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Attorneys for IDWR

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase No. 34-07088
	)	
	)	IDWR'S REPORT RE:
Case No. 39576	)	REMARKS
	)	
_____	)	

DESCRIPTIVE SUMMARY

A status conference for subcase no. 34-07088 was held on October 5, 1995. At the conference, the Special Master inquired of IDWR whether the remarks under element 10 of the Amended Standard Form 5 were necessary for the administration or definition of the water right.

Pursuant to Idaho Code § 42-1412(4), IDWR provides the following information regarding the basis of its recommendation in the director's report.

BACKGROUND OF WATER RIGHT NO. 34-07088

In 1974, John L. Powers filed an Application for Permit, number 34-07088, with the Idaho Department of Water Resources (IDWR) to develop a spring near the City of Mackay. (Attachment 1).¹

¹ Attachments are incorporated by reference.

The City of Mackay filed a Protest against the application. (Attachment 2). The City claimed that Power's proposed spring would interfere with the nearby City of Mackay Spring from which the City held a water right pursuant to the Woodman v. Millonig Decree. (Attachment 3).

In 1978, IDWR issued its Memorandum Decision and Order. (Attachment 4). It found that a clay barrier separated Power's proposed spring from the city's spring and that development of the Power's spring would not interfere with the city's spring so long as the clay barrier was not breached. Therefore, IDWR approved the application on the condition that "[a]ny development of the spring area must not disturb the clay barrier separating the applicant's spring from the city's spring." Id.

The City filed an Appeal and Petition in the District Court of the Seventh Judicial District, seeking to overturn IDWR's decision. (Attachment 5).

In 1981, the court issued a Memorandum Decision and Judgment Setting Aside Order Allowing Application for Permit. (Attachment 6). In its decision, the court found that the permit needed added safeguards to protect the clay barrier from being breached by Power's proposed use of the spring. Id. As a result, the court directed IDWR to provide a "more precise definition of the works authorized, or a condition be adopted to implement the excavation depth caution" and that "the limitation [be] made a condition of the allowance of the application." Id.

On remand, the parties stipulated to appropriate language

for the conditions, and in 1982, IDWR issued a Memorandum Decision and Order on Remand, granting the permit subject to those conditions. (Attachment 7).

IDWR's order was not appealed. IDWR subsequently issued Powers a license for the spring, subject to the conditions set forth in its 1982 order. (Attachment 8).

DISCUSSION

Idaho Code § 42-1411(2) provides that "[t]he director shall determine the following elements to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law." This includes "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. 42-1411(2)(k). Further, § 42-1412(6) requires that these remarks be included in the decree.²

Pursuant to these statutory directives, the director has determined that the conditions set forth in its recommendation are necessary to define, clarify, and/or administer water right no. 34-07088. This determination is based on the fact that the water right would never have existed but for imposition of the conditions. In 1974, when Powers applied for a permit, the licensing process provided the sole method for acquiring a water right. See I.C. § 42-201. The licensing statute allows the

² Idaho Code section 42-1412(6) provides that "[t]he decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411."

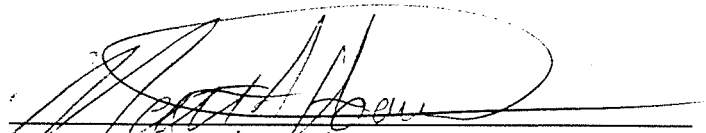
director to grant a permit upon certain conditions. I.C. § 42-203A. In this case, the director granted the permit subject to the conditions stated in its 1982 Memorandum Decision and Order on Remand. Had those conditions not been included in the permit, IDWR would not have granted the application. As a result, no water right would have ever been created. Therefore, in order to recommend this right, the director must necessarily include the conditions as part of the definition of the water right. Without these conditions, the water right simply cannot exist.

Furthermore, the conditions are necessary to the continuing validity of the water right. Under Idaho Code section 42-350, failure to comply with the conditions of the right is cause for the director to issue an order revoking the license. In this instance, the conditions govern the continued use of the water right by preventing damage to the clay barrier separating Power's spring from the city's spring, thus preventing injury to the city's water right.

CONCLUSION

IDWR submits this report to assist the court and the parties. The language in the "remarks" section was a necessary condition to the creation of the right and is a necessary condition to the continued existence of the right, and is therefore necessary to define, clarify, or administer the water right.

Respectfully submitted

A handwritten signature in dark ink, appearing to read "Lynne Krogh/Matt J. Howard", is written over a horizontal line.

Lynne Krogh/Matt J. Howard
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF MAILING

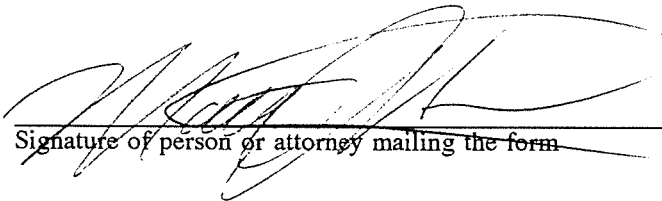
I certify that on November 1, 1995, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P. O. Box 2707
Twin Falls, Idaho 83303-2707

2. Copies to:

John L. Powers
P.O. Box 493
Mackay, ID 83251



Signature of person or attorney mailing the form

Identification No. 34 7088
Application No. _____

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION

APPLICATION FOR PERMIT **APPROVED**
To Appropriate the Public Waters of the State of Idaho
(TYPE OR PRINT IN INK)

