

This
Right has been
Decreed in the
SRBA.

ESIDENT CHAMBERS:
AINE COUNTY
ONE 788-4854
ILEY, IDAHO 83333

ICOLN COUNTY
ONE 886-2173
OSHONE, IDAHO 83332

DOUGLAS D. KRAMER

DISTRICT JUDGE
IDAHO FIFTH JUDICIAL DISTRICT

~~RAK PROHASKA~~, OFFICIAL COURT REPORTER

GOODING COUNTY
PHONE 934-4861
GOODING, IDAHO 83330
CAMA COUNTY
PHONE 764-2238
FAIRFIELD, IDAHO 83327

RECEIVED

March 16, 1981

NOV 6 1981

Department of Water Resources

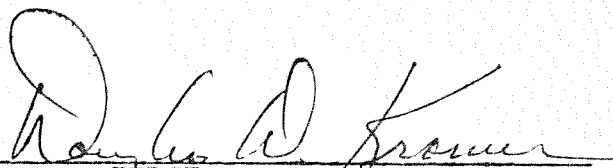
#17553

In the Matter of Application for
Amendment of Permit 36-7072 etc.

The above entitled matter having been inactive for a period of over one year, and proper notice given pursuant to Rule 40 (c) of the Idaho Rules of Civil Procedure and good cause appearing therefore,

IT IS HEREBY ORDERED that the above entitled matter be dismissed without prejudice.

DATED this 16th day of March, 1981.


JUDGE

MICROFILMED

1 Thomas G. Nelson
2 PARRY, ROBERTSON, DALY & LARSON
3 P. O. Box 1906
4 Twin Falls, Idaho 83301
5 Telephone: 733-3722
6
7
8

9 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
10 STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

11 * * * * *

12 IN THE MATTER OF APPLICATION) Case No. _____
13 FOR AMENDMENT OF PERMIT)
14 NO. 36-7072 IN THE NAME OF) NOTICE OF AND PETITION FOR
15 VALLEY TROUT FARMS, INC.) APPEAL UNDER §42-211, I.C.

16 * * * * *

17 Petitioner Robert H. Brailsford alleges:

18 I.

19 Valley Trout Farms, Inc., is the holder of Permit No.
20 36-7072, issued by the Idaho Department of Water Resources, for
21 the appropriation of certain of the public waters of the State
22 of Idaho, said waters to be diverted and used in Gooding County,
23 Idaho.

24 II.

25 On or about May 8, 1978, Valley Trout Farms, Inc.,
26 applied to the Idaho Department of Water Resources for an
27 amendment to said permit. Petitioner protested, on the ground
28 that the granting of said permit would adversely affect the
29 rights of petitioner under Permit No. 36-7085.

30 III.

31 On January 18, 1979, the Director of the Department of
32 Water Resources issued an order allowing the requested
amendment. A certified copy of the application for amendment
and a certified copy of the Director's order are attached hereto

MICROFILMED

1 as Exhibits "A" and "B" respectively, and by this reference made
2 a part hereof as though set out in full herein.

3 IV.

4 The order of the Director is incorrect in law and fact
5 since the granting of the amendment adversely affects the rights
6 of Petitioner. Petitioner hereby appeals for a judicial review
7 of the order of the Director and requests a trial de novo.

8 WHEREFORE, Petitioner prays:

9 1. That the Court hear anew the matters relating to
10 the application for amendment, and thereupon enter an order
11 directing the Director of the Idaho Department of Water
12 Resources to deny the application for amendment.

13 2. For costs of suit including reasonable attorney's
14 fees.

15 3. For such other and further relief as the Court may
16 deem proper.

17 DATED this 14 day of March, 1979.

18 PARRY, ROBERTSON, DALY & LARSON

19
20 By: Thomas G. Nelson

21 Thomas G. Nelson

22 ACKNOWLEDGEMENT OF SERVICE

23 I, A. Kenneth Dunn, do hereby certify that I
24 received the foregoing NOTICE OF AND PETITION FOR APPEAL UNDER
25 §42-211, I.C., on behalf of the Department of Water Resources.

26 DATED this 15 day of March, 1979.

27 DEPARTMENT OF WATER RESOURCES

28
29 By: A. Kenneth Dunn



STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

John V. Evans
Governor

C. Stephen Allred
Director

Statehouse
Boise, Idaho 83720
(208) 384-2215

July 1, 1977

Re: Permit No. 36-7072

Dick Graves
Southern Idaho Production
Credit Association
Gooding, Idaho 83330

Dear Mr. Graves:

I have examined the above referenced permit and found it to be valid and owned by Aquaculture Industries, Inc.

The original permit was issued to Mr. Norman S. Standal and M. George Lemmon on November 12, 1970, subject to the terms and conditions as set forth in the Order issued November 9, 1970. A copy of the Order is enclosed. The time to show proof of beneficial use on the permit was December 1, 1972. On November 10, 1972, an extension of time to show proof of beneficial use was granted until December 1, 1975.

In December of 1972, Mr. Standal and Mr. Lemmon assigned this permit to Aquaculture Industries, Inc. The assignments were accepted by the Department as being within the provision of Item 5A of the Order of November 9, 1970, since Mr. Standal and Mr. Lemmon were at that time the major stockholders and officers of Aquaculture Industries, Inc.

On November 6, 1975, a second extension of time to show proof of beneficial use was granted until December 1, 1978. This second extension was requested by Aquaculture Industries, Inc. due to litigation which they indicated prevented them from completing the project to beneficially use all the 215.00 cubic feet per second of water shown on their permit.

An additional extension of time beyond the December 1, 1978 date to show beneficial use would probably be granted if it can be shown that the litigation has prevented the owners from completing the project and that the litigation has been actively pursued by the owners.

MICROFILMED

Page 2
Dick Graves
Re: Permit No. 36-7072
July 1, 1977

Such a request and any evidence necessary to support such a request should be submitted to this Department early in October of 1978.

The question of assigning the permit to a new owner was discussed in our office in light of Item 5A of the Order dated November 9, 1970. The opinion was that since the project is now substantially developed and operating and based on the other evidence we now have, an assignment at this time would probably not be considered speculation.

I hope this information is useful to you. If I can be of additional help, please feel free to contact me.

Yours truly,

DAVID B. SHAW
Water Allocations
Section Supervisor

DBS:jfr

Enclosure: Copy of Order

MICROFILMED

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NOV 4 1975

EBERLE, BERLIN, KADING, TURNBOW & GILLESPIE
CHARTERED

Department of Water Resources

T. H. EBERLE
JAMES L. BERLIN
R. B. KADING, JR.
R. M. TURNBOW
JAMES R. GILLESPIE
KENNETH L. PURSLEY
WILLIAM J. MCKLVEEN
DALE G. HIGER
WARREN E. JONES
PETER C. JENKINS
GARDNER W. SKINNER, JR.
MARK S. GESTON
MICHAEL A. GREENE
B. NEWAL SOUYRES, JR.

ATTORNEYS AND COUNSELORS AT LAW
CAPITOL PARK PLAZA
300 NORTH SIXTH STREET
POST OFFICE BOX 1368
BOISE, IDAHO 83701

J. L. EBERLE (1890-1964)
DALE O. MORGAN (1914-1970)

November 3, 1975

Department of Water Resources
State Capitol
Boise, Idaho 83720

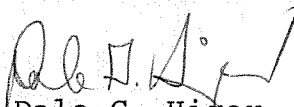
Re: Permit No. 36-7072

Gentlemen:

Please find enclosed an Application for Extension of Time. Please review the application and advise me as quickly as possible as to your decision.

If I can provide you with any additional information, please let me know.

Very truly yours,


Dale G. Higer

DGH:jb
Enclosure

NOV 11 1975



STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

STATE HOUSE BOISE, IDAHO 83720

October 3, 1975

Re: Application No. 36-7121
Permit No. 36-7072

Mr. Edward W. Clyde, Attorney
351 South State Street
Salt Lake City, Utah 84111

Dear Mr. Clyde:

We have reviewed the filings of Mr. Standal and Mr. Lemmon on the Thousand Springs Area as you requested in your letter of September 22, 1975.

Application No. 36-7121 is still awaiting the outcome of the suit between Judge Ritter and Mr. Standal and Mr. Lemmon. No change has been requested on this application, which is still in the name of Norman Standal and George H. Lemmon.

We have reviewed Permit No. 36-7072 under which Mr. Standal's present development has taken place. There has also been no amendments filed on this permit. This permit has been assigned to Aquaculture Industries, Inc., Box 326, Hagerman, Idaho. On October 1, 1975, we sent Aquaculture Industries, Inc. notice that proof of beneficial use under this permit is due on or before December 1, 1975.

