

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 73951 IN THE	)	AMENDED PRELIMINARY
NAME OF MUD LAKE WATER USERS	)	ORDER DENYING
INC.	)	APPLICATION FOR TRANSFER
_____	)	

**SUMMARY OF PROCEEDINGS**

On July 24, 2007, Mud Lake Water Users Inc. ("MLWU") filed with the Department of Water Resources ("Department") application for transfer no. 73951 to add a point of diversion to water rights 31-65, 31-329 and 31-331.

Notice of the application was published on January 31 and February 7, 2008, in the Times-News in Twin Falls, the Idaho Statesman in Boise, the Lewiston Tribune in Lewiston, and the Post Register in Idaho Falls. Notice of the application was also published on January 30 and February 6, 2008 in the Jefferson Star in Rigby. On February 19, 2008, protests to the application were timely received from the United States Fish and Wildlife Service ("USFWS"), Lyle R. Shupe ("Shupe"), Perry Woodard ("Woodard"), and Sidney G. Ashcraft ("Ashcraft").

On February 20, 2008, a Recommendation of Watermaster was received from Gregory Shenton, ("Shenton") Watermaster of Water District 31, indicating he did not oppose approval of the application because the pump is the last point of diversion on Camas Creek and would not cause injury to the existing water rights.

A prehearing conference was held on June 5, 2008, at the Department's Eastern Region, 900 N Skyline Dr. in Idaho Falls, Idaho. All parties were present except for Sid Ashcraft who was inadvertently not notified of the prehearing.

On October 24, 2008, Robert L. Harris, Attorney at Law, on behalf of MLWU, filed a Petition for Declaratory Ruling. The motion related to whether or not MLWU is required to file an application for transfer to add a point of diversion to its water rights in order to utilize a pump which recovers water from leaking gates that pass water through MLWU's dike ("dike") and which pumps stranded water from Camas Creek on the upstream side of the dike that would proceed downstream if the dike were not present.

Responding to the Petition for Declaratory Ruling, on January 7, 2009, the Department issued an Order Requiring Mud Lake Water Users Association to File an Application for Transfer to Add a Point of Diversion. The Interlocutory Order held 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 dike can be added as a point of diversion to the water rights of MLWU and operated for the purpose of lifting leaked ground water and

natural flow surface water from the upstream side of the dike and discharging it into the backwaters of Mud Lake.

On January 27, 2009, a hearing was held at the Department's Eastern Region Office. Keith Shulberg, Shawn Grover, Peter Fisher, Dallas Furness were present on behalf of MLWU and were represented by Robert L. Harris, Attorney at Law. Woodard and Shupe were present and appeared pro se. The protestant Sid Ashcraft did not appear. The following witnesses testified at the hearing:

- Keith Shulberg ("Shulberg"), Director for MLWU
- Shenton, watermaster for Water District 31
- Ron Carlson ("Carlson"), Professional Engineer and Land Surveyor and retired Eastern Region Manager for the Department
- Woodard, protestant
- Shupe, protestant

At the hearing, the hearing officer admitted the following items into evidence.

Exhibit No.	Applicant's Exhibit
1	Map of Dike
2	Map of Dike & Mud Lake
3	Map of protestant's water rights
4	List of water rights for Lyle Shupe
5	List of water rights for Perry Woodard
6	Proof report of water right 31-262
7	Proof report of water right 31-267
8	Camas slough elevations

On August 27, 2009, a Notice of Proposed Default Order was mailed to Sid Ashcraft for not appearing at the date and time set for hearing in this matter. Based upon his failure to file a written petition requesting the default order not be entered, Sid Ashcraft was dismissed as a party to the contested case on September 3, 2009.

On September 18, 2009, IDWR issued a Preliminary Order approving in part and denying in part transfer no. 73951 with conditions.

On October 2, 2009, MLWU timely petitioned the hearing officer to reconsider the Preliminary Order. On October 13, 2009, the hearing officer granted the Petition for Reconsideration stating that "the merits of the Petition for Reconsideration will be addressed by the hearing officer by separate order that will be issued within a short period of time." On October 28, 2009, MLWU submitted a memorandum describing in more detail the issues MLWU wanted the hearing officer to address.