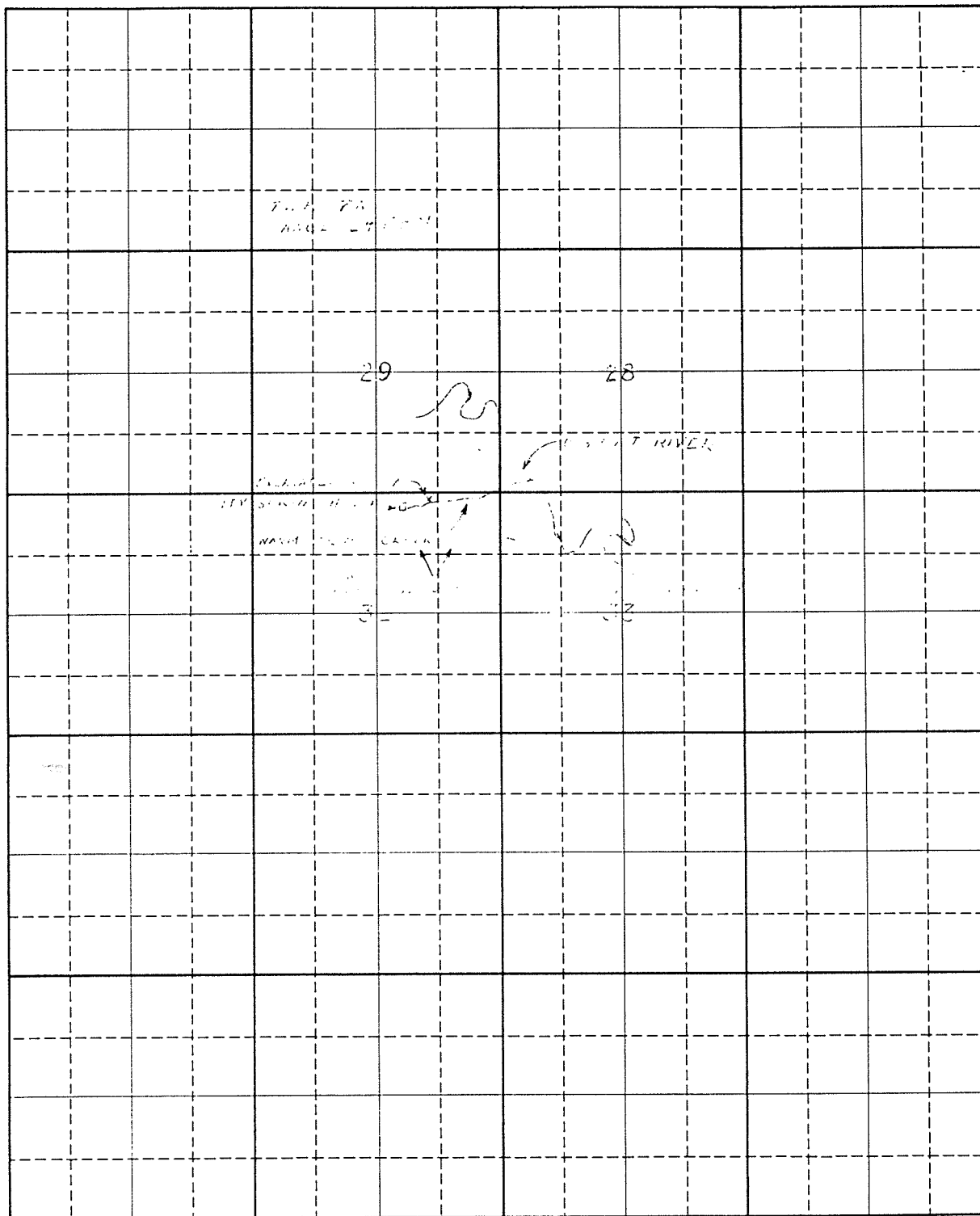
1. Name of applicant JOHN L. POWERS
post office address 211 N. Main, Mackay, Idaho
2. Source of water supply Spring which is a tributary of Warm Springs Creek
3. a. Location of point of diversion is NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 32 Township 7 N.
Range 24 E. B.M. Custer County; additional points of diversion if any: _____

b. If water is not consumed, it will be discharged into Warm Springs Creek at a point in NE $\frac{1}{4}$
of NE $\frac{1}{4}$ of Section 32 Township 7 N. Range 24 E. B.M. _____
4. Water will be used for the following purposes:
Amount 2 for irrigation purpose from April 1 to Oct. 31 (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
5. Total quantity to be appropriated:
a. 2 cubic feet per second and/or
b. _____ acre feet per annum.
6. Proposed diverting works:
a. Description of ditches, flumes, pumps, headgates, etc. A basin will be excavated to collect ground water which will essentially form a spring tributary to Warm Springs Creek. Water thus developed will be pumped through a pipeline to higher ground for sprinkling.

b. Height of storage dam _____ feet, active reservoir capacity _____ acre feet; total reservoir capacity _____ acre feet, materials used in storage dam: _____
Period of year during which storage will occur _____ to _____ inclusive.
(Mo. Day) (Mo. Day)
c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.
7. a. Time required for the completion of the works and application of the water to the proposed beneficial use is 5 years.
b. Estimated construction cost is \$ 5,000.
8. Description of proposed uses:
a. If water is **not** for irrigation:
(1) Give the place of use of water: _____ $\frac{1}{4}$ of _____ $\frac{1}{4}$ of Section _____ Township _____
Range _____ B.M. _____
(2) Amount of power to be generated: _____ hp under _____ feet of head.
(3) List number of each kind of livestock to be watered _____

(4) Name of municipality to be served _____, or number of families to be supplied with domestic water _____.
(5) If water is to be used for other purposes describe: _____

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



Scale: 2 inches equal 1 mile

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

John L. Powers
(Applicant)

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JAN 9 1977

Department of Water Resources
BEFORE THE DIRECTOR
DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO

In the matter of the Application of) APPLICATION NO. 34-7088
JOHN L. POWERS, for appropriation) PROTEST
of water from Warm Springs Creek)

COMES NOW the City of Mackay, Custer County, Idaho, a Municipal Corporation of Idaho, by and through its duly appointed City Attorney and files this Protest to the Application of JOHN L. POWERS for the appropriation of 0.2 cubic feet per second of water from a spring tributary of Warm Springs Creek on the following grounds and for the following reasons:

1. That the proposed use, 0.2 cubic feet per second, or 10 miners inches, will reduce the quantity of water under existing water rights available to the inhabitants of the City of Mackay, Idaho pursuant to that Decree entered July 14, 1952 in the action entitled Woodman et ux vs. Millonig et ux et al, Civil No. 1589, Sixth Judicial District Court of the State of Idaho, in and for the County of Custer, wherein the City of Mackay was decreed the use of all of the waters of the spring known as the Warm Springs Creek which is the water supply for the inhabitants of said City, and which is situated within the real property described in the Notice of Application herein, with the exception of five (5) miners inches.

2. That the City of Mackay, Idaho has recently constructed improvements to the City water system which utilize the entire flow of the Warm Springs Creek, and that the City of Mackay, Idaho and the inhabitants thereof, have, and will continue to have, the need and beneficial use of the entire flow of said Warm Springs Creek Spring.

3. That the Notice of Application for Water Permit filed by JOHN POWERS herein does not specify from which spring the appropriation is sought; that the City of Mackay alleges that the City of Mackay water supply, herein referred to as the Warm Springs Creek and spring, and any other springs developed by JOHN POWERS in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 32, T. 7 N., R. 24 E., B.M., derive from a common source of water and that withdrawal of water from the Warm Springs Creek Spring or from any other springs within said described property will reduce the quantity of water available to the inhabitants of said City; and that presently pending in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Custer, is an action entitled John Powers vs. City of Mackay, et al, Civil no. 2253, wherein, among other issues, the issue of the right of JOHN POWERS, applicant herein and plaintiff therein, to withdraw more than five (5) miners inches from the Warm Springs Creek is in issue, and wherein the Court requested, and was granted, an Examination by the Department of Water Resources to determine, inter alia, the effect of withdrawal of water by JOHN POWERS from Warm Springs Creek upon the City of Mackay water supply, which is the Warm Springs Creek spring.

4. That in addition to the foregoing, the City of Mackay hereby alleges that the City water supply, to-wit: the Warm Springs Creek, is insufficient to supply present and future needs of the City and its inhabitants, if the requested 0.2 cubic feet per second were withdrawn therefrom as requested.

TED C. SPRINGER
Attorney at Law
Post Office Box 409
Challis, Idaho 83226
(208) 879-2312

5. That as alleged in the Answer of the City of Mackay in the pending District Court action Civil no. 2253 referred to above, and realleged here, applicant JOHN POWERS has failed to apply to beneficial use the waters he has previously withdrawn from Warm Springs Creek, and that the City therefore respectfully protests the withdrawal of additional waters from said Creek.

The CITY OF MACKAY further requests, in furtherance of its protest, copies of the plan, and map of the proposed works for the application of the water sought to be appropriated, showing the location, dimensions and specifics of the spring, pump, and pipeline proposed to be used, and the exact location of the lands proposed to be irrigated.

DATED This 8th day of January, 1975.

