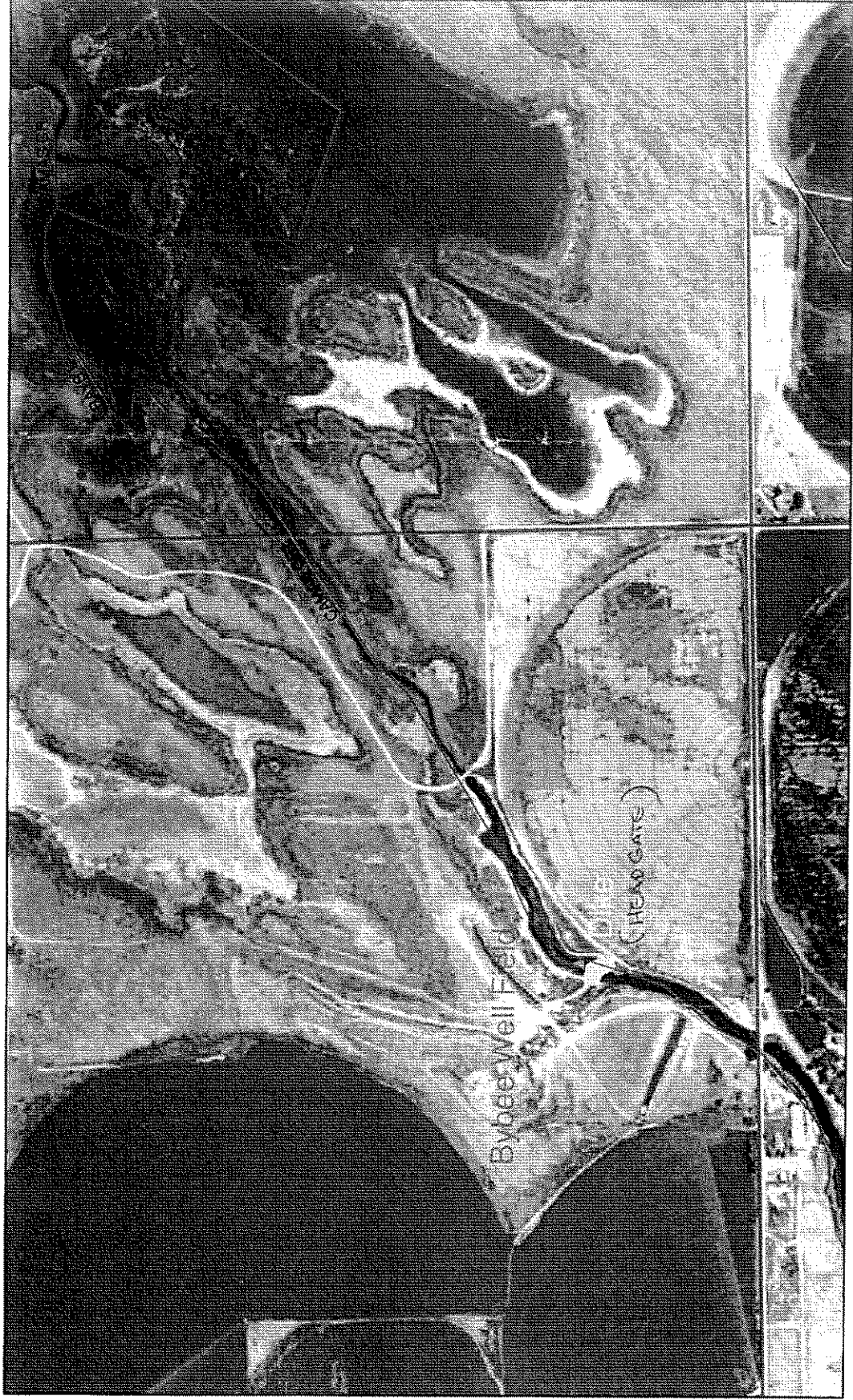
MUD LAKE WATER USERS

Prepared by:
Robert L. Harris
February 5, 2007
2006 NAIP Aerial Photo

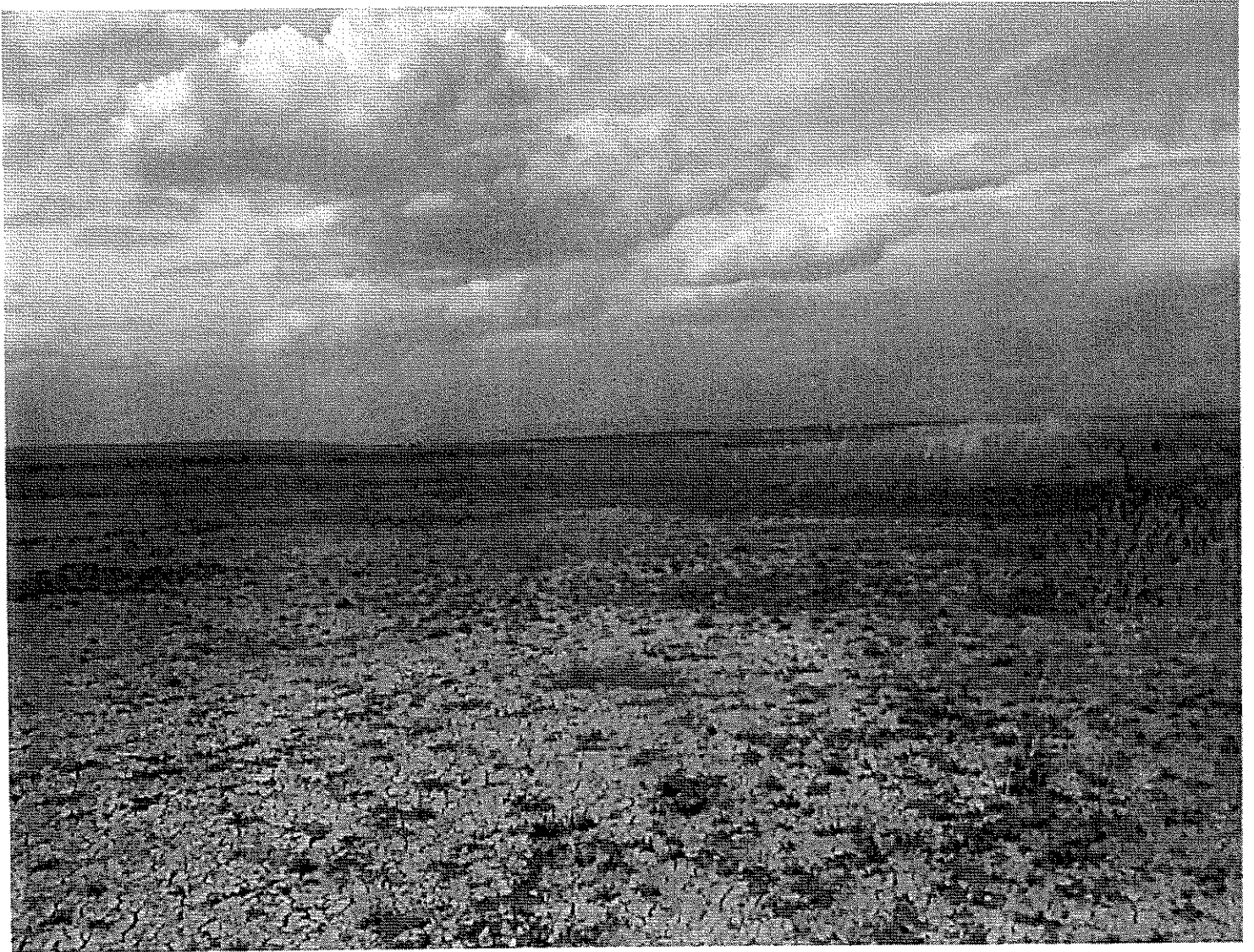


Legend