## ANALYSIS OF ISSUES RAISED

The following is a recitation of the points raised by MLWU in its Petition for Reconsideration followed by the hearing officers responses.

1. *Nothing in the 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.*

The hearing officer concurs that future operation of the pump must conform to the agreement between MLWU and USFWS establishing the minimum pumping level of 13.4 feet.

2. *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.*

In 1994, by not requiring that an application for transfer be filed was tantamount to a verbal approval for installation of the pump which may have been acceptable at the time given the situation and the informality that was deemed appropriate. Since then, the administration of water rights in Eastern Idaho, both groundwater and surface water, is under greater public scrutiny and requires a higher level of transparency. Title 67, Chapter 52 of the Idaho Code 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. As explained in the Interlocutory Order, dated January 8, 2009, "decisions that bind the Department are issued in writing as either recommended, preliminary, or final orders."

3. *To the extent the transfer was necessary, 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.*

A re-evaluation of the actions by Owlsey Canal Company in the 1960s and the subsequent affect on storage rights in Mud Lake merits amending the Preliminary Order to clarify present obligations of MLWU and to provide guidance for the proper administration of water pumped over the dike.

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

Ground water diverted under rights 31-329 and 31-331 that leaks through the head gates to the upstream side of the dike, when the staff gage is at 13.4 feet or higher, mixes with the stranded surface water before it can be measured. The amount of water leaking through the head gate would vary depending on the difference in hydraulic head between the upstream and the downstream side of the dike and the efficiency of the screw gates in preventing leakage. Without the ability to measure the leakage prior to the ground water

mingling with the stranded surface water, the watermaster can not accurately track the quantity of ground water leaking through the head gates.

## **CASE SUMMARY**

MLWU holds a number of decreed surface water rights for irrigation storage in Mud Lake and a number of water rights to pump ground water into Mud Lake. One place that MLWU pumps ground water is at the Bybee well field ("well field") located adjacent to Camas Creek between Rays Lake and Mud Lake. Ground water pumped at the well field is diverted into a small side channel and then injected into Camas Creek. The topography of the area around the well field is very flat, with only a slight grade towards Mud Lake. Consequently, injecting ground water pumped from the well field into Camas Creek changes the hydraulic head of Camas Creek near the well field, causing ground water to flow to both Mud Lake and back towards Rays Lake. To prevent the ground water from the well field from flowing into Rays Lake, over thirty seven years ago, a dike with six large culverts was constructed across the Camas Creek channel. Each culvert was equipped with a gate for the purpose of controlling the direction of flow. During spring runoff and the early part of the irrigation season when the flows in Camas Creek are the highest, water flows through the culverts and into Mud Lake. When the flows decline and MLWU starts pumping ground water at the well field, the gates at the dike are closed. Closing the gates directs the flow of ground water towards Mud Lake but also stops the flow of Camas Creek through the dike. About fourteen to sixteen years ago, MLWU installed a pump in the Camas Creek channel on the Rays Lake side of the dike and started pumping water over the dike into the backwaters of Mud Lake. At the time, Ron Carlson, Eastern Region Manager for the Department, gave his consent to the installation of the pump and did not require the filing of an application for transfer. But in 2006, after receiving an enquiry from a Rays Lake water right holder questioning the legality of the pump, a letter dated 18 July 2006 from Tim Luke, Water Distribution Manager, to Shenton, directed Shenton to cease further diversion by the pump at the dike until MLWU had taken the necessary steps to have the pump recorded as a point of diversion. In July 2007, MLWU filed application for transfer no. 73951, to add the pump as point of diversion on three of its water rights. The application was subsequently protested.

## **JURISDICTION AND AUTHORITIES**

Idaho Code § 42-101 states, in pertinent part:

All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same there from for any beneficial purpose....

Idaho Code § 42-108 states, in pertinent part:

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 § 42-222 states, in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates....

The applicant bears the burden of proof for all of the factors listed in Idaho Code §42-222.

### **ISSUES PRESENTED**

USFWS stated the proposed change is not in the local public interest because it may affect benefits to the public provided by USFWS. In the protest the USFWS stated the protest could be resolved by a condition establishing a minimum pumping elevation at the proposed point of diversion at approximately 4783.85 feet above mean sea level ("AMSL"), which corresponds to 13.9 feet on the new Rays Lake Bridge staff gage.