Respectfully submitted,
FOR THE CITY OF MACKAY, IDAHO


TED C. SPRINGER
Attorney at Law
P.O. Box 409
Challis, Idaho 83226
Telephone: 879-2312

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of January, 1975, I mailed the original and one copy of the foregoing Protest to Keith Higginson, Director, Department of Water Resources, 1515 Lincoln Road, Idaho Falls, Idaho 83401, and a true copy thereof to Keith Higginson, Director, Department of Water Resources, Statehouse, Boise, Idaho 83707, by placing the same, postage prepaid thereon, in the U.S. Mail at Challis, Idaho.


TED C. SPRINGER

34-5
34-7

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF OUSTER.

ARTHUR H. WOODMAN, AND WANDA Y.
WOODMAN, HUSBAND AND WIFE,

PLAINTIFFS,

VS.

DECREE

JAKE MILLONIG AND MRS. JAKE MILLONIG,
HUSBAND AND WIFE; VILLAGE OF MACKAY,
IDAHO, A MUNICIPAL CORPORATION, AND
B. C. JONES, MAYOR OF VILLAGE OF
MACKAY,

DEFENDANTS.

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THE ABOVE-ENTITLED ACTION CAME ON FOR HEARING BEFORE THE ABOVE-ENTITLED COURT, ON JUNE 27, 1952, AT THE COURT HOUSE IN CHALLIS, OUSTER COUNTY, IDAHO, BEFORE THE HONORABLE PRESTON THATCHER, DISTRICT JUDGE, SITTING WITHOUT A JURY, AND THE PLAINTIFFS WERE PRESENT IN OPEN COURT, AND WERE REPRESENTED BY THEIR ATTORNEYS, BLACK, BLACK & OLIVER, AND BISTLINE & BISTLINE, ALL OF POCA TELLO, IDAHO, AND THE DEFENDANTS, MILLONIG, APPEARED IN PERSON AND WITH THEIR ATTORNEY, ROBERT FELTON, OF ARCO, IDAHO, AND THE DEFENDANT, VILLAGE OF MACKAY, IDAHO, A MUNICIPAL CORPORATION, APPEARED, THROUGH AND BY ITS DULY AUTHORIZED REPRESENTATIVES, AND ITS ATTORNEY, ROBERT FELTON, OF ARCO, IDAHO, AND WHEREUPON A PRE-TRIAL CONFERENCE WAS HELD IN OPEN COURT, IN THE PRESENCE OF ALL OF THE PARTIES AND THEIR RESPECTIVE ATTORNEYS, AND BEFORE THE COURT, AND THE ISSUES TO BE PRESENTED TO THE COURT WERE DEFINED BY THE RESPECTIVE PARTIES, AND THEREUPON A STIPULATION WAS ENTERED INTO IN OPEN COURT, AND REDUCED TO WRITING THEREAFTER, AND SIGNED BY ALL OF THE PARTIES, FIXING THE RESPECTIVE RIGHTS OF THE PARTIES AS IS MORE FULLY SET FORTH IN SAID STIPULATION; THAT THE COURT HAS HEARD THE RESPECTIVE CLAIMS OF THE PARTIES, AND HAS CAREFULLY EXAMINED THE STIPULATION SIGNED BY ALL OF THE PARTIES, AND FINDS THAT SAID STIPULATION IS REASONABLE, JUST AND CORRECT, AND FINDS THAT SAID STIPULATION SHOULD BE APPROVED BY THE COURT, AND ITS TERMS INCORPORATED IN THIS DECREE, AND THE MATTER HAVING NOW BEEN SUBMITTED TO THE COURT FOR DISPOSITION, BASED UPON SAID STIPULATION, AND THE PARTIES HAVING EXPRESSLY WAIVED THE MAKING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND THE COURT BEING FULLY ADVISED IN THE PREMISES;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AS FOLLOWS:

1. THAT THE COURT EXPRESSLY APPROVES EACH AND EVERY TERM OF SAID STIPULATION, AND BY REFERENCE INCORPORATES ALL OF SAID STIPULATION IN THIS DECREE, THE SAME AS THOUGH SET FORTH IN FULL HEREIN, AND FURTHER EXPRESSLY DECREES THE WATERS OF SAID WARM SPRINGS CREEK AS IS HEREINAFTER SET FORTH.

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, AND THE COURT FINDS THAT THERE IS A CERTAIN WARM SPRING KNOWN AS WARM SPRINGS CREEK, SITUATE UPON THE LANDS OF THE PLAINTIFFS, FLOWING IN EXCESS OF 60 MINERS INCHES OF WATER PER SECOND, AND THAT AT SAID SPRING THERE IS LOCATED A SPRING HOUSE, AS DESCRIBED IN SAID STIPULATION, AND THAT RUNNING FROM SAID SPRING HOUSE THERE IS A PIPE LINE TO CERTAIN RESERVOIRS LOCATED ON THE LANDS OF THE DEFENDANTS, MILLONIG, CONSTRUCTED AND MAINTAINED BY THE DEFENDANT, VILLAGE OF MACKAY, AND THAT SAID PIPE LINE HAS BEEN SO ESTABLISHED AND MAINTAINED FOR A PERIOD OF MORE THAN TEN (10) YEARS, AND IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, THAT THE DEFENDANT, VILLAGE OF MACKAY, HAS OBTAINED A PERPETUAL EASEMENT TO MAINTAIN THE SAID SPRING AND SPRINGHOUSE, AND THE SAID PIPE LINE, TOGETHER WITH THE RIGHT TO REPAIR, AND IF NECESSARY, RECONSTRUCT THE SAID SPRING HOUSE AND RESERVOIR, TO CONFORM WITH THE PUBLIC HEALTH REQUIREMENTS OF THE STATE OF IDAHO; PROVIDED, HOWEVER, THAT IN THE EVENT THAT THE DEFENDANT, VILLAGE OF MACKAY, SHALL FURTHER DEVELOP

THE SAID SPRING, THAT THE SPRINGS DEVELOPED BY THE PLAINTIFFS, HEREINAFTER REFERRED TO, SHALL FIRST BE MEASURED AS TO THE FLOW OF WATER FROM SAID SPRINGS, AND SHOULD THE FURTHER DEVELOPMENT OF SAID SPRING BY THE DEFENDANT, VILLAGE OF MACKAY, DECREASE OR DIMINISH THE FLOW FROM THE SPRINGS DEVELOPED BY PLAINTIFFS, AS HEREINAFTER DESCRIBED, THEN THE PLAINTIFFS SHALL BE ENTITLED TO WITHDRAW FROM SAID PIPE LINE AN ADDITIONAL AMOUNT OF WATER EQUIVALENT TO THE DIMINISHED OR DECREASED FLOW FROM SAID SPRINGS DEVELOPED BY PLAINTIFFS, AS HEREINAFTER DESCRIBED.