I have also talked with personnel in our District Office in Twin Falls and they are aware of no changes being made at the present time.

Any changes that are made on either the application or the permit will be advertised in the local newspaper to allow an opportunity for those affected to protest any proposed change.

Sincerely,

BOBBY D. FLEENOR
Chief, Water Rights

BDF:jfr

RECEIVED

PS Form 3811, Jan. 1975

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).

- ☐ Show to whom and date delivered..... 15¢
☐ Show to whom, date, & address of delivery.. 35¢
☐ RESTRICTED DELIVERY.
Show to whom and date delivered..... 65¢
☐ RESTRICTED DELIVERY.
Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:

MICROFILMED

3. ARTICLE DESCRIPTION:

REGISTERED NO. CERTIFIED NO. INSURED NO.

27275

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE ☐ Addressee ☐ Authorized agent

4. *Zemine Holt*

DATE OF DELIVERY

OCT 2 1975

POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S
INITIALS

October 1, 1975

CERTIFIED MAIL

27275

Re: Permit No. 36-7072

Aquaculture Industries, Inc.
Box 326
Hagerman, Idaho 83332

Gentlemen:

One of the conditions of approval of your water Permit No. 36-7072 (see last page of your approved permit) was that evidence of the extent of development be submitted as proof of application of water to beneficial use to this office on or before December 1, 1975. Enclosed is an affidavit form which must be used to submit the required proof of beneficial use.

If you have not fully completed your project, and you have not previously received an extension of time, you may request an extension of time provided the delay is for reasonable cause as indicated in Section 42-204, Idaho Code, amended. If you have been prevented from proceeding by a governmental agency or by litigation, more than one extension of time can be granted.

Either the beneficial use affidavit or a request for an extension of time must be received by this Department on or before the above mentioned date, otherwise the permit will lapse and be of no further force or effect.



R. KEITH HIGGINSON
Director

RKH:jg
Enc: Proof affidavit

MICROFILMED



STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

Cecil D. Andrus
Governor

R. Keith Higginson
Director

Statehouse
Boise, Idaho 83720
(208) 384-2215

February 4, 1975

Edward W. Clyde, Attorney
Clyde & Pratt
351 South State St.
Salt Lake City, Utah 84111

Dear Mr. Clyde:

Thank you for sending us a copy of Judge Bellwood's January 28th letter concerning the results of the suit filed by Judge Ritter and Mrs. Hull against Standal and Lemmon in connection with their Permit No. 36-7072.

Before any further action is taken on Application No. 36-7121, which you have protested, we will need to review the conclusions of law and judgement issued by Judge Bellwood. Then, of course, we must defer any action until the appeal period has passed.

Again we appreciate your promptness in letting us know the outcome of that trial.

Sincerely,

BOBBY D. FLEENOR
Chief, Water Rights

BDF:jg

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WATER RESOURCE BOARD:

John F. Streiff
Chairman

Franklin Jones
Member

George L. Yost
Vice-Chairman

M. Reed Hansen
Member

Donald R. Kramer
Secretary

Scott W. Reed
Member

Edwin C. Schlender
Member

Joseph H. Nettleton
Member

EDWARD W. CLYDE
ELLIOTT LEE PRATT
WILLIAM G. GIBBS
FRANK J. ALLEN
ROLAND R. WRIGHT
JOHN T. EVANS
RICHARD C. CAHOON

EDWARD T. WELLS
STEVEN A. TUFT
MICHAEL M. QUEALY

CLYDE & PRATT
ATTORNEYS AT LAW
351 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

January 31, 1975

RECEIVED

FEB 3 1975

Department of Water Resources

PHONE 322-2516
AREA CODE 801

R. Keith Higginson, Director
Dept. of Water Administration
Idaho Statehouse, Annex 2
Boise, Idaho 83707

Re: Application No. 36-7121

Dear Keith:

We have completed the trial of the suit filed by Judge Ritter and Mrs. Hull against Standal and Lemmon with reference to their Application No. 36-7072. We, of course, did not appear at your hearing on that case, and it was under that application that Standal and Lemmon built their fish ponds, destroying the natural channel from the springs into the Snake River. The trial judge has ruled in favor of Judge Ritter, and has ordered Standal and Lemmon and their successors to remove their fish ponds from these natural channels and to restore the channels to their pre-existing condition.

You, no doubt, will recall that one of our contentions on the above captioned application was they did not have sufficient land to use the water, and they concurred, by occupying the natural channels, which I denied their right to use. The court has sustained our position and that particular objection to their efforts to appropriate water from the lands of Judge Ritter would now appear to be correct.

However, in addition, you will recall that we denied that they could sustain their application which was wholly dependent upon their being able to condemn part of Judge Ritter's lands to divert the water and to convey it across his lands to their ponds. Since we filed our briefs on that matter, the Idaho Supreme Court in Lemmon v. Hardy, 95 Ida. 778, 519 P. 2d 1168 (1974), has unequivocally held that the applicant cannot appropriate water under Idaho law where he does not own the land where it is going to be used, and where the water is going to be diverted. The assertion that the necessary rights in Judge Ritter's land could be acquired by condemnation was raised by Standal and Lemmon in the Hardy case, and was rejected. In view of the holding that they cannot use the channels for fish ponds in the case just concluded, and the further holding of the Supreme Court that they can't appropriate water where they don't have the necessary interest in land, it is respectfully submitted that

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Clyde & Pratt

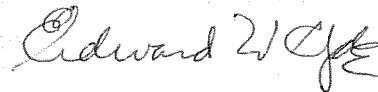
R. Keith Higginson
Page 2
January 31, 1975

the above captioned application to appropriate water where the point of diversion is on Judge Ritter's land and where they must condemn a channel across his lands must be denied. I am enclosing a copy of the trial judge's memorandum decision. I am sure you are familiar with the case of Lemmon v. Hardy, supra.

I am enclosing a second copy of this letter so that you can send it to opposing counsel. I do not know who the present attorney is for Messrs. Standal and Lemmon in regard to that application.

Best regards.

Very truly yours,



Edward W. Clyde

EWC:ML
Encl.

MICROFILMED

Re: Permit No. 36-7072

November 6, 1975

Aquaculture Industries, Inc.
Box 326
Hagerman, Idaho 83332

Gentlemen:

Enclosed is a copy of the approved application for extension of time in connection with the above referenced permit.

The time within which to submit proof of beneficial use of water has been extended to December 1, 1978.

Sincerely,

D. Darlene Reich
Water Rights Supervisor

cc: Dale Higer, Attorney

SHERMAN J. BELLWOOD
JUDGE FIFTH JUDICIAL DISTRICT
P.O. Box 246
RUPERT, IDAHO 83350

January 28, 1975

Mr. Edward W. Clyde
351 South State Street
Salt Lake City 84111

Mr. Bert Larson
Box 525
Twin Falls, ID 83301

Mr. Lloyd J. Walker
Box 23
Twin Falls, ID 83301

Re: Ritter & Hull

vs.

Standal & Lemmon &
Aquaculture Indust. Inc.
Gooding County # 14752

Gentlemen:

The plaintiffs seek injunction to compel the defendants to re-open, and keep open, the channel of an estuary of the Snake River into which Bridal Veil Falls drains. The defendants have virtually closed the channel by means of an earthen dike in connection with their trout farm operations for which they have an Idaho permit to appropriate waters of the estuary.

I am persuaded by plaintiffs' arguments, the evidence, and the law as I understand it, that defendants have no right to maintain the channel closure. Furthermore, it is to be noted, defendants' water permit has limitations: "***and the use or alteration of stream channels shall be subject to all applicable provisions of state and federal law" and defendants must "protect the public interest in the enjoyment of the esthetic and recreation quality of the springs and stream channels."

Counsel for plaintiffs will prepare and submit findings of fact which are supported by evidence, conclusions of law, and judgment in accordance with the conclusions stated herein.

Defendants should have six months within which to restore the channel.

Defendants' objections to Exhibits B-2K, -2L and -2M, and to Exhibits 12, 13 and 14, are overruled. Defendants' motion to dismiss made during trial is overruled. Defendants' objections to Exhibit 19 is overruled.

Plaintiffs' objections to the D-series of exhibits are overruled.