Woodard contends pumping water over the dike is an attempt to take Rays Lake water. It is his option MLWU should fix the leaking gates at the dike rather than add a point of diversion.

Shupe believes pumping water over the dike will cause a drop in Rays Lake and Sandhole Lake impacting the availability of stockwater from the two lakes and decreasing infiltration in the aquifer, lowering the water table and increasing costs of pumping water from the aquifer.

### **FINDINGS OF FACT**

1. Department records show six water users, MLWU being one, with a combined total of sixty two water rights for irrigation storage with Mud Lake as the source of water and priority dates ranging from October 3, 1910, to December 31, 1960.

2. The protestant, Woodard, holds three decreed ground water rights and two decreed surface water rights from Rays Lake. The Rays Lake water rights are identified in the Department's records as 31-262 with a priority of January 27, 1914 and 31-267 with a priority of August 10, 1917. Combined these two rights authorize the diversion of 1.7 cfs for the irrigation of 76 acres and are supplemental to the two decreed ground water rights.



3. The protestant, Shupe, holds decreed right 31-2187 for stock water from Rays Lake and Sandhole Lake with a priority of January 26, 1916. A condition of this right states the quantity of water diverted shall not exceed 13,000 gallons per day.

4. Documents in the Department's records reveal Owsley Canal Company, Holley Canal Company and Jackett Canal Company reorganized in March 1998 to form MLWU. As a result of the reorganization, the water rights for MLWU consist of twenty six ground water rights, one wastewater right and forty four surface water rights for irrigation storage in Mud Lake. One of MLWU's surface water rights is 31-65 with a priority of October 3, 1910 for irrigation storage and irrigation from storage of 738 acre feet ("af") in Mud Lake.

5. Mud Lake is an on-stream storage reservoir at the downstream end of the Camas Creek drainage. Camas Creek naturally flows into Mud Lake and supplies water for storage rights with Mud Lake as the source. Camas Creek is also the primary source of water for Rays Lake and Sandhole Lake. Both lakes are located upstream from Mud Lake but also at the lower end of the Camas Creek drainage on the Camas National Wildlife Refuge.

6. It appears from the U.S. Geologic Survey, Hamer Quadrangle map that water must be diverted from Camas Creek into Sandhole Lake. The map also shows the outlet of Sandhole Lake is at an elevation of at least 4788 feet AMSL and drains into Rays Lake.

7. Neither Rays Lake nor Sandhole Lake have a designated minimum lake level as provided by Idaho Code § 42-1503.

8. MLWU's Snake River Basin Adjudication ("SRBA") Claim to Water Right No. 31-327 is not associated with this transfer application, but documents submitted with this SRBA claim reveal in the early 1930's, numerous open discharge wells were drilled to augment the natural flow being stored in Mud Lake. Owsley Canal Company drilled several of these wells in the well field and perfected water rights for these wells authorizing the combined diversion of 200 cubic feet per second ("cfs"). The well water is collected in a channel that discharges into Camas Creek in the SW1/4SE1/4, Section 25, Township 07 North, Range 35 East, BM.

9. Prior to 1960, the natural flow in Camas Creek, not diverted by upstream water users, would flow unobstructed into Mud Lake and was accounted for by the watermaster as Mud Lake water used to fill storage rights in Mud Lake.

10. Due to flat topography of the area, if the natural flow in Camas Creek was high or the wells in the well field were pumping, the water level in Mud Lake would rise, backing up in the Camas Creek channel and eventually begin filling Rays Lake.

11. Shulberg testified that during the 1960's a dike was constructed across the channel of Camas Creek in NW1/4SW1/4SE1/4, Section 25, Township 7 North, Range 35 East, BM as illustrated in applicant's exhibit #1.

12. The dike is just upstream from where the well field channel empties into Camas Creek but is downstream from all the decreed points of diversion for irrigation water rights diverted from Camas Creek as well as the decreed points of diversion for water rights of Woodard and Shupe out of Rays Lake and Sandhole Lake.

13. Shulberg testified there are six sixty-inch diameter culverts extending through the dike. Five of the culverts were placed at the same lower elevation with the sixth culvert at a higher elevation. In the 1970s, gates were installed on the culverts. Presently each culvert is equipped with a Waterman screw gate.