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3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, THAT THE PLAINTIFFS HAVE THE FIRST AND PRIOR RIGHT TO RECEIVE FIVE (5) MINERS INCHES PER SECOND OF THE WATER FROM SAID SPRING, AND THAT THE SAME SHALL BE WITHDRAWN BY VALVE, TO BE INSERTED IN THE PIPE LINE ABOVE REFERRED TO, AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT THE PLAINTIFFS SHALL, AT ALL TIMES, BE ENTITLED TO RECEIVE, THROUGH SAID VALVE, A CONTINUOUS FLOW OF FIVE (5) MINERS INCHES OF WATER, AND THE SAID VALVE SHALL BE SO CONSTRUCTED IN SAID PIPE LINE AS TO FURNISH SUCH CONTINUOUS FLOW OF FIVE (5) MINERS INCHES OF WATER TO PLAINTIFFS, TO BE COLLECTED, UTILIZED AND APPLIED TO A BENEFICIAL USE, IN SUCH MANNER AS PLAINTIFFS MAY DETERMINE, AND THE DEFENDANTS, AND EACH AND ALL OF THEM, BE, AND THEY ARE HEREBY PERPETUALLY RESTRAINED AND ENJOINED FROM INTERFERING WITH, OR DIMINISHING THE FLOW OF FIVE (5) MINERS INCHES OF WATER THROUGH SAID VALVE, TO THE LANDS OF THE PLAINTIFFS. THAT THE SAID CONSTRUCTION AND INSERTION OF SAID VALVE, TO BE INSERTED IN THE PIPE LINE, AS ABOVE REFERRED TO, SHALL BE ENTIRELY AT THE EXPENSE OF PLAINTIFFS.

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4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, THAT THE DEFENDANT, VILLAGE OF MACKAY, SHALL HAVE THE RIGHT TO UTILIZE ALL OF THE REMAINDER OF THE WATER OF SAID SPRING, WITH THE EXCEPTION OF FIVE (5) MINERS INCHES PER SECOND, THE PROPERTY OF PLAINTIFFS, ABOVE DESCRIBED.

5. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, THAT THE DEFENDANT, VILLAGE OF MACKAY, SHALL HAVE THE RIGHT TO CONSTRUCT AND MAINTAIN NECESSARY DITCHES UPON THE LANDS OF THE PLAINTIFFS, TO REMOVE SURFACE WATER AND RUN-OFF WATER FROM THE SAID SPRING HOUSE, IN ORDER TO PROTECT SAID SPRING AGAINST CONTAMINATION AND POLLUTION, BUT SUCH DITCHES SHALL BE SO CONSTRUCTED AS TO CAUSE A MINIMUM OF INCONVENIENCE TO THE LANDS OF THE PLAINTIFFS.

6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT THE PLAINTIFFS SHALL HAVE THE RIGHT TO COVER THE SAID PIPE LINE OF THE DEFENDANT, VILLAGE OF MACKAY, AS ABOVE DESCRIBED, WITH DIRT, AT PLAINTIFFS' EXPENSE, BUT PROVIDED FURTHER THAT PLAINTIFFS SHALL BE LIABLE FOR ANY DAMAGES THAT THE PIPE LINE MAY SUFFER AS A RESULT THEREOF; PROVIDED, HOWEVER, THAT PLAINTIFFS SHALL NOT BE LIABLE FOR ORDINARY WEAR AND TEAR, NOR FOR MAINTENANCE OF SAID PIPE LINE.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT WHILE THE DEFENDANT, VILLAGE OF MACKAY, SHALL HAVE THE RIGHT TO UTILIZE THE ENTIRE WATER OUTPUT OF SAID SPRINGS, WITH THE EXCEPTION OF SAID FIVE (5) MINERS INCHES, THE PROPERTY OF THE PLAINTIFFS, THAT AT THE TIMES THE DEFENDANT, VILLAGE OF MACKAY, DOES NOT USE ALL OF SAID WATER, AND THAT AT THE PRESENT LOCATION OF THE TWO RESERVOIR TANKS, CONSTRUCTED AND MAINTAINED BY SAID DEFENDANT, VILLAGE OF MACKAY, THERE IS A PROVISION FOR OVERFLOW FROM SAID TANKS, HEREINAFTER REFERRED TO AS WASTE WATER, WHICH IN THE PAST HAS BEEN DIVERTED BY DITCHES FROM THE OVERFLOW FROM SAID RESERVOIR TANKS, TO THE LANDS OF THE PLAINTIFFS AND THE DEFENDANTS, MILLONIG. IT IS THEREFORE EXPRESSLY DECREED THAT ALL WASTE WATER NOT APPLIED TO A BENEFICIAL USE BY THE DEFENDANT, VILLAGE OF MACKAY, SHALL BE PERMITTED TO FLOW AT THE PRESENT LOCATION OF SAID RESERVOIR TANKS, SO THAT SUCH WASTE WATER AS REMAINS, MAY BE DIVERTED TO THE LANDS OF THE PLAINTIFFS AND THE DEFENDANTS, MILLONIG, IN THE MANNER HEREINAFTER MORE PARTICULARLY DESCRIBED.

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8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT CERTAIN OTHER SPRINGS DEVELOPED BY THE PLAINTIFFS, UPON THEIR SAID LANDS, ARE THE SOLE PROPERTY OF THE PLAINTIFFS, PROVIDED, HOWEVER, THAT IF THE PLAINTIFFS, IN THE DEVELOPMENT OF SUCH SPRINGS, SHALL DIMINISH THE FLOW

OF THE WARM SPRINGS CREEK, THAT THE DEFENDANT, VILLAGE OF MACKAY, SHALL HAVE THE RIGHT TO RE-OPEN THE ISSUE AS TO WHETHER OR NOT SUCH SPRINGS AS ARE NOW, OR MAY HEREAFTER BE DEVELOPED BY THE PLAINTIFFS, ARE ACTUALLY A PART OF THE WATER OF WARM SPRINGS CREEK, AND THE COURT EXPRESSLY RESERVES JURISDICTION TO DETERMINE SUCH QUESTION SHOULD IT ARISE.

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, AS TO THE DISTRIBUTION OF THE WASTE WATER HEREINBEFORE DESCRIBED, AS BETWEEN THE PLAINTIFFS AND THE DEFENDANTS, MILLONIG, THAT A TEMPORARY ORDER IS HEREBY ISSUED, AS BETWEEN THE PLAINTIFFS AND THE DEFENDANTS, MILLONIG, WITHOUT PREJUDICE TO THE RIGHTS OF EITHER SUCH PLAINTIFFS OR SUCH DEFENDANTS, THE SAME TO BE IN FULL FORCE AND EFFECT UNTIL NOVEMBER 1, 1952, OR THEREAFTER, UNLESS EITHER OF THE PLAINTIFFS OR THE DEFENDANTS, MILLONIG, SHALL APPLY TO THE COURT TO REOPEN AND RE-DETERMINE THE RIGHTS OF SAID PARTIES IN AND TO SAID WASTE WATER, AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, AS FOLLOWS:

A. THAT COMMENCING ON SUNDAY, JUNE 29, 1952, THE DEFENDANTS, MILLONIG, SHALL HAVE THE RIGHT TO APPROPRIATE THE ENTIRE FLOW OF WASTE WATER, AS THE SAME IS WASTED AT THE RESERVOIRS OF THE DEFENDANT, VILLAGE OF MACKAY, FOR A PERIOD OF ONE (1) WEEK, AND THEREAFTER ON SUNDAY, JULY 6, 1952, THE PLAINTIFFS SHALL HAVE THE RIGHT TO DIVERT AND APPROPRIATE ALL OF SAID WASTE WATER, FOR A PERIOD OF ONE (1) WEEK, AND THAT THEREAFTER EACH OF SAID PARTIES SHALL HAVE THE RIGHT TO MAKE SUCH APPROPRIATION, RESPECTIVELY, ON ALTERNATE WEEKS, UNTIL NOVEMBER 1, 1952, AND COMMENCING ON SUNDAY OF EACH WEEK, AS ABOVE-DESCRIBED.