Sincerely,


Sherman J. Bellwood

MICROFILMED

SHERMAN J. BELLWOOD
JUDGE FIFTH JUDICIAL DISTRICT
P.O. Box 246
RUPERT, IDAHO 83350

January 28, 1975

Mr. Edward W. Clyde
351 South State Street
Salt Lake City 84111

Mr. Bert Larson
Box 525
Twin Falls, ID 83301

Mr. Lloyd J. Walker
Box 23
Twin Falls, ID 83301

Re: Ritter & Hull
vs.
Standal & Lemmon &
Aquaculture Indust. In
Gooding County # 14752

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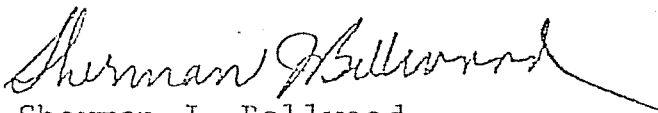
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Plaintiffs' objections to the D-series of exhibits are overruled.

Sincerely,


Sherman J. Bellwood

MICROFILMED

August 15, 1974

Re: Permit No. 36-7072 - Aquaculture Industries, Inc.

Lloyd J. Walker
Bank of Idaho Building
P. O. Box 23
Twin Falls, ID 83301

Dear Mr. Walker:

Pursuant to your letter dated August 14, 1974, enclosed is a copy of the extension of time for the above referenced permit granted on November 10, 1972. The time within which to submit proof of beneficial use was extended to December 1, 1975.

We hope the poor copy you received has caused you no inconvenience.

Sincerely,

(Mrs.) Jan Grover
Secretary

JG
Enclosure

MICROFILMED

LAW OFFICES OF
LLOYD J. WALKER
BANK OF IDAHO BUILDING
P. O. Box 23
TWIN FALLS, IDAHO 83301
TELEPHONE (208) 733-3083

LLOYD J. WALKER
CLINTON E. JACOB

GIACOBBI SQUARE
SUN VALLEY, IDAHO 83353
(208) 726-5861

August 14, 1974

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AUG 15 1974

Department of Water Resources

Mr. Keith Higginson
Director
Department of Water Administration
Statehouse
Annex 2
Boise, Idaho 83707

Dear Keith:

Apparently on the 10th of November, 1972, the Department granted an extension for the completion of the construction under permit #36-7072. I have copies of the extension but the quality is so poor I would appreciate it very much if you could furnish me with an additional copy. If for one reason or another your file copy is also of poor quality would you confirm in writing that the construction completion date has been extended to December 1, 1975.

Sincerely yours,

Lloyd J. Walker

LLOYD J. WALKER

LJW:gb
cc: John Giannetti

MICROFILMED

36-7072

January 3, 1974

Mr. Lloyd J. Walker
Law Offices
Walker, Depew & Kennedy
Bank of Idaho Building
P. O. Box 23
Twin Falls, Idaho 83301

Re: Permit No. 36-7072, Aquaculture Industries, Inc.

Dear Lloyd:

I'm sorry that I've been so long in answering your recent request for a letter concerning Permit No. 36-7072. We have spent some time researching the files and, particularly, the Findings of Fact and Conclusions of Law issued by this office on November 9, 1970.

This particular case is unusual, due to the fact that construction was underway even prior to the time the application was approved pursuant to the above-mentioned order. Therefore, in our Finding No. VIII, we indicated that 75% of the work necessary to prepare the ponds, ditches, and other facilities is completed. We recognize that the work has now essentially all been completed and there is no further need for your clients to submit plans to this office for our approval. The matter was submitted to the Court of Twin Falls county and the Court's approval of the project and its subsequent construction has satisfied the requirements of this office with regard to approval of plans; specifically, therefore, under Paragraph V(c) the construction plans need not now be submitted to this office for our approval.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjr

36 7072

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APR 12 1971

Department of Water Administration

DW

EDT

EKA

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

IN THE MATTER OF THE APPLICATION)
FOR PERMIT NO. 36-7072, NORMAN)
STANDAL AND GEORGE LEMMON, AN)
APPLICATION FOR PERMIT NO. 36-7085)
ROBERT BRAILSFORD, PRESIDENT OF)
BRAILSFORD BROTHERS, INC., AN)
IDAHO CORPORATION.)

CASE NO. 24011

MEMORANDUM OPINION

The above-entitled matter is before me for decision under the provisions of Section 67-5215, Idaho Code, providing for judicial review of administrative orders. I have been furnished with a copy of pleadings, affidavits, various letters and other written documents filed with the Department of Water Administration of the State of Idaho and the briefs of counsel submitted to that Department in its "permit files Nos. 36-7085 and 36-7072." By stipulation of counsel and the appropriate statutes, I am given authority to conduct a judicial review of the above-entitled matter based upon the record set out above.

Section 67-5215(g), Idaho Code, provides some guide lines for this judicial review, namely, "the Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." And unless the rights of Brailsford Brothers, Inc., have been prejudiced because the Department's Findings of Fact, Conclusions of Law, and Order

36 7072

1 are "in violation of Constitutional or statutory provisions"
2 or "Affected by other error of law" or "clearly erroneous in
3 view of * * * * the whole record," I am required to affirm
4 the Department's decision.

5 Assignment of Error No. 1 is directed to Finding of
6 Fact No. VIII which appellant states is not based upon facts
7 in the record. However, this particular Finding of Fact is
8 almost a verbatim transcript of Paragraph 7 of the affidavits
9 of Norman S. Standal and George Lemmon dated June 23, 1970,
10 and June 16, 1970. The agency apparently gave enough weight
11 to this portion of the affidavits to transform it into a
12 Finding of Fact. I do not believe I have authority to sub-
13 stitute my judgment for that of the Department in this regard.

14 Assignment of Error No. 2 complains of the failure of
15 Finding of Fact No. IX to find that Standal's and Lemmon's
16 application for permit was made for speculative purposes. Since
17 I have recently been "burned" because of my inability to
18 distinguish a Finding of Fact from a Conclusion of Law (see
19 Warner C. Mills v. James G. Holliday, Capital Reports, Vol.18,
20 No. 6), I am somewhat hesitant to mention it, but I suspect
21 this particular Assignment of Error has reference to a Conclu-
22 sion of Law as distinguished from a Finding of Fact. In any
23 event Finding of Fact IX does set forth that "applicants
24 (Standal and Lemmon) did not own or have any right to use of
25 occupancy of the land where they intended to use the water" at
26 the time their application was filed. Since both parties
27 concede this, I do not see why either party should complain
28 about it now turning up as a Finding of Fact.

29 Assignments of Error Nos. 4 and 5 go to the heart
30 of Brailsford Brothers, Inc., complaint mentioned in the

23 7072

1 foregoing paragraph, and that is Conclusion of Law No. 2 in
2 which the Department held that the failure of the applicants
3 for permit to have any interest in the real property on which
4 they intended to use the water applied for will not, in and of
5 itself, support the conclusion that the application for permit
6 was made for speculative purposes. I have no quarrel with the
7 Department's conclusion.

8 It seems to me that to hold otherwise would place a
9 much too narrow definition upon the phrase "speculative
10 purposes." Whether the venture is speculative depends almost
11 entirely upon the true intentions of the applicants. Those
12 intentions may be hidden away in the minds of the applicants,
13 but judges and juries frequently determine an individual's
14 intention by considering the person's acts, communications,
15 and myriads of surrounding circumstances. It seems to me that
16 ownership or lack of ownership of the land upon which the water
17 is to be used is just one of the many circumstances to be
18 considered in arriving at the applicants' intentions on the
19 road to the ultimate question of speculation. I believe the
20 facts and circumstances considered by the Department, including
21 the lack of interest in the land on which the water is to be
22 used at the time of filing, is sufficient to support the
23 conclusion that this is not a speculative venture so far as
24 Standal and Lemmon are concerned.

25 Assignment of Error No. 3 goes to the failure of the
26 Department to find that applicants will be unable to benefi-
27 cially use the amount of water applied for on fifteen acres
28 of land. The proposed use of most of the water applied for was,
29 until recent years, a unique use -- it is nonconsumptive use.
30 I do not believe the amount of water which can be beneficially

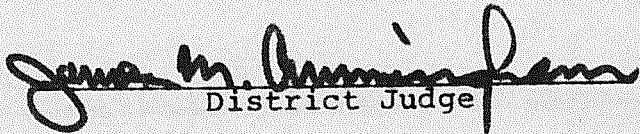
36 7072

1 used in the production of fish on 15 acres of ground can sat-
2 isfactorily be determined at this time except within very
3 broad limits, and I do not believe that the Department went
4 beyond these broad limits in its order. Upon proof of bene-
5 ficial use, the precise amount of water needed can be deter-
6 mined with some degree of precision and thereafter awarded.
7 Until that time, however, I do not think the Department is in
8 error in allowing 100 c/f/s.