14. With installation of the gates, the practice was to close the gates either after Camas Creek no longer contributed inflow into Mud Lake because the hydraulic head was equal on both sides of the dike or when the flow in Camas Creek had to be supplemented with ground water from the well field to meet water user's demands.

15. Closing the gates provided control for directing pumped groundwater from the well field into Mud Lake for the benefit of Owsley Canal Company. However, this action also caused the dike to become a barrier blocking Camas Creek and stranding natural flow behind the dike, potentially causing injury to the storage rights remaining unfilled.

16. Shulberg testified a pump was installed in 1996. The pump lifts water stranded in the Camas Creek channel on the upstream side of the dike and discharges it into the back waters of Mud Lake on the downstream side; adding on average 400 to 500 af of water to storage in Mud Lake.

17. Carlson testified he did not require the filing of an application for transfer to add the pump as a point of diversion because in his opinion and the opinion of the Water Management Division Administrator for the Department, the pump was viewed as an upgrade to the delivery system for the recovery of water the water users were entitled to in order to fill their storage rights..

18. Shenton testified that from 1997 to 2007, when the demand for irrigation water diverted from Mud Lake exceeded the inflow from Camas Creek, he would close the gates on the dike, turn on the wells in the well field and turn on the pump to lift water over the dike.

19. By measuring the water in Camas Creek downstream from the dike with the pump on and the pump off, Shenton testified he determined the pump diverted between 11 to 12 cfs.

20. Shenton testified, when the water level on the Mud Lake side (downstream) of the dike is higher than on the Rays Lake side (upstream), water leaks through the closed gates into Camas Creek on the upstream side of the dike.

21. Often, when the wells in the well field are pumping, the culverts on the upstream side of the dike are submerged or partially submerged and any ground water leaking through the gates mingles with the stranded surface water inside the culverts. Lacking a measuring device or control structure to track the leaking ground water, it becomes inseparable from the stranded surface water.

22. USFWS protested the application for transfer on the basis it would injure water rights held by the USFWS and the proposed change was not in the local public interest.

23. MLWU and USFWS resolved the protest of the USFWS by agreeing to the following.

- The use of the dike pump by MLWU may only draw down the water level behind the dike to a level measured at 13.4 feet on the New Rays Lake staff gage.
- IDWR shall add the above condition to any water right listing the dike pump as a point of diversion.

24. Shenton testified the elevation readings on the new staff gage, installed on the upstream side of the dike, correspond to the elevation readings on the staff gage located at the Rays Lake Bridge in the southwest corner of the Camas Wildlife Refuge. The gage at the dike was installed to facilitate operation of the pump in compliance with the agreement between MLWU and USFWS.

25. Documentation provided by USFWS indicates 13.4 feet on the new Rays Lake staff gage equates to an elevation of 4783.35 feet AMSL.

26. Shenton testified there was three to four feet of water at the Rays Lake Bridge on May 8, 2008, and the water level was at 12.8 feet on the new staff gage. He stated at that level water goes all the way up the Camas Creek channel into Rays Lake. That same day he visited the Woodard pump and measured twenty inches of water above the bottom of the casing.

27. With a water level of 13.4 feet on the new Rays Lake staff gage there would be over two feet of water above the bottom of the casing on the Woodard pump.

28. The administration of surface water rights from Mud Lake and Camas Creek plus the ground water rights at the well field are under the control of the watermaster for Water District 31.

## ANALYSIS

Prior to construction of the dike, the natural flow in Camas Creek below the last diversion for the USFWS flowed unobstructed into Mud Lake to become storage for irrigation and depending on the volume of spring run off the backwaters of Mud Lake could extend up the Camas Creek channel into Rays Lake. Construction of the dike across the Camas Creek channel in the 1960s benefited the Owsley Canal Company by providing better control for directing into Mud Lake the ground water pumped from the well field and discharged into Camas Creek. However, to the detriment of the other water users with storage rights in Mud Lake, the dike also blocked the flow of Camas Creek. With the gates in the dike closed, the flows in Camas Creek became stranded behind the dike stopping any further contribution of the natural flow to fill storage rights, potentially causing injury to storage rights in Mud Lake. In 1996, a pump was installed to lift stranded water over the dike. The installation of the pump, enabled recovery of natural flow which would have contributed to storage in Mud Lake was it not for the dike. The pump does not remove water from the source as normally expected by a pump designated as a point of diversion. In a sense, the pump is re-establishing the pre-dike condition in Camas Creek by creating a connection between the upstream and downstream side of dike and as described by Ron Carlson is an enhancement to the delivery system of nature flow into Mud Lake. However, instead of crediting this water to just 31-65, the water pumped over the dike should augment storage in Mud Lake and be credited to fill the next in time storage right regardless of who holds