B. IT IS FURTHER ORDERED THAT THE PLAINTIFFS SHALL HAVE A TEMPORARY EASEMENT TO BUILD, CONSTRUCT AND MAINTAIN A NEW DITCH TO CONVEY SAID WASTE WATER ACROSS THE LANDS OF THE DEFENDANTS, MILLONIG, AT A POINT BELOW THE CONTOUR OF THE PIPE LINE ABOVE REFERRED TO, TO BE CHOSEN BY PLAINTIFFS, IN ORDER TO DIVERT AND CARRY SAID WASTE WATER FROM THE RESERVOIR SITE OF THE DEFENDANT, VILLAGE OF MACKAY, TO THE PROPERTY OF THE PLAINTIFFS.

C. IT IS FURTHER ORDERED THAT THE DEFENDANTS, MILLONIG, SHALL HAVE AN EASEMENT TO CONSTRUCT AND REPAIR A CERTAIN DITCH LOCATED ON THE EASTERLY OR LOWER SIDE OF THE PLAINTIFFS' PROPERTY, USED FOR THE PURPOSE OF COLLECTING WASTE WATER RUNNING OFF OF THE PLAINTIFFS' PROPERTY, AND TO CARRY THE SAME TO THE PROPERTY OF THE DEFENDANTS, MILLONIG.

D. THE COURT EXPRESSLY RESERVES JURISDICTION TO REOPEN AND TRY THE ISSUES BETWEEN THE PLAINTIFFS AND THE DEFENDANT, MILLONIG, AFTER NOVEMBER 1, 1952, IT BEING EXPRESSLY UNDERSTOOD THAT THIS DECREE SHALL BE IN FULL FORCE AND EFFECT UNTIL SUCH TIME, AND THEREAFTER, OR UNTIL SUCH TIME THEREAFTER AS EITHER PARTY MAY DETERMINE, SUCH PARTY MAY PETITION THE COURT FOR A HEARING TO MAKE THE AFORESAID PROVISIONS FINAL, OR TO TRY THE ISSUES OF FACT NOW EXISTING BETWEEN PLAINTIFFS AND THE DEFENDANTS, MILLONIG.

10. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT PURSUANT TO THE STIPULATION OF THE PARTIES AND THEIR RESPECTIVE COUNSEL, AND PURSUANT TO THE PRE-TRIAL CONFERENCE HELD IN OPEN COURT, THAT THE SAID CAUSE HAS THEREFORE BEEN SUBMITTED TO THE COURT, UPON THE BASIS OF SUCH PRE-TRIAL CONFERENCE, AND THE STIPULATION OF THE PARTIES AND THEIR RESPECTIVE COUNSEL, AND IT BEING FURTHER STIPULATED BY ALL OF THE PARTIES, AND THEIR RESPECTIVE COUNSEL, THAT SAID MATTER MIGHT BE SUBMITTED TO THE COURT UPON SAID STIPULATION, AND WITHOUT FORMAL EVIDENCE BEING OFFERED, ADDUCED AND RECEIVED, SUCH PROCEDURE IS HEREBY APPROVED, THE SAME AS THOUGH SAID MATTER HAD BEEN TRIED IN OPEN COURT.

11. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT EACH AND ALL OF THE PARTIES HERETO SHALL PAY THEIR OWN COSTS, PURSUANT TO THE STIPULATION.

DATED THIS 14TH DAY OF JULY, 1952.

#1589
FILED 8-26-52

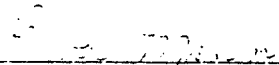
JOHN BOYD, CLERK.

PRESTON THATCHER
DISTRICT JUDGE.

STATE OF IDAHO)
) ss.
COUNTY OF CUSTER)

I, EVA MANN, CLERK OF THE DISTRICT COURT IN AND FOR THE COUNTY OF CUSTER, STATE OF IDAHO, DO HEREBY CERTIFY THAT I HAVE COMPARED THE FOREGOING COPY WITH THE RECORD WHICH APPEARS IN BOOK 4 OF JUDGMENTS AT PAGE 391, RECORDS OF CUSTER COUNTY, IDAHO, AND THE SAME IS A FULL, TRUE AND CORRECT COPY OF SUCH RECORD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND OFFICIAL SEAL THIS 16TH DAY OF SEPTEMBER, 1965.



CLERK OF THE DISTRICT COURT

IN THE MATTER OF APPLICATION FOR PERMIT)
)
NO. 34-7088 IN THE NAME OF JOHN L. POWERS)
)
)
)

MEMORANDUM DECISION
AND ORDER

In November of 1976, Sherl Chapman, a consulting geologist, was retained by the City of Mackay to conduct another study. Mr. Chapman's conclusions were completed in January of 1977 and a report was submitted to the Department for review in September of 1977. A hearing before the Department was then scheduled for September 19, 1977. The applicant was present and represented by Kent W. Foster.

EXHIBIT A

Attorney at Law, of the firm Holden, Holden, Kidwell, Hahn and Crapo, of Idaho Falls, Idaho. The protestant, the City of Mackay, was represented by Ted C. Springer, Attorney at Law, Challis, Idaho.

Testimony and evidence was submitted on behalf of both the applicant and protestant. The Department has taken the matter under consideration and having reviewed all pertinent information, the Director of the Department of Water Resources makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. The applicant is holder of Right No. 34-0959 representing 0.10 cubic feet per second of water with a priority of January 1, 1904, to be diverted from Warm Springs Creek for irrigation within the NE $\frac{1}{4}$ Lot 2, Sec. 32, SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 29, Twp. 7N, Rge. 24E; Right No. 34-0961, representing 0.08 cubic feet per second of overflow from the City's facilities, with a priority of June 29, 1952, to be diverted for irrigation and stockwater within the SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 28, SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 29, all in Twp. 7N, Rge. 24E.

2. The City is holder of Right No. 34-0960 with a priority of January 2, 1904, and is thereby entitled to all of the flow of a certain spring located in the NW $\frac{1}{4}$ of Lot 2, Sec. 32, Twp. 7N, Rge. 24E, at the source of Warm Springs Creek less the 0.10 cubic feet per second of flow of right 34-0959.

3. The Department of Water Resources' studies revealed a clay barrier between the City's spring and the one proposed to be developed by the applicant. The Department found the water quality of both the City spring and the applicant's spring to be very comparable. However, it was found that the applicant's spring was considerably warmer.

City of Mackay - August 12, 1974, temperature 17 $^{\circ}$ C (63 $^{\circ}$ F)

John Powers - August 12, 1974, temperature 21 $^{\circ}$ C (70 $^{\circ}$ F)

4. The consultant hired by the City of Mackay installed four observation wells and one "test pit" in the area between the City's spring and the spring which has been excavated by the applicant. The procedure used by the consultant included damming the outlet of the applicant's spring and then monitoring any changes that could be observed in the observation wells during a fourteen-day period. The City's consultant concluded that because the water levels in one of the observation wells increased from the time the test started until its conclusion and because observation well no. 4 began to gain water eleven days after the test started, there was a direct relationship between the applicant's spring and the city's spring.