Dike Lakes Rivers Major Rivers PLS-Section



MAP 2



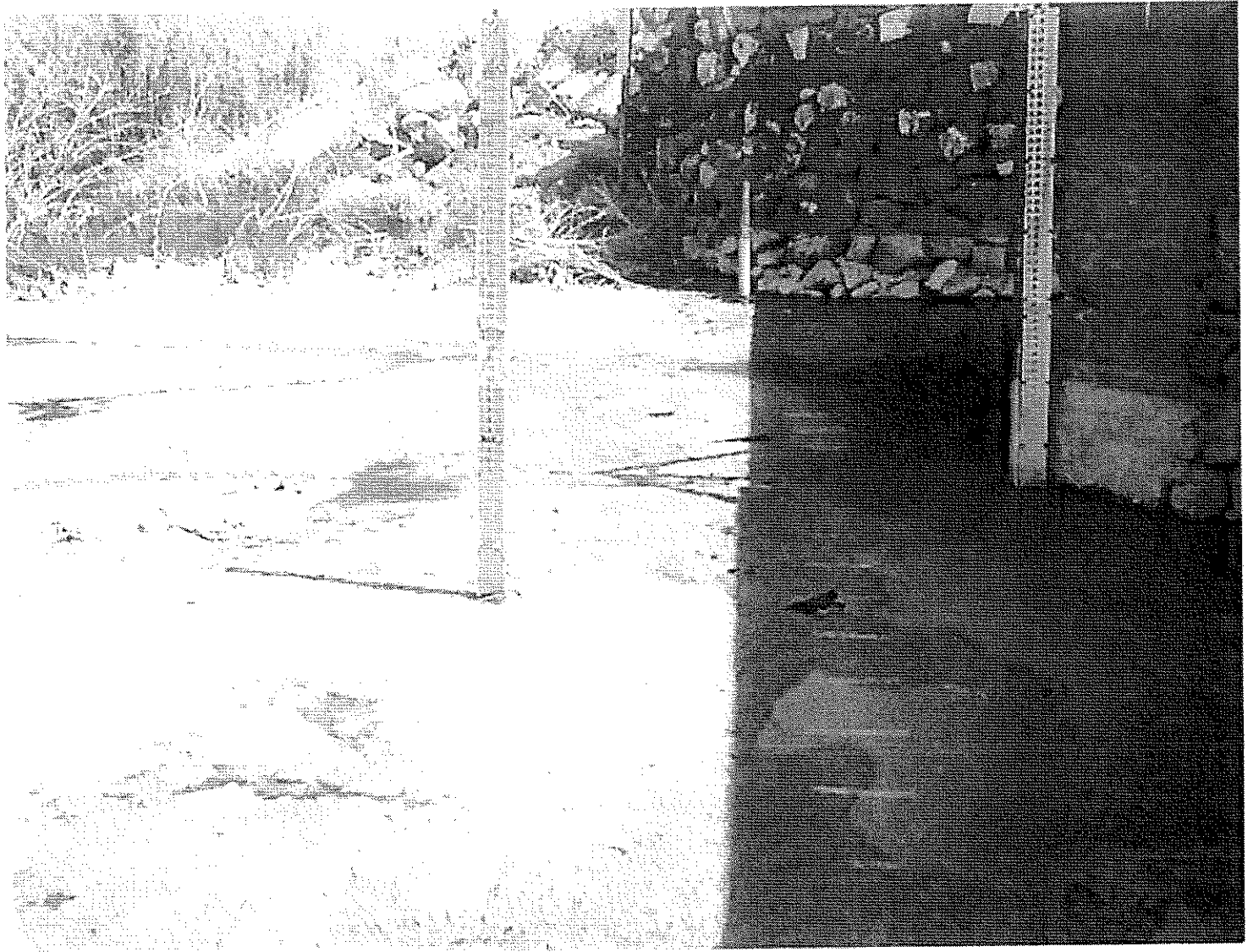
PICTURES TAKEN BY GENE HANSEN
ON 6/4/2007

MLWU PICTURE #1
RAYS LAKE



MLWU PICTURE #2

1 1/2 mile upstream
From HEADGATE



MLWV Picture 43
320 FT Upstream
From Headgate



MLWU Picture #4
WATER FLOWING
FROM HENOGATE



MLWD PICTURE #5
WATER FLOWING
FROM HEADGATE