9 I believe that what has already been said takes care
10 of Assignment of Error Nos. 6 and 7.

11 It seems to me that application No. 36-7085 was made
12 in good faith and that the decision of the Department should
13 be and is affirmed.

14 Dated this 12th day of April, 1971.

15
16 
17 District Judge
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36 7072

This letter is being written to conform to Paragraph V(c) of the administrative order which was entered by the Department of Water Administration in the matter of the application for Permit No. 36-7072 on the 9th day of November, 1970.

Paragraph V(c) of the order requires an approval of the plans and construction of the ponds. This approval was actually given during the trial in which Brailsford Brothers objected to the application for Permit No. 36-7072. The construction plans were submitted and are a part of the record in the District Court in Twin Falls County. The approval of those plans was given as a part of that proceeding and is reflected in Paragraph VIII of the Findings of Fact.

This letter is for the purpose of confirming specifically that under Paragraph V(c) the construction plans were submitted as a part of the hearing and approved by this office.

36 7072

June 29, 1973

File 36-7072

Mr. Lloyd J. Walker
Law Offices
Walker, Depew & Kennedy
Bank of Idaho Building
P. O. Box 23
Twin Falls, Idaho 83301

Re: Permit No. 36-7072, Aquaculture Industries, Inc.

Dear Lloyd:

This is in reply to your letter of June 13, 1973, requesting the concurrence of this office in the sale of the common stock of Aquaculture Industries, Inc., to Marina Protein, Inc.

Initially, when the permit was issued, we were concerned about the element of speculation on the part of the two applicants, George Lemmon and Norman Standal. In filing the application, they represented that they were capable and prepared with their own means and resources to develop the facilities for use of the entire flow of water under that permit and that they had every intention of doing so. This, of course, has not been the case. In approving the assignment from the original applicants to Aquaculture Industries, Inc., we agreed that so long as Lemmon and Standal remained stockholders and officers of the company, that we had no reason to object to the transfer. The water right is now in the name of Aquaculture Industries, Inc., and it is my understanding that it will remain in that ownership. Therefore, even though I am personally not in favor of the sale and am convinced that such proposed sale further demonstrates the speculation and insincerity on the part of the original applicants, I am advised that there is no legal basis for our objecting to it. I would therefore advise that this office would not oppose the sale which you have suggested.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

36 7072

NAME AND ADDRESS OF SENDER

Dept. of Water Admin.

Indicate type of mail:

☐ REGISTERED ☐ REGISTERED C.O.D. ☒ CERTIFIED

Affix stamp here if is copies of this bill. POSTMARK AND DATE

NUMBER OF ARTICLE	NAME OF ADDRESSEE, STREET, AND POST OFFICE ADDRESS	POSTAGE	FEE	R. R. FEE	REST. DEL. FEE
1	22460 H.A. Lancaster, Box 124, Twin Falls, Idaho 83301		30	15	
2					
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INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee
(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO.
22460

INSURED NO.

DATE DELIVERED
JAN 13 1971

1

2

3

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
H.A. Lancaster & Clerk

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
Helen Porterfield Deputy

SHOW WHERE DELIVERED (only if requested)
33 7072

c55-16-71648-10 GPO

TOTAL NO. OF PIECES LISTED BY SENDER

1

TOTAL NO. OF PIECES REC'D AT P. O.

POSTMASTER, PER (Name of receiving employee)

*Show under if international

POD Form 3877, Nov. 1968

APPLICATION FOR REGISTRATION OR CERTIFICATION

(Surcharges are not)

Mr. Smith would like to know who the present assignees are of Permit Nos. 36-7068 and 36-7069
Mr. Smith's phone no. is: 733-6684

DOUGLAS J. HINZE

NO - DO NOT SEND OUT

Norman Standal and George Lemmon
c/o Attorney Leon Smith
Kramer, Smith & Beeks
P. O. Box 508
Twin Falls, Idaho 83301

Re: Application for Permit No. 36-7072
Department of Water Administration
Order Dated November 9, 1970

Gentlemen:

Pursuant to request of counsel of Leon Smith representing Aquaculture Industries, Inc., Norman Standal and George Lemmon, I am writing this letter to clarify the position of the Idaho State Department of Water Administration as it pertains to water permit No. 36-7072, currently held by Aquaculture, ~~XXXX~~ Industries, Inc., an Idaho corporation engaged in the business of fish production.

The question asked of me by Attorney Smith requested an opinion as to ~~the clients~~ ^{compliance} by permit holder with paragraph 5 of my order dated November 9, 1970. It is my understanding that this opinion is necessary for the consummation of a sale of all common stock issued by Aquaculture Industries, Inc., from the present stockholders to the buyers and also Marine Protein, Inc., a New York corporation. It is my further understanding that, at the present time, there is contemplation of no transaction of the transfer of corporate stock and the water permit will remain listed in Aquaculture Industries, Inc., which will probably become a wholly owned subsidiary of Marine Protein, Inc., after a sale of Aquaculture Industries, Inc.

Since it is my understanding that Permit No. 36-7072 is not actually being assigned or sold but will remain in Aquaculture Industries, Inc., compliance with paragraph 5(a) of my November 9, 1970 order will be deemed satisfied and further corroborated by this letter. This department has recently received ^{completion} ~~conditions~~ of construction plans and specifications of what has been built on the premises of the place of application of the waters/ subject to Permit No.

36-7072 ~~and I have personally viewed the site to review the development of the premises as a ~~result of~~ result of the documentation on file pertaining to Permit No. 36-7072 and other matters of personal knowledge to me.~~ I am satisfied as of this date that the permit holder for Permit No. 36-7072 has fully complied with the terms and conditions of paragraph 5 of my order dated November 9, 1970.

36 7072

May 31, 1973

Mr. Leon Smith, Jr.
Attorney at Law
P. O. Box 508
Twin Falls, Idaho 83301

Re: Application for Permit No. 36-7072

Dear Mr. Smith:

Your recent telephone call suggested that we respond concerning a proposal for a sale of all common stock of Aquaculture Industries, Inc., to some other organization. As you are aware, this permit was issued with the condition that it not be assigned without the written consent of this office and that we would consider any attempt to assigning it as an indication that it was obtained for speculative purposes.

In January, 1971, we wrote to Messrs. Standal and Lemmon in connection with their proposal to assign the application to Aquaculture Industries, Inc. A copy is enclosed for your information. As indicated in that letter, it was our feeling that the application must remain in the ownership of Messrs. Standal and Lemmon, either personally or as major stockholders in the corporation which owns the fish rearing facilities. We would interpret any attempt to sale all the common stock of Aquaculture Industries, Inc., as an attempt of Standal and Lemmon to divest themselves of any further obligation in connection with the completion of construction of works and application of water to beneficial use. Therefore, unless you can show otherwise, this office would not approve the type of transfer that you are contemplating.

You also inquired as to the present assignees of Permit Nos. 36-7068 and 36-7069. Our records show that these permits are currently held by Mr. Donald J. Hinze of 232 Locust Street North, Twin Falls, Idaho.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

Enclosure

36 7072

January 6, 1971

Re: Permit No. 36-7085
Permit No. 36-7072

I hereby certify that this is a true and correct copy of the records of the Idaho
Department of Water Administration.

C. STEPHEN ALLRED
Deputy Director

36 7072

April 3, 1973

C
Mr. James L. Kennedy, Jr.
Bank of Idaho Building
P. O. Box 23
Twin Falls, Idaho 83301

O
Dear Mr. Kennedy:

Enclosed are the copies of the information you requested in your letter of March 27.

P
I believe the order of November 9, 1970 includes both the disposition of the Brailsford protest and the conditions of approval referred to on page four of the permit.

The time was extended for the completion of this project to December 1, 1975 as shown on the copy of the extension request.

I hope this will supply the information you need.

Y
Sincerely,

Bobby D. Fleenor
Assistant Director

BDF:kss

Enclosures

36 7072

Routing Slip
Department of Water Administration

Routing Order	To	Initial
	Director	<i>RKA</i>
	Deputy Director	
	Legal	
	Admin. Asst.	
<i>L</i>	Water Rights <i>Please Reply</i>	
	Engineering	
	Investigations	
	Eastern Dist.	
	Western Dist.	
	Southern Dist.	
	Northern Dist.	
	File	
	Read and Discard	
	Return to	
<i>N</i>		

36 121713

LAW OFFICES
WALKER, DEPEW & KENNEDY
BANK OF IDAHO BUILDING
P. O. BOX 23
TWIN FALLS, IDAHO 83301
TELEPHONE (208) 733-3083

LLOYD J. WALKER
JAY L. DEPEW
JAMES L. KENNEDY JR.