However, the Department conducted an additional field review of the area on November 30, 1977, and found the water levels in observation well no. 1 to be higher than it was when the study for the City was done one year earlier. Observation well no. 4 had about one-half ($\frac{1}{2}$) foot of water in the bottom of it. In addition, it was determined that the bottom of observation well no. 4 was about two feet higher in elevation than the top of the dam the City's consultant used in conducting his test and, therefore, could not have caused the change in the water level in this observation well by damming.

CONCLUSIONS OF LAW

1. The City has a right to use all of the flow of the upper "city" spring with the exception of 0.10 cubic feet per second which must be supplied to the applicant.

2. The consultant for the City of Mackay erred in his interpretation of his data. No relationship between the City's spring and the applicant's spring has been shown in any of the studies that have been done.

3. The applicant is entitled to a permit from the Department of Water Resources.

ORDER

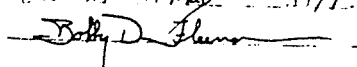
IT IS, THEREFORE, HEREBY ORDERED and Application for Permit No. 34-70403 is APPROVED subject to the following conditions:

1. This permit is subject to all prior water rights.
2. Any development of the spring area must not disturb the clay barrier separating the applicant's spring from the city's spring.
3. Proof of construction of works and application of water to beneficial use shall be submitted to the Department on or before March 1, 1983.

Dated this 8 day of March, 1978.


A. KENNETH DUNN
Deputy Director

This document is a copy of the original and is not to be used for legal purposes.

Received by 17:00 May 1979.


TED C. SPRINGER
Attorney for Appellant
P.O. Box 645
Challis, Idaho 83226
(208) 879-2312

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JUN 15 1979

Department of Water Resources

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

In the Matter of Permit No. 34-7088,	)	Case No. 2554
In the Name of JOHN L. POWERS	)	
Before the Idaho Department of	)	APPEAL AND PETITION
Water Resources	)	

COMES NOW the City of Mackay, Idaho, protestant and appellant in the above matter, and pursuant to Idaho Code 42-203 files this Appeal and Petition as follows:

1. Appellant appeals the Memorandum Decision and Order dated March 8, 1978 as amended on April 26, 1979, copies of which Orders are attached hereto as Exhibit "A".

2. A certified copy of the Application for Permit filed by applicant, John L. Powers is attached hereto as Exhibit "B".

3. The name of the applicant is John L. Powers, Mackay, Idaho. His attorney of record is Kent W. Foster, Esq., Holden, Holden, Kidwell, Hahn & Crapo, P.O. Box 129, Idaho Falls, Idaho 83401. The attorney for appellant City of Mackay, Idaho is Ted C. Springer, Esq., P.O. Box 645, Challis, Idaho 83226.

4. The grounds and reasons for this appeal are as follows:

a) The Order is unreasonable, unlawful, erroneous and contrary to law in that the Order states in Conclusions of Law No. 2 that "no relationship between the city's spring and the applicant's spring has been shown in any of the studies that have been done", which is erroneous, in that studies and evidence before the Department indicate a relationship between the two springs.

*Correct
fully set
by Chapman*

TED C. SPRINGER
ATTORNEY AT LAW
P. O. BOX 409
CHALLIS, IDAHO 83226
208 879-2312

b) The Order is unreasonable and contrary to law in that it is based in part on additional field reviews of the area after the hearing on September 19, 1977, which reviews were not subject to examination or rebuttal by appellant.

c) The Order is erroneous, unreasonable, and contrary to law in that it approves of a permit for the withdrawal of water by the applicant from Warm Springs Creek, notwithstanding the right and need of the City of Mackay to all of the waters of Warm Springs Creek for the municipal water supply, thereby reducing the quantity of water under existing water rights.

d) The Order is erroneous and unreasonable in that it fails to acknowledge the amounts of water presently withdrawn by the applicant from Warm Springs Creek in determining whether further development of the spring area should be allowed by applicant.

e) The Order is erroneous and unreasonable in that it fails to specify conditions on the permit, such as requirement of a measuring device by the applicant, limitation on pump size or other device used to withdraw the 0.20 cubic feet per second, limitation on method of spring development by applicant in addition to non disturbance of the clay barrier and provisions for termination of applicant's withdrawal and for indemnity of the City of Mackay in the event of interference with the City water supply by applicant.

f) The Order is erroneous and unreasonable in that it allows development of the spring area by applicant notwithstanding evidence that interference by applicant with the existing prior rights of the City would be difficult if not impossible to enforce and correct, and irreparable, thereby denying the City its right to the entire flow of the Warm Springs Creek with the exception of the 5 miners inches previously decreed to applicant.

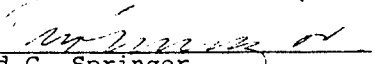
WHEREFORE appellant City of Mackay petitions this Court to reverse the Order of the Director of the Idaho Department of Water Resources and deny the Application for Permit of John L. Powers; or, in the alternative to modify and condition said permit to protect the prior rights of the appellant City of Mackay .

APPEAL AND PETITION

PAGE 2

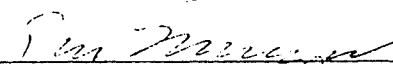
Appellant further requests and reserves the right to supplement and/or amend this Appeal and Petition.

Respectfully submitted this 12 day of June, 1979.


Ted C. Springer,
Attorney for City of Mackay, Idaho
P.O. Box 645
Challis, Idaho 83226

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of June, 1979, I mailed a true and correct copy of the above and foregoing Appeal and Petition to Kent W. Foster, Esq., Holden, Holden, Kidwell, Hahn & Crapo, P.O. Box 129, Idaho Falls, Idaho 83401, by placing the same in the United States Mail, postage thereon prepaid.


Ted C. Springer

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JUN 19 1981

Department of Water Resources

FILED IN CHAMBERS / E BLASFORD,
BINGHAM COUNTY, IDAHO. _____

Wed., June 17, 1981

4:20 P.M.

Clarence Beebe
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

IN THE MATTER OF PERMIT NO.)	Case No. 2554
34-708 IN THE NAME OF)	
JOHN L. POWERS.)	MEMORANDUM DECISION
)	AND
)	JUDGMENT SETTING ASIDE
)	ORDER ALLOWING APPLICATION
)	FOR PERMIT

This is an appeal from a decision of the Director of the Department of Water Resources ordering approval of a permit to John L. Powers to appropriate .2 cfs for irrigation purposes.

The Court's review is pursuant to I.C. 67-5215.

Transcript before the Department of Water Resources is designated "Tr."; transcript of rehearing before the Director of the department is designated "Tr.A".

The appellant, City of Mackay, Idaho, (hereinafter Mackay) has a right to all the water from a spring known as the City Springs, except 5 miners inches, which is a right belonging to Respondent, John R. Powers (hereinafter Powers). In the same area is a spring known as the Powers' Spring, the water from which is a right belonging to Powers. In the area is Warm Springs Creek, to which the City and Powers' springs would, if not diverted, contribute.

The waters of the two springs and Warm Springs Creek are discharge from an aquifer - - a common source (Tr.A 68; Tr. 12).

The permit in question would allow Powers to excavate the area of Powers' Spring, which is located some 130 feet

downgrade from, and about 9 feet lower than, the City Spring. Mackay's concern that this would decrease the output of the City Spring brought on contest before the Department of Water Resources, the director and this appeal.

