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May 29, 2007

Garrick Baxter
Deputy Attorney General
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

RE: Mud Lake Water Users, Inc. – Pump Diversion Near Ray's Lake and SRBA
Claim No. 31-11951

Dear Garrick:

Thank you for your letter dated May 15, 2007, which sets forth the Department's position as to Mud Lake Water Users' pump diversion near Ray's Lake. As we discussed on the phone, because the pump has only been in place for approximately 12 years, it was unnecessary to pursue our SRBA Claim because we could not meet the time frames for an accomplished transfer. As we discussed, we were simply following Mr. Tim Luke's suggestion that the matter could be resolved with the filing of an SRBA Claim. At the time the SRBA Claim was filed, it was our position that a water right was not needed for the pump. After reviewing your letter, it remains our position that a water right is not necessary for use of the pump near Ray's Lake. Our reasons for this conclusion are set forth below.

As an initial matter, we appreciate your outline of facts contained in your letter, which we mostly agree with. The only fact which we may dispute is whether or not Mud Lake Water Users holds any water rights with Ray's Lake or Camas Creek listed as sources for those rights. Mud Lake Water Users has merged with other water user organizations in that area, and it is possible that some of their rights may include Camas Creek as a listed point of diversion. In any event, even assuming that Mud Lake Water Users does not possess any water rights which have Ray's Lake or Camas Creek listed as sources for their water rights, it is our position that a water right is not needed for two major reasons.

First, the pump does not divert water for application of any beneficial use. The pump is merely used to move water that has become stranded behind the dike, over the dike, and into the Camas Creek channel. As we interpret Idaho law, Idaho Code § 42-105 allows natural channels to be used essentially as canals in order to deliver water to water right holders. In this particular instance, the water that makes its way down to the dike is water that would eventually make its way into Mud Lake, where Mud Lake Water Users would thereafter divert for irrigation. When the pump is operated, water is not diverted from the pump to any shareholders' lands or water delivery facilities. It is simply pumped over the dike and into the creek channel. Because Camas Creek is tributary to Mud Lake, we do not see why the Department has taken the position that it needs Camas Creek on Mud Lake Water Users' rights to allow for this historic practice. If Mud Lake Water Users were to issue a delivery call as to its water rights in Mud Lake, such a delivery call would necessarily involve all of the tributary sources to Mud Lake, of which Camas Creek is a part. It is all part of the same watershed.

In addition, there are no downstream water right holders that have objected to Mud Lake Water Users' practice of pumping water over the dike. Any water right holders in Ray's Lake would not have standing to object to this practice simply because the water, which makes its way to the dike, has passed Ray's Lake and cannot be diverted by any water right holders from Ray's Lake. Thus, in our view, there are no water right holders injured by this practice.

The second reason why we believe a water right is not necessary for Mud Lake Water Users' practice of using the pump is that closing the headgates on the dike does not divide the water source as you have alleged in your letter. In your letter, you state that "once the headgates near the Bybee well fill close, the water system is divided and the water on the Ray's Lake becomes a separate source from Mud Lake." We are not aware of any statute, or other rule or policy from the Department supporting this claim. If such a policy exists, we would request that you provide this written policy to us for our review. It appears to us that a water system does not simply become divided because of an obstruction in a stream channel.

Earlier in this letter we discussed Idaho Code § 42-105, which allows water right holders to commingle water diverted pursuant to their water rights with natural water in order to transport that water to another location. Mud Lake Water Users has elected to do this with their pumps. The pumps are turned on, and divert water into the Camas Creek channel through which the ground water is delivered to Mud Lake and subsequently used by Mud Lake Water Users. If we suppose that instead of pumping into the Camas Creek channel, that Mud Lake Water Users installed a pipeline from the pumps all the way down to Mud Lake, thereby eliminating the need for a dike in the Camas Creek channel, we presume the Department's position would be that we would need a water right for use of the pipeline. Thus, we believe that your position in this sense exalts form over substance.

While it is our position that a water right is not needed for use of the pump, we would nevertheless be amenable to filing a water right application permit as long as it was prepared by the Department. For the reasons identified above, and others, it does not appear to us that any listed beneficial use could be listed for this particular water right application. Thus, if the Department would prepare such an application, and provide a draft for our review, we would thereafter be happy to file the water right application. However, because of the strange nature of any proposed water right in this instance, we are not inclined to try to read your mind as to what the water right application must contain. Rather than go back and forth through various forms of the application, we believe it would streamline the process if such an application was prepared by you and reviewed by us prior to its submittal.

We would ask that you reconsider your position that a water right is needed by Mud Lake Water Users. If not, we request that you prepare a water right permit application for our review, and we will submit it to the Department. Please let us know if the Department will be willing to prepare such an application, and the expected time frame within which we may receive a draft of the application.

If you have any questions or concerns regarding the foregoing, please let us know.

Sincerely,

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.