March 27, 1973

RECEIVED
MAR 29 1973
Department of Water Administration
SUN VALLEY, IDAHO 83353
(208) 726-5861

Mr. R. Keith Higginson, Director
Department of Water Administration
State of Idaho
Statehouse - Annex Z
Boise, Idaho 83707

Re: Permit 36-7072

Dear Keith:

Thank you very much for sending a copy of the above referenced permit in response to my telephone request for the Aquaculture, Inc., filing at Magic Springs.

The item which you provided was exactly what we needed. However, we do have the following questions regarding it:

- (1) Re protest filed by Robert Brailsford:
What was the disposition of the Brailsford protest, which is apparently distinct from the one filed by Idaho Power Co. and withdrawn on December 1, 1969? May we have a copy of the order?
- (2) Re approval condition, 1(b): Was there an extension of time for proof of construction and application from December 1, 1972, to some later date? What is the extended date? May we have a copy of the extension?
- (3) Re approval condition, 1(c): What are the conditions referred to as being set forth in the order issued on November 9, 1970? May we have a copy of the order?

36 7072

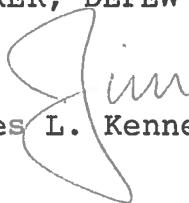
Mr. R. Keith Higginson
March 27, 1973
Page 2

We would appreciate very much an answer to these questions from you or your staff together with pertinent enclosures as indicated.

Thanking you for your cooperation and with every good wish, I am

Sincerely yours,

WALKER, DEPEW & KENNEDY


James L. Kennedy Jr.

JLK:sf

36 7072

April 10, 1973

John Rosholt
Parry, Robertson, Daly, and Larson
Idaho First National Bank Building
Twin Falls, Idaho 83301

Dear John:

We are enclosing the copies of the extension of time application and the two assignments in connection with permit no. 36-7072 that you requested on April 9. The fee for the copies is 65 cents.

Sincerely,

Donald W. McEldowney
Water Rights Administrator

DWM:kss

Enclosures

36 7072

January 10, 1973

Re: Permit No. 36-7072 & 36-7066

Fredrick L. Gettelman, Secretary
Aquaculture Industries, Inc.
Hagerman, Idaho 83332

Dear Mr. Gettleman:

We have received your assignments of the above referenced permits. We have reviewed the assignments in the department and they appear to be in order and we find no reason why they should not be approved at this time. Therefore, the assignments are being recorded as submitted.

If you have any questions, please contact us.

Very truly yours,

Donald W. McEldowney
Water Rights Administrator

DWM/cd

36 7072

AQUACULTURE INDUSTRIES, INC.

TELEPHONE 837-6676



HAGERMAN, IDAHO 83332

December 19, 1972

RECEIVED

DEC 21 1972

Department of Water Administration

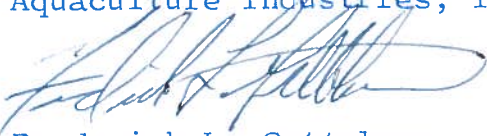
Dept. of Water Administration
State House Annex
Boise, Idaho

Gentlemen:

Enclosed please find requests for permit transfers from Norman Standal and George Lemmon on permits 36-7072 and 36-7066.

Norman Standal is President and George Lemmon is Vice President of the corporation and major stock holders of Aquaculture Industries, Inc.

Sincerely,
Aquaculture Industries, Inc.

A handwritten signature in blue ink, appearing to read "Frederick L. Gettelman".

Frederick L. Gettelman
Secretary

36 7072

STATE OF IDAHO 42076 DEPARTMENT OF STATE

ANNUAL STATEMENT

DUE JULY 1st
PENALTY, IF NOT FILED BY SEPTEMBER 1st
FORFEIT, IF NOT FILED BY NOVEMBER 30thJAN 11 3 51 AM '71
SECRETARY OF STATE
STATE OF IDAHO

Corporate Name Aquaculture Industries, Inc.

Officer Filing Annual Statement

Corporate Mailing Address 313 Shoshone Street North.....

City Twin Falls..... State Idaho..... Zip Code 83301.....

STATE OF Idaho..... } ss.

County of Twin Falls..... }

I, ..., being first duly sworn, make the following

statement concerning Aquaculture Industries, Inc.
(Name of Corporation)

Address of Principal place of business or office in Idaho: 313 Shoshone St., No. County Twin Falls

Name of Officers:

Norman Standal President

George Lemmon Vice President

Donald J. Hinze Secretary

Edward Sandlin Treasurer

Mailing Address of Officers:
(Postoffice box or Street number)

Star Route, Bliss, Idaho.....

Hagerman, Idaho.....

232 Locust St., No., Twin Falls.....

1953 Ninth Avenue East, Twin Falls

Name of Directors:

Norman Standal

George Lemmon

Donald J. Hinze

Edward Sandlin

C. K. Werth

Mailing Address of Directors:
(Postoffice box or Street number)

Star Route, Bliss, Idaho.....

Hagerman, Idaho.....

232 Locust St., No., Twin Falls.....

1953 Ninth Ave., East, Twin Falls

P.O. Box 98, Markesan, Wisconsin

(There must be at least two officers and three directors listed.)

Date of annual election of directors July 15 of each year.....

Managing agent in Idaho Name Address

CONDITION OF CAPITAL STOCK

The Authorized Capital of said Corporation is \$200,000.00

Divided into 2,000 shares of the par value of \$100.00/share \$

2. The amount of Capital Stock subscribed is 1,078 Shares \$

Amount issued \$ 107,800.00 Amount paid up \$107,800.00 \$107,800.00

3. If a Mining Corporation, state whether the corporation is productive or non-productive
(The Attorney General has ruled that a mine is productive if ore is being produced regardless of whether a profit is being made. All mining companies selling ore must pay tax.)

4. Is the Corporation a Co-operative Marketing Association? No

5. (a) Is the Corporation non-profit earning? No
(Irrigation and telephone corporations and all companies not organized for pecuniary profit must answer this question.)(b) If a non-profit earning corporation, COMPLETE STATEMENT ON REVERSE SIDE.
(The 1955 Session of the Idaho Legislature amended Sec. 30-601, Idaho Code, to provide "that corporations not organized to pecuniary profit shall file an additional statement showing the annual salary or wages paid to all directors, officers, agents and employees of such corporations.")

Affiant's Signature



Per , if not filed by September 1st \$10.00
Forfeit, if not filed by November 30th, 1972

Filing Annual Statement Fee	
Delinquent Penalty	
TOTAL PAID	

CORPORATE REFERENCE NUMBER 042076

CAPITAL STOCK:

Aquaculture Industries, Inc.
Frederick L. Gettelman, Secretary
P.O. Box 326
Hagerman, Idaho 83332

Authorized Capital Stock \$200,000.00

Divided into Number
of Shares 2,000

Par Value of \$100.00

Capital Stock Subscribed \$210,800.00

Amount Issued. \$210,800.00

Amount Paid Up \$210,800.00

Please put corporate name, officer filing Annual Statement, mailing address, city, state, zip code in above box.

The name of the Corporation: Aquaculture Industries, Inc.
(Correct Corporate Name)

Principal place of business and mailing address P.O. Box 326 Hagerman, Idaho 83332

Name	Address
Norman Standal	President Star Route Bliss, Idaho
George Lemmon	V.-Pres. Rural Route Hagerman, Idaho
Fred L. Gettelman	Secretary P.O. Box 326 Hagerman, Idaho
Edward Sandlin	Treasurer 1953 9th Ave. E. Twin Falls, Idaho
	Director
	Director All the officers are the directors
	Director
	Director
	Director
	Director

Managing agent Norman S. Standal

Managing agent in Idaho Mailing Address Star Route Bliss, Idaho

Date of Annual Election of Directors March

Is the corporation engaged in active business operations in Idaho? Yes
Yes or No.

Principal business activity Fish Growing

Fiscal year ends October 31

Did the Corporation file an Idaho Income Tax Return for its last Fiscal Year Yes
Yes or No

If No, explain.

If a Mining Corporation, state whether the corporation is productive or non-productive.

(The Attorney General has ruled that a mine is productive if ore is being produced regardless of whether a profit is being made. All mining companies selling ore must pay tax.)

Is the Corporation a Co-operative Marketing Association? Yes

(a) Is the Corporation non-profit earning? No

(Irrigation and telephone corporations and all companies not organized for pecuniary profit must answer this question)

(b) If a non-profit earning corporation, COMPLETE STATEMENT ON REVERSE SIDE.

(The 1955 Session of the Idaho Legislature amended Sec. 30-601, Idaho Code, to provide "that corporations not organized to pecuniary profit shall file an additional statement showing the annual salary or wages paid to all directors, officers, agents and employees of such corporations.")