Unquestioned is Mackay's right to have the groundwater flow regimen of its spring unaffected. The basis of the decision granting Powers' application for a permit to excavate at his spring site to capture additional groundwater in the area can be gleaned from the Memorandum Decision and Order (Tr. 19, 20) in the light of the evidence and contentions. The crucial question was whether or not excavation in the Powers' Spring area would affect the flow of the City Spring. The answer depends upon the nature of any hydrologic relationship between the two springs (Tr. 60 - - Chapman evaluation). The existence of a relatively impermeable blue clay barrier between the seepage areas of the two springs, and test evaluations led one expert to the conclusions that excavations accomplished at the Powers' Spring had no measurable effect under present conditions on the Mackay spring and further modest development unlikely would have any effect (Tr. 100 - - Casterlin Memorandum).

The decision of the Director was to the effect the studies (presumably geologic and hydrologic) disclosed no relationship between the springs. A condition of the approval "Any development of the springs area must not disturb the clay barrier separating the applicant's spring from the city's spring" emphasizes the clay barrier as being the basis for the conclusion there is no direct relationship between the springs.

The decision which only so conditions further development of the Powers' Spring ignores Casterlin's (upon whose expertise the decision is extensively based) caution that further development should not extend much deeper than the present excavation to preclude any chance of future interference.

A Mackay contention is that the order is erroneous in failing to specify as a condition of the permit a limitation on method of spring development (Appellant's Brief, 'P.2; Appellant's Reply Brief, P.2), contending, inter alia, the Casterlin caution as to depth of excavation should be implemented as a condition.

The approved Application for Permit describes the proposed diverting works:

"A basin will be excavated to collect ground water which will essentially form a spring tributary to Warm Springs Creek. Water thus developed will be pumped through a pipeline to higher ground for sprinkling."

The description is indefinite as to dimensions of the excavation.

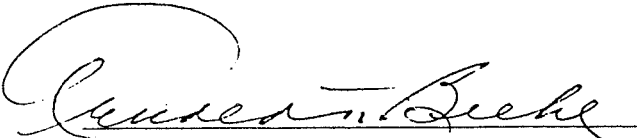
I.C. 42-202(4) provides an application must set forth a description of the proposed work and amount of water to be diverted. In many instances, the amount of water to be diverted might well modify and aid in making definite a description of the works. In the case of excavation for ground water, the water quantity seems more a result of the works than a modifier of the nature of the works.

The record supports the Director's decision and order as being based upon substantial, competent evidence, except the evidence dictates need for more precise definition of the works authorized, or a condition be adopted to implement the excavation depth caution.

The expert testimony in the record, whether of Chapman or Casterlin, indicates potential interference with the City Spring waters by excavation. Casterlin's caution should be defined more precisely than "not extend very much deeper than the present excavation" and the limitation made a condition of the allowance of the application. Having not implemented this bottom line of protection of Mackay's water right, the allowance of the application is clearly erroneous.

The Order is set aside and the matter remanded for further consideration.

DATED and DONE this 17th day of June, 1981.



ARNOLD T. BEEBE
District Judge

cc: Michael D. Crapo, Esq.
Howard Carsman, Esq.
Ted C. Springer, Esq.

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

IN THE MATTER OF APPLICATION FOR PERMIT NO.	)	MEMORANDUM DECISION
	)	AND
34-7088 IN THE NAME OF JOHN L. POWERS	)	ORDER ON REMAND

On December 17, 1974, John L. Powers submitted an application for permit No. 34-7088 to the Department of Water Resources (IDWR). Following the required publication of notice, the City of Mackay filed a protest against approval of the application. A hearing was held to consider the matter on September 19, 1977, and a Memorandum Decision and Order approving the permit with conditions was issued on March 8, 1978 and amended on April 26, 1979. The decision was appealed to the District Court of the Seventh Judicial District, and on June 17, 1981, the court issued a Memorandum Decision and Judgment setting aside the IDWR order approving application for permit No. 34-7088. The matter was remanded to IDWR for a more precise definition of the works authorized to develop the spring area that constitutes the source of water for the application, or the imposition of a condition implementing the excavation depth caution contained in the IDWR order.

A stipulation was entered into on September 29, 1981, between the applicant, protestant, and IDWR detailing the procedure to be followed in determining the nature of the works authorized. On October 5, 1981, the applicant filed a proposal for excavation. On October 22, 1981, the protestant filed a response to the proposal for excavation. On November 1, 1981, the protestant requested that a hearing be set to consider the matter of the proposed excavation. On February 17, 1982, a hearing was held in Idaho Falls to consider the matter of the proposed excavation. The applicant, John L. Powers, was present and represented by Michael D. Crapo and Kent W. Foster, attorneys at law. The protestant was represented by Oval L. Caskey, Rowsel Ellis and Ted Springer, attorney at law.

Arguments were made on the issues of:

1. Permissible depths to which the spring could be cleaned and the methods to be allowed in the cleaning of the spring.
2. The need for measurement of the rate of flow from the spring.

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Agreement was stipulated on the record to the following:

1. The spring excavation as it existed in both depth and lateral dimensions at the time of the hearing was adequate and satisfactory to both parties.
2. Monuments will be placed under the supervision of IDWR to reference the depth and lateral dimensions of the excavation.
3. Department employees are authorized to enter the property of both applicant and protestant as needed to administer application 34-7088 and any permit subsequently issued.
4. That the following are part of the record:
 - (a) Stipulation -- procedures on remand -- dated 9/29/81.
 - (b) Proposal for excavation -- dated 10/5/81.
 - (c) Response of protestant -- dated 10/22/81.
 - (d) Applicant's reply -- dated 11/1/81.
 - (e) Request for hearing -- dated 11/1/81.
 - (f) Negotiation letter from Michael Crapo -- dated 1/15/82.
5. Waiver of a proposed decision for the hearing on remand.

Synopsis of Arguments:

APPLICANT: The present maximum depth of the spring is about 4 feet. Although the present dimensions are adequate, the precise maintenance of existing dimensions during necessary cleaning of the spring will be impossible. The applicant would like the latitude of deepening the excavation to as much as 5 feet deep using a backhoe, shovel or hydraulic pump methods.

He would like the right to build a retaining wall of permanent materials to reduce the need to clean the springs, but does not want to be required to build the wall.

Measurement of spring flow is not needed because the decision of IDWR as upheld by the court found that no interference exists between the applicant's spring and that of the protestant.

PROTESTANT: The present dimensions of the spring are satisfactory, but the depth and lateral dimensions should not be increased by cleaning. Cleaning should only be accomplished by hand without hand tools unless an IDWR inspector is present. Backhoes or hydraulic pumps should not be used in cleaning to prevent disturbance to the walls of the spring.

A retaining wall of permanent material should be required around the spring.

The spring flow should be measured, even at the protestant's expense, to determine when cleaning is needed and the effect of cleaning on the status quo.

FINDINGS OF FACT

1. The depth and lateral dimensions of the spring excavation existing on the day of the hearing are acceptable to both parties.
2. Uncontrolled cleaning could increase the dimensions of the spring from those in existence on the day of the hearing.
3. The applicant stated that cleaning would be done using either a shovel, backhoe, or hydraulic pump. The type of tool, at least among those identified by the applicant, used to clean the spring will not matter as long as the dimensions are not increased.