the water right. Administering water recovered by the pump in this manner will quiet the potential to continue injuring storage rights in Mud Lake initially caused by the dike. Because one of the predecessors to MLWU was the primary benefactor from construction of the dike, in fairness to the other water users, MLWU should bear the burden of operation and maintenance costs associated with the pump.

As stated above, use of the pump to augment storage in Mud Lake quiets the potential injury to other water rights with irrigation storage in Mud Lake. Moreover with MLWU entering into a stipulation with the USFWS and agreeing to not pump water below an elevation of 4783.35 feet AMSL or 13.4 feet on the staff gage at the dike, water remaining on the upstream side of the dike will be backed up into Rays Lake and available for use under other water rights diverted from Rays Lake. Stockwater rights in Sandhole Lake should not be impacted by operation of the pump because the outlet for Sandhole Lake is some 5 feet higher than 4783.35 feet AMSL. Water flowing from Sandhole Lake is a function of the water level in Sandhole Lake exceeding 4788 feet AMSL as a result of the inflow from water diverted out of Camas Creek upstream from Rays Lake.

To provide for recovery of ground water that has leaked through the screw gate, the application also requests the pump be added as a point of diversion to two of MLWU's ground water rights. However, when the water level on the upstream side of the dike is at or above 13.4 feet on the staff gage the culverts on the upstream side are partially submerged and ground water leaking through the gates mixes with the stranded surface water inside the culvert. The amount of water leaking through the head gate would vary depending on the difference in hydraulic head between the upstream and the downstream side of the dike and the efficiency of the screw gates in preventing leakage. 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 redirection on the ground water rights is not appropriate.

Prior to 2007, the watermaster calculated the capacity of the pump by measuring the flow in the Camas Creek channel below the dike with the pump off and with the pump on. However, with a measuring device at the pump, the watermaster can easily monitor the rate of diversion and volume of water being diverted. With this information, the watermaster can readily track which storage right is getting benefit of the pumped water

The use of water on the lower end of Camas Creek for the purpose of irrigation storage in Mud Lake is a long accepted practice dating back to 1910. Continuing this practice is consistent with the conservation of water resources within the state of Idaho.

There is no conflict with the local public interest, because the eventual use of the natural flow water diverted by the pump will continue to be irrigation in an area that is primarily agricultural. To protect the public interest values asserted by the USFWS, use of the pump is guided by the stipulation between MLWU and USFWS which specifies the pump will be turned off when the water level on the upstream side of the dike is at or below an elevation of 4783.35 feet AMSL, or 13.4 feet on the recently installed staff gage at the dike.

Use of the pump to divert nature flow over the dike will not adversely affect the local economy because the water is not being transferred outside of the local area or watershed where the source originates.

## **CONCLUSIONS OF LAW**

1. Without a method to determine or measure the volume of ground water leaking through the gates, the watermaster can not accurately access the total volume of water eligible for rediversion under water rights 31-329 and 31-331 in a manner that will ensure neither right is being enlarged.

2. The pump in the NW1/4SW1/4SE1/4, Section 25, Township 07 North, Range 35 East, BM. is downstream from all the points of diversion where natural flow from Camas Creek is diverted so lifting stranded natural flow over the dike can not injure other natural flow rights on Camas Creek.

3. Limiting operation of the pump to those periods when the water level on the upstream side of the dike is at 13.4 feet or higher on the new Rays Lake staff gage leaves water in Rays Lake for diversion under other water rights with Rays Lake as the source.

4. With the installation of a measuring device, the watermaster can monitor the volume of water diverted from Camas Creek and credit it to the next in time irrigation storage water right.