Edward A. Small
Affiant's Signature

STATE OF Idaho

County of Gooding

Subscribed and sworn to before me this 23rd day of August, 1977

(NOTARY SEAL)

(over)

Notary Public

36 7072

ANNUAL STATEMENT

DUE JULY 1st
PENALTY, IF NOT FILED BY SEPTEMBER 1st
FORFEIT, IF NOT FILED BY NOVEMBER 30th

DOMESTIC CORPORATION
Domestic or Foreign

STATE OF Idaho }
County of Gooding } ss.

I, Frederick L. Gettelman, being first duly sworn, make the following statement concerning Aquaculture Industries, Inc.

(Name of Corporation)

Address of Principal place of business or office in Idaho: Hagerman, County Gooding

Name of Officers:

Mailing Address of Officers:
(Postoffice box or Street number)

Norman S. Standal
President

Star Route, Bliss, Idaho

George H. Lemmon
Vice-President

Hagerman, Idaho

Frederick L. Gettelman
Secretary

Apt. 5 Lynnwood Manor, Twin Falls,

Edward A. Sandlin
Treasurer

1953 Ninth Ave. East, Twin Falls,

Name of Directors:

Mailing Address of Directors:
(Postoffice box or Street number)

Norman S. Standal

Star Route, Bliss, Idaho

George H. Lemmon

Hagerman, Idaho

Frederick L. Gettelman

Apt. 5 Lynnwood Manor, Twin Falls,

Edward A. Sandlin

1953 Ninth Ave. East, Twin Falls,

(There must be at least two officers and three directors listed.)

Date of annual election of directors March

Managing agent in Idaho Norman S. Standal Star Route, Bliss, Idaho
Name Address

CONDITION OF CAPITAL STOCK

2. The Authorized Capital of said Corporation is - - - - - \$ 200,000.00
Divided into 2,000 shares of the par value of - - - - - \$ 100.00
The amount of Capital Stock subscribed is - - - - - \$ 210,800.00
Amount issued \$ 210,800.00 Amount paid up - - - - - \$ 210,800.00

3. If a Mining Corporation, state whether the corporation is productive or non-productive
(The Attorney General has ruled that a mine is productive if ore is being produced regardless of whether a profit is being made. All mining companies selling ore must pay tax.)

4. Is the Corporation a Co-operative Marketing Association? Yes

5. (a) Is the Corporation non-profit earning? No
(Irrigation and telephone corporations and all companies not organized for pecuniary profit must answer this question.)

(b) If a non-profit earning corporation, COMPLETE STATEMENT ON REVERSE SIDE.
(The 1955 Session of the Idaho Legislature amended Sec. 30-601, Idaho Code, to provide, "that corporations not organized for pecuniary profit shall file an additional statement showing the annual salary or wages paid to all directors, officers, agents and employees of such corporations.")

Frederick L. Gettelman
Affiant's Signature.

Subscribed and sworn to before me this 29th day of June, 19 71.

(NOTARY SEAL)

Samuel T. Lillard
Notary Public.

(OVER)

36 7072

71700428 JUL 8 1971 100000*

November 10, 1972

Re: Permitt No. 36-7072

Norman S. Standal & George Lemmon
Star Route
Bliss, Idaho 83314

Gentlemen:

Enclosed is a copy of the approved application for extension of time in connection with the above referenced permit.

Please note that the time within which to submit proof of beneficial use has only been extended to December 1, 1975.

Sincerely,

BOBBY D. FLEENOR
Assistant Director

BDF:DR
Enclosure

36 7072

October 20, 1972

Re: Permit No. 36-7072

Norman S. Standal and George Lemon
Star Route
Bliss, Idaho 83314

Gentlemen:

We have received, on October 19, 1972, an application for extension of time submitted in behalf of your permit No. 36-7072. Before action is taken on this application, we will require that you submit the following information in support of your application for extension of time.

1. A detailed break-down of construction completed to date, listing the exact nature of the construction, and cost related to the construction.
2. A location map showing the location and extent of the development completed to date.
3. A detailed statement as to how the 60% completed figure was arrived at, and also an outline as to what the balance of the 40% will involve.
4. A detailed statement as to the dates and time involved in the "negotiation with National Monument Investigating Committee" and why this has prevented you from proceeding.
5. A detailed proposal of how the additional time requested would be used or a construction schedule showing this information.

All the above required information must be submitted in affidavit form to the Department no later than November 20, 1972.

If you have any questions on the matter, please contact us.

Very truly yours,

R. Keith Higginson
Director

by
Donald W. McEldowney
Water Rights Supervisor

36 7072

AQUACULTURE INDUSTRIES, INC.

TELEPHONE 837-6676



HAGERMAN, IDAHO 83332

November 2, 1972

Mr. Donald W. McEldowney
Department of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707



Dear Mr. McEldowney

In reply to your letter of 10/20/72 requesting additional information for our extension on permit No. 36-7072. We, Norman Standal and George Lemmon, Swear the following to be true to the best of our knowledge.

1. Nature, completion and costs of present construction.
(Refer to Aquaculture Industries, Inc. 1000 Springs hatchery drawing furnished your department per your 9/69 request)
 - a. Hatchery and upper pond water diversion and supply pipe line are completed as shown.
 - b. Six of the nine upper ponds are completed.
 - c. Hatchery shown is completed.
 - d. Diversion and main channel is completed from Bridal Veil spring to small springs as shown.
 - e. The four southerly raceways (ponds 1 thru 12) are completed.
 - f. The additional raceways (ponds 12 thru 21) are roughed in.
 - g. In addition we have built access roads, landscaped the property and built a modern processing plant.

Approximate Cost Breakdown:

Legal services and expenses (water permit)	\$ 5,600
Land improvements (roads, ponds, canals, etc)	90,000
Structures (building, water structures, etc)	92,000
General (engineering, administrative, inventory)	112,000
Total approximate costs	\$299,600

2. Location and extent of development refer to item 1 above.
3. The 60% completed figure is our best estimate. The 40% balance will, to our present knowledge, consist of
 - a. Completion of two more hatchery raceways.
 - b. Completion of three more market raceways (lower ponds)

33 7072

Page 2

Mr. Donald W. McEldowney
Department of Water Administration

November 2, 1972

- c. Extension of main canal to pick up balance of water under permit No. 36-7072
- d. Additional road and ground work.

4 & 5 We met with Paul Fritz in June and again with him, his staff and the State Parks Board representatives on August 23, 1972 to discuss the inclusion of our property in a National Park or Monument. Mr. Fritz said at that time it would take about four months to evaluate their findings. In seeking Mr. Fritz's judgment of the effect the completion of our plans would have on the present and future esthetic value of our property, he recommended several changes, amongst them being the discontinuance of the construction of an access road we were building to the lower ponds. As a result we have discontinued construction in that area. There has, rightfully been considerable public interest shown in the development of this property and it is our feeling it should eventually have some kind of public use.

If our permit is extended as requested it will allow us time to consider all aspects of our construction and complete the above described work in a harmonious and beneficial manner for all concerned.

Our only other choices are to rush the construction in whatever manner is necessary to put the water to use, or risk losing our permit. In this case the esthetic value of our property would probably be destroyed by poor planning or by someone else using a pipeline to take the water across the river for a similar hatchery operation. If you have any other questions please contact us.

Sincerely,


Norman S. Standal


George Lemmon


Notary Public

My commission expires on 3-3-75

Sworn and subscribed
before me this 6th of November 1972

36 7072

January 6, 1971

Mr. H. A. Lancaster
Clerk of the District Court
Fifth Judicial District
Twin Falls County
Box 126
Twin Falls, Idaho 83301

Dear Mr. Lancaster:

Pursuant to Section 42-203, Idaho Code, the State Reclamation Engineer conducted hearings and issued a decision approving applications for Permit No. 36-7072 and 36-7085 authorizing the diversion of water from Bickel Springs or Thousand Springs in Gooding County, Idaho. The matters were consolidated for hearing purposes. The decision to issue the permits was based upon briefs submitted to the department by the parties concerned, pursuant to a stipulation that the matter be decided on the material contained in those briefs and within the records of the department. On December 14, 1970, the department received a Praecipe for Transcript on Judicial Review and notice of appeal from Mr. John A. Rosholt of the firm of Parry, Robertson, Daly & Larson. Pursuant to Section 42-203 and 67-5215, Idaho Code, and Mr. Rosholt's request, we submit copies of the applications filed by the applicants, associated documents, pertinent correspondence, briefs and reply briefs as follows:

Permit File No. 36-7085 (Up to the time of consolidation)

Amended application for permit in the name of Robert H. Brailsford, President of Brailsford Brothers, Inc., an Idaho Corporation, dated November 12, 1970.