CONCLUSIONS OF LAW

1. The applicant is entitled to a permit to appropriate water from the spring excavation as it existed on the day of the hearing.
2. The applicant is entitled to clean and maintain the spring as necessary to receive the water applied for as long as cleaning and maintaining does not increase the dimensions of the spring excavation and does not reduce the flow of the protestant's spring.
3. Flow from the protestant's spring will not be reduced by cleaning of the applicant's spring if the excavation is not significantly increased in lateral size or depth.

ORDER

The Memorandum Decision and Order of IDWR issued on March 8, 1978, and as amended on April 26, 1979, is hereby readopted with the following additional conditions:

1. The depth and dimensions of the spring excavation existing on the day of the hearing on February 17, 1982 shall not be increased by more than 6 inches at any point or in overall lateral dimension.
2. Permanent monuments shall be placed to reference the lateral boundaries and depth of the existing excavation. IDWR shall approve the construction and location for the monuments prior to their installation and measure and document their location and elevation with respect to the spring excavation. The cost of monument construction shall be shared equally by the parties.
3. Cleaning may be accomplished by any of the methods outlined by the applicant at the hearing including backhoe, shovel or hydraulic pump methods. If mechanically or hydraulically powered equipment is used to clean the spring excavation, the applicant shall notify IDWR five days in advance of the work being done so that a supervisor can be provided by IDWR; or IDWR, at the

Director's option, may designate a qualified supervisor to be present while cleaning work is done. The cost of said supervision shall be shared equally by applicant and protestant. Cleaning with hand tools shall not require prior notice nor direct supervision during the cleaning process, but the protestant may request that an inspection be made after the work is done. The inspection will be made either by IDWR or a qualified inspector selected by IDWR, but paid jointly by the applicant and protestant.

4. No cleaning is authorized if the flow from the spring is 0.20 cubic per foot per second or greater and must be discontinued when the flow from the spring exceeds that amount.

5. A retaining wall may be constructed around the spring excavation. Plans for a retaining wall must be approved by IDWR prior to its construction.

6. A measuring device of a type acceptable to IDWR shall be installed and maintained on the spring outflow channel, upstream from its confluence with Warm Springs Creek.

7. The Director of IDWR retains jurisdiction of this permit. Failure to adhere to the conditions of approval shall constitute cause for the Director to void the permit.

8. Proof of construction of works and application of water to beneficial use shall be submitted to IDWR on or before April 1, 1987.

ANALYSIS

IDWR does not normally exercise jurisdiction over the cleaning and maintenance of springs. It does so in this instance because upon remand, the court directed IDWR to condition the permit to control the size and depth of the excavation. Cleaning and maintaining have the potential of increasing the dimensions of the excavation and perhaps thereby disturbing the barrier layer of clay separating the parties' springs.

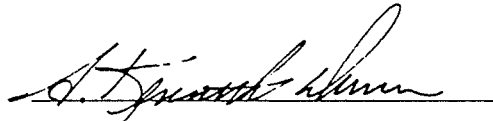
Maintenance of the dimensions of the spring excavation as it existed on the day of the hearing, appears to be the objective of both parties. To the extent that cleaning becomes necessary from time to time, the maintenance of any exact dimension becomes impractical. Arguments presented at the hearing on remand indicate that part of the excavation terminates on solid rock. It is unlikely that the excavation at these points will be substantially deepened using the tools identified by the applicant. Likewise, it seems unlikely that the blue clay layer which apparently forms the separation between the applicant's and protestant's springs will be disturbed by a modest additional

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excavation. Thus, to give the applicant the needed flexibility to clean the spring, a 6-inch tolerance is herein approved. However, it is not the intent of this approval to allow the excavation to be deepened and expanded 6-inches in every dimension, but only at random points incidental to the cleaning operation.

Measurement of the flow from the springs is necessary to determine the need for cleaning and the effectiveness of the cleaning operation. While this measurement could be done with a portable current meter, the repeated need for measurement and the low cost of a weir or flume for measuring surface flows makes the requirement of a permanently installed measuring device practical.

Signed at Boise, Idaho on this 19th day of April, 1982.

A handwritten signature in cursive script, appearing to read "A. Kenneth Dunn", written over a horizontal line.

A. KENNETH DUNN, Director

MICROFILMED

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 34-7088 IN THE NAME
OF JOHN L. POWERS

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT ON this 21st day of April, 1982, a true and correct
copy of the foregoing MEMORANDUM DECISION AND ORDER were mailed, postage prepaid to:

John L. Powers
211 North Main
Mackay, ID 83251

Oval L. Caskey, Mayor
City of Mackay
City Hall
Mackay, ID 83251

Kent W. Foster & Michael D. Crapo
HOLDEN, KIDWELL, HAHN & CRAPO
P. O. Box 129
Idaho Falls, ID 83401

Powsel Ellis
Box 55
Mackay, ID 83251

Ted Springer
HOPKINS, FRENCH, CROCKETT & SPRINGER
P. O. Box 1219
Idaho Falls, ID 83402



RITA I. FLECK
Sr. Secretary
Idaho Department of Water Resources

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 34-07088

Priority: December 22, 1974

Maximum Diversion Rate:

0.20 CFS

Maximum Diversion Volume:

28.5 AF

This is to certify, that JOHN L. POWERS

P.O. BOX 493

MACKAY ID 832510000

has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated December 17, 1974; and has submitted Proof of Beneficial Use on September 6, 1988. An examination indicates that the works have a diversion capacity of .200 cfs of water from:

SPRING

tributary to BIG LOST RIVER

source, and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
IRRIGATION	04/01 to 11/01	0.20 CFS	28.5 AF

LOCATION OF POINT(S) OF DIVERSION: Lot 2(NENWNE), Sec. 32, Township 07N, Range 24E
CUSTER County

PLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
07N	24E	29	SESE 5			5
		32	Lot 1(NENE) 2.5	Lot 2(NWNE) 2		4.5

Total number of acres irrigated: 9.5

CONDITIONS/REMARKS:

1. The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can actually be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.
2. This water right is appurtenant to the described place of use.
3. This right is subject to all prior water rights and may be forfeited by five years of non-use.
4. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.
5. A measuring device and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works.

RECORDED
JAN 15 1992

State of Idaho
Department of Water Resources**WATER RIGHT LICENSE**

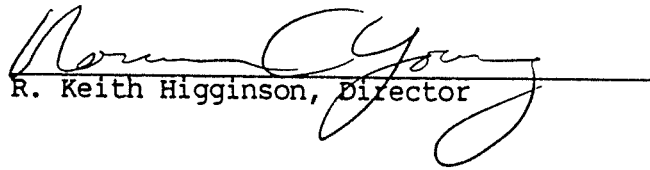
WATER RIGHT NO. 34-07088

CONDITIONS/REMARKS:

6. Use of water under this water right will be regulated by the watermaster of State Water District No. 34.
7. Any cleaning by mechanically or hydraulically powered equipment shall require prior approval by the Department.
8. No cleaning is authorized if the flow from the spring is 0.20 cfs or greater and must be discontinued when the flow from the spring exceeds that amount.
9. Any retaining wall constructed around the spring excavation must be approved by the Department prior to its construction.
10. The depth and dimensions of the spring excavation existing in 1982 shall not be increased by more than six inches at any point or in overall lateral dimension.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. Witness the seal and signature of the Director, affixed at Boise, this 20TH day of DECEMBER, 1991.

Acting for


R. Keith Higginson, Director

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