5. Continuing the historical practice of using water at the lower end of Camas Creek for irrigation storage in Mud Lake is consistent with the conservation of water resources in the state of Idaho.

6. Using the pump to augment irrigation storage in Mud Lake does not conflict with local public interest as defined in section 42-202B, Idaho Code because the use of water continues to be irrigation in a primarily agricultural community. Public interest values asserted by USFWS were addressed in a stipulation between USFWS and MLWU.

7. The change requested by the transfer application for water right 31-65 will severely limit the recovery of natural flow stranded behind the dike and prevent the watermaster from administering the delivery of natural flow into Mud Lake in a manner that quiets potential injury to the natural flow irrigation storage water rights in Mud Lake.

8. The pump is simply an enhancement to the delivery system for augmenting irrigation storage in Mud Lake with natural flow from Camas Creek. It should not be identified as a point of diversion on the water rights for irrigation storage in Mud Lake.

9. Application for transfer no. 73951 should be denied with conditions that provide guidance for the watermaster on operation of the pump in the NW1/4SW1/4SE1/4, Section 25, Township 07 North, Range 35 East, BM.

## ORDER

IT IS HEREBY ORDERED that the addition of a point of diversion to water rights 31-65, 31-329 and 31-331 as requested by application for transfer no. 73951 is **Denied**.

IT IS FURTHER HEREBY ORDERED that operation and maintenance of the pump is subject to the conditions listed below.

1. The operation of the pump in the NW1/4SW1/4SE1/4, Section 25, Township 07 North, Range 35 East, BM will be regulated by a watermaster with responsibility for the distribution of water among appropriators within State Water District No. 31, Mud Lake and tributaries.

2. MLWU shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable of the pump in the NW1/4SW1/4SE1/4, Section 25, Township 07 North, Range 35 East, BM.

3. Operation of the pump 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 feet (4783.35 feet AMSL) 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.

4. Any water lifted over the dike by the pump in the NW1/4SW1/4SE1/4, Section 25, Township 7 North, Range 35 East, BM will be credited to the irrigation storage water right that is the next in time to be filled.

5. Payment of all costs associated with operation and maintenance of the pump in the NW1/4SW1/4SE1/4, Section 25, Township 7 North, Range 35 East, BM shall be the responsibility of MLWU.

IT IS FURTHER HEREBY ORDERED that the above conditions pertaining to the maintenance and operation of the pump are being imposed separate from the transfer and the parties have a right to request a hearing in order to present additional testimony and evidence concerning maintenance and operation of the pump.

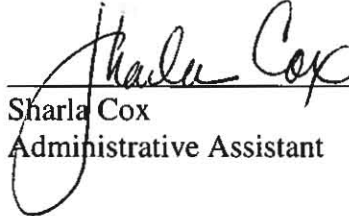
Dated this 22 day of January, 2010.



**Ernest Carlsen**  
Hearing Officer

**CERTIFICATE OF MAILING**

I hereby certify that on the 22<sup>ND</sup> day of January 2010, I mailed a true and correct copy, postage prepaid, of the foregoing AMENDED PRELIMINARY ORDER DENYING APPLICATION FOR TRANSFER to the person(s) listed below:

  
Sharla Cox  
Administrative Assistant

**US CERTIFIED MAIL**

**RE: TRANSFER NO. 73951**

**US FISH & WILDLIFE SERVICE  
BARBARA SCOTT-BRIER  
911 NE 11<sup>TH</sup> AVE, 2W-EN  
PORTLAND OR 97232**

**WATER DISTRICT 31  
PO BOX 33  
DUBOIS ID 83423-0033**

**HOLDEN KIDWELL HAHN & CRAPO  
ROBERT L HARRIS  
PO BOX 50130  
IDAHO FALLS ID 83405-0130**

**LYLE R SHUPE  
2296 E 1950 N  
HAMER ID 83425**

**PERRY WOODARD  
BOX 85  
HAMER ID 83425**

**SID ASHCRAFT  
2504 N LENNOX  
MESA AZ 85207**

## **Statement of Available Procedures and Applicable Time Limits**

### **RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES**

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration within fourteen (14) days after service as further described below:**

#### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service.

**Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

#### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

#### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.



## **CERTIFICATE OF SERVICE**

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

## **FINAL ORDER**

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty one (21) days.

## **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.