Order dated November 9, 1970 signed by R. Keith Higginson approving Application for Permit No. 36-7085.

Affidavit of Publication No. 714, Gooding County.

Affidavit of Publication No. 14590, Twin Falls County.

Letter of January 30, 1970, Norman S. Standal and George Lemmon.

Application for Permit from Brailsford Brothers, Inc., received September 29, 1969.

January 6, 1971

Affidavit of Publication No. 14363, Twin Falls County.

Affidavit of Publication No. 620, Gooding County.

Letter of October 28, 1969, Norman S. Standal and George H. Lemmon.

Letter of December 9, 1969 signed by John A. Rosholt, with exhibits.

Letter dated November 25, 1969 from John A. Rosholt.

Letter of November 28, 1969 from John A. Rosholt, with attachments.

Letter of November 12, 1969 from James E. Bruce.

Exhibit B - November 26, 1969. Brailsford Bros., Inc. Proposed
Irrigation and Fisheries Project, Project Profile.

Permit File No. 36-7072 (Up to time of consolidation)

Letter dated October 28, 1970 from R. Keith Higginson.

Letter of November 5, 1970, John C. Hepworth.

Application for Permit in the name of Norman S. Standal and George
Lemmon, received July 17, 1969.

1000 Springs Trout Facilities Layout Plan - Lemmon-Standal-Sheet No. 3.

Bickel Springs Trout Facilities Layout Plan - Lemmon-Standal.

Order dated November 9, 1970, R. Keith Higginson, approving Application
for Permit No. 36-7072.

Affidavit of Publication No. 553, Gooding County.

Letter dated August 11, 1969 from Robert Brailsford.

Letter dated August 3, 1969, John R. LeMoyne.

Letter dated August 6, 1969, Snake River Ski Club.

Letter of September 26, 1969, C. Stephen Allred.

To Whom It May Concern, December 15, 1969.

Letter dated October 28, 1969, Norman S. Standal and George Lemmon,
with attachments.

33 7072

Consolidated file (Identical for each case)

Notice of Conference, dated December 4, 1969, C. Stephen Allred.

Memo from C. Stephen Allred, dated December 24, 1969.

January 6, 1971

Roster of attendance sheet, December 16, 1969.

Pre-hearing Conference Order, dated April 27, 1970, R. Keith Higginson.

Notice of Hearing, dated April 27, 1970, from C. Stephen Allred.

Stipulation Vacating Hearing Setting, dated May 13, 1970, John C. Hepworth.

Letter of June 16, 1970, enclosing Stipulation, Michael H. Felton.

Affidavit dated June 16, 1970, Norman S. Standal.

Affidavit dated June 23, 1970, Norman S. Standal.

Brief of applicants, Standal and Lemmon, July 16, 1970, John C. Hepworth.

Affidavit, July 13, 1970, Richard J. Gooby.

Brief of Brailsford Brothers, Inc., July 20, 1970, John A. Rosholt.

Reply Brief of Standal and Lemmon, August 18, 1970, John C. Hepworth.

Application for Permit, Norman Standal and George H. Lemmon, received February 24, 1970.

Affidavit, June 25, 1970, Dave Erickson.

Letter dated June 9, 1970, J. David Erickson (Exhibit A).

Letter dated August 18, 1970, John A. Rosholt, with attachment (Reply Brief of Brailsford Brothers, Inc.

Findings of Fact and Conclusions of Law, November 9, 1970, R. Keith Higginson.

If you have any questions, please feel free to contact me.

Very truly yours,

C. STEPHEN ALLRED
Deputy Director

enclosure

SS 7072

October 2, 1972 CERTIFIED MAIL

#24008

Re: Permit No. 36-7072

Norman S. Standal & George Lemmon
Star Route
Bliss, Idaho 83314

Gentlemen:

One of the conditions of approval of your water Permit No. 36-7072 (see last page of your approved permit) was that evidence of the extent of development be submitted as proof of application of water to beneficial use to this office on or before December 1, 1972. Enclosed is an affidavit form which must be used to submit the required proof of beneficial use.

If you have not fully completed your project, and you have not previously received an extension of time, you may request an extension of time provided the delay is for reasonable cause as indicated in Section 42-204, Idaho Code, amended. If you have been prevented from proceeding by a governmental agency or by litigation, more than one extension of time can be granted.

Either the beneficial use affidavit or a request for an extension of time must be received by this Department on or before the above mentioned date, otherwise the permit will lapse and be of no further force or effect.

R. Keith Higginson

R. KEITH HIGGINSON
Director

Enc: Proof affidavit
dr

36 7072

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐

Show to whom, date and address
where delivered

☐

Deliver ONLY
to addressee

RECEIPT

Received the numbered article described below

REGISTERED NO.

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

CERTIFIED NO.

24008

1

Norman S. Standal

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

INSURED NO.

2

Mrs. Norman Standal

DATE DELIVERED

3

SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

36 7072

42-203 Supp
Dept wants some type
of appearance, answer a
motion to set etc.
Steve asked handling
principles.

100

100

Department of Water Administration

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

IN THE MATTER OF THE APPLICATION	)	
FOR PERMIT NO. 36-7072, NORMAN	)	
STANDAL AND GEORGE LEMMON, AN	)	<u>PETITION FOR</u>
APPLICATION FOR PERMIT NO. 36-7085,	)	
ROBERT BRAILSFORD, PRESIDENT OF	)	<u>JUDICIAL REVIEW</u>
BRAILSFORD BROTHERS, INC., AN	)	
IDAHO CORPORATION.	)	

Brailsford Brothers, Inc., petitions as follows:

I.

For Judicial Review of the above-entitled matter pursuant to the provisions of the Idaho Administrative Procedures Act, and specifically Idaho Code Section 67-5215.

II.

For Judicial Review of the Findings of Facts and Conclusions of Law (Exhibit "A" hereto) and Order (Exhibit "B" hereto) of the Director of the Department of Water Administration in the above-entitled matter, specifically as follows:

1. Finding of Fact No. VIII is improper and irrelevant because not based upon facts in the record and therefore clearly erroneous.

2. Finding of Fact No. IX is improper inasmuch as applicants Lemmon and Standal had the burden of proof to show some interest in land upon the date of filing their original application and it is also improper for the Director of the

33 7072

1 Department to conclude that the failure of such proof does not constitute
2 speculation under Idaho Code Section 42-203.

3 3. The Director failed to take Judicial Notice of the physical
4 characteristics of the land and the physical impossibility of applicants Lemmon
5 and Standal utilizing 15 acres of land for the construction of fish ponds as
6 stated in Finding of Fact No. XI.

7 4. Contrary to Conclusion of Law II, and based upon a proper ap-
8 plication of the law to the facts, the Director of the Department of Water
9 Administration must conclude that George Lemmon and Norman Standal must
10 have some interest in the land at the point of use at the time their application
11 was filed to comply with Idaho Code Section 42-203.

12 5. Contrary to Conclusion of Law II, and based upon a proper ap-
13 plication of the law to the facts, the Director of the Department of Water
14 Administration must conclude that the evidence was sufficient to constitute
15 speculation on the part of Norman Standal and George Lemmon and that said
16 Director should have denied said application or advance the priority date on
17 said application until the time that the applicants acquired some interest in the
18 land where they alleged they would beneficially apply said water.

19 6. That Paragraph 1 of the Order, as issued by the Director of the
20 Department of Water Administration, improperly orders approval of Permit
21 No. 36-7072 based upon the above erroneous Findings of Fact and Conclusions
22 of Law.

23 7. That Paragraph 3 of said Order is improper since Application No.
24 36-7072 should have properly been denied or at best been given a priority date
25 of October 8, 1969, the date upon which Norman Standal and George Lemmon
26 purchased some property.

27 WHEREFORE, Petitioner prays that after Judicial Review of this
28 matter by the District Court of the Fifth Judicial District of the State of Idaho,
29 in and for the County of Twin Falls, that the Court will make an appropriate
30 order as follows:
31
32

1 1. Ordering revocation of Application No. 36-7072 or in the alternative
2 issuing Permit No. 36-7072 with a priority date inferior to that of Petitioner's
3 on Application No. 36-7035.

4 Dated this 10th day of December, 1970.

5
6 BRAILSFORD BROTHERS, INC.

7 By Parry, Robertson, Daly & Larson
8 P.O. Box 525
9 Twin Falls, Idaho 83301
10 Attorneys for Petitioner

11 John A. Rosholt
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36 7072

LAW OFFICES
WALKER, DEPEW & KENNEDY
BANK OF IDAHO BUILDING
P. O. BOX 23
TWIN FALLS, IDAHO 83301
TELEPHONE (208) 733-3083

LLOYD J. WALKER
JAY L. DEPEW
JAMES L. KENNEDY JR.

June 13, 1973

RECEIVED
JUN 14 1973
Department of Water Administration
SUN VALLEY, IDAHO 83353
(208) 726-5861

#36-7072

Mr. Keith Higginson
Director
Department of Water Administration
Statehouse Annex 2
Boise, Idaho 83707

Re: Aquaculture Industries, Inc.

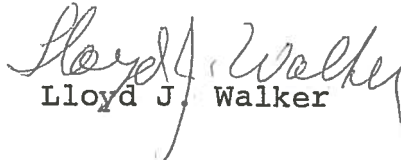
Dear Keith:

Enclosed is a statement on the condition of Aquaculture Industries, Inc. by it's secretary, Frederick Gettelman. I have reviewed the statement and it appears to contain all of the elements we discussed.

If you still have trouble granting the transfer requested, I would appreciate hearing from you so that we might correct any inadequacies.

Sincerely yours,

WALKER & KENNEDY


Lloyd J. Walker

LJW:gb
Enc.

36 7072

RECEIVED
JUN 14 1973
Department of Water Administration

STATEMENT OF CONDITION

This statement is made to support the request of Aquaculture Industries, Inc. for permission pursuant to Paragraph 5 of the order entered by the Director of the Department of Water Administration in the administrative hearing, which was entitled "In the matter of the application for permit No. 36-7072, etc." In that proceeding, and pursuant to Paragraph 5, the Administrator reserves the right to review any requests for transfer of the permit or sale of the stock. It is hereby requested that permit No. 36-7072, which is owned by Aquaculture Industries, Inc., remain there but that all of the stock owned by the current stockholders of Aquaculture Industries, Inc. be transferred to Marine Protein, Inc. with offices in New York City. It has been determined that the Administrator is desirous of maintaining a record in this matter and receiving a status report so that a determination can be made that the trout farm, which was the purpose of the water permit, is actually functioning and operating; and is the subject of the sale as distinguished from the subject of a bare water right only. For that purpose this statement is made and the contents come from the books and records of the corporation together with physical observations.

As a part of the administrative hearing in which this permit was granted, there was presented as a part of

36 7072

the application to the Administrator, which later became a part of the appeal file of the Fifth District Court, a construction plan for the construction of nine raceways which are approximately 80 x 600 feet long and which are subdivided into 27 ponds which are approximately 80 x 200 feet. In addition to that, the construction plan showed cement raceways of approximately 30 x 300 feet to be constructed adjacent to the hatchery house and processing house.

These plans as submitted were approved by the Department of Water Administration and the Fifth Judicial District judge on appeal and all of the construction that has taken place has been in strict accordance with the plans as submitted. This is in conformance with Paragraph 5-C of the Administrator's order and this statement is being made only for the purpose of establishing to the Administrator that the plans as submitted to him with the application have been adhered to strictly in all construction matters thus far.

We have been scrupulous in constructing according to the construction plans previously approved by the Administrator. Thus far there has been completed the processing plant which has been in the past utilized and is capable of processing a million and a half pounds of fish per year. There exists in addition to that on the premises a standard freezing unit for the purpose of freezing the trout for shipment to market. This is a fully completed and activated processing plant which is fully capable and has processed in the past all of the fish produced on the premises. In addition to that, offices have been constructed

36 7072

wherein company records, etc., are kept, and the hatchery facilities have been completed. The hatchery facility is capable of hatching six million fish a year, which, when translated into market size fish would be approximately three million pounds of fish for market. The raceways adjacent to the processing plant, which are approximately 30 x 300 feet and divided into six sections are completed. After the fish have been hatched as fingerlings, they are transplanted into the raceways adjacent to the processing plant where their growth continues. At the lower level, there have been completed four full raceways which are compartmentalized into 11 separate ponds. All of these have been utilized for more than two years now in the rearing of fish for market and the ponds, as completed, are capable of producing at least 750,000 pounds a year and could produce up to one million pounds per year. There are partially completed three more raceways which will be divided into nine more ponds, and with the completion of that portion of the facility at least one and a half million pounds of trout per year could be raised; and under a somewhat more intense program, a possibility of two million pounds could be raised annually.

Of the water applied for, the construction of the collection ditches outlined on the plans as approved by the Administrator previously, there is collected about 155 cubic second feet of water. The balance of the collection ditch will be completed along with the completion of the three raceways which are partially done at this time, so that there will be full utilization of the entire 215 cubic second feet of water.

Again the collection of the water has been done in accordance with the plans which were submitted to and approved by the Administrator.

The cost of the construction, together with the processing plant, and the equipment located in the processing plant, including vehicles, all mechanical tools, etc., have an actual value of approximately \$341,746.00. This is a fully developed operating trout farm in which that investment has taken place and which has, in the past, produced trout and which is currently producing trout for market in the United States.

There was produced and marketed during the last growing and marketing season 425,000 pounds of trout. We are currently in a new marketing season and there were hatched one and one half million trout eggs which are sufficient to produce approximately 750,000 pounds of trout during this season. These trout are currently being raised for market. There exists, of course, the grown fish from last year's hatch and there is currently live inventory on the premises of 1,250,000 fish which is translated into 188,000 pounds of live swimming fish. Most of these are ready for market in so far as the pounds are concerned. Most of the weight, of course, is attributed to the marketable fish; the fish which were just hatched and which will be the market fish next year are very small yet and are not very heavy.

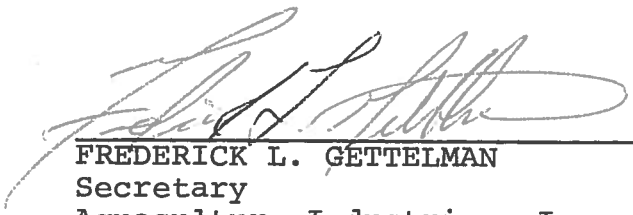
We are currently selling in twenty states in the United States, with our primary markets in the Midwest, Texas and California. We have processed inventory throughout various warehouses in the West and Midwestern parts of

36 7072

the United States. As of the date of this statement, there are approximately 26,000 pounds of dressed fish in inventory throughout broker warehouses ready for sale. The corporation has been marketing fish under two labels, Magic Springs and Rainbow Falls.

Thus, this is a fully operating trout farm which has been developed in a reasonable manner and in a reasonable speed. The completion of the raceways and the full utilization of the water should be completed within the next twelve months. Although the Department of Water Administration has allowed until 1975 for that purpose. The business is one that is fully integrated and includes hatching trout eggs through rearing them, processing them, packaging them, and then selling them on the open market. It is the going trout farm that is the subject of this sale.

Dated this 13th day of June, 1973.



FREDERICK L. GETTELMAN
Secretary
Aquaculture Industries, Inc.

January 12, 1971

Re: Permit No. 36-7072

Norman S. Standal & George Lemmon
Star Route
Bliss, Idaho 83314

Gentlemen:

We have your recent request for authority to assign your Permit No. 36-7072 to Aquaculture Industries, Inc. As previously discussed with you, an assignment of this permit will be approved only if made for security purposes and where the original applicant still controls the development and intends to develop the permit with his own resources or resources loaned to him for that purpose. We will not approve an assignment where the permit holder divests control of the permit. From the information in your letter and information obtained from the Secretary of State's Office, this does not appear to be the intent of your proposed assignment. If you wish, you may submit additional information that would indicate the purpose of the assignment is for security purposes and that you would still wholly own the permit. You should also submit a draft of the proposed assignment agreement.

We are sorry about the delay but we had been informed by the Secretary of State's Office that Aquaculture Industries, Inc. was not in good standing as a corporation and we were waiting for final action by that office. On December 23, we received official notice that the Aquaculture Industries, Inc. had forfeited its corporate charter on December 1, 1970. On January 12, 1971, we received notice that Aquaculture Industries, Inc. had filed its annual statement and its charter had been reinstated.

Please let us know your further intentions with regard to Permit No. 36-7072.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH/BDF/kh

36 7072

Norman S. Standal
George Lemmon
Star Route
Bliss, Idaho 83314



State of Idaho
Department of Water Administrator
Statehouse - Annex 2
Boise, Idaho 83707

ATTN: R. Keith Higginson
Director

36 7072

Norman S. Standal
George Lemmon
Star Route
Bliss, Idaho 83314



State of Idaho
Department of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707

ATTN: R. Keith Higginson
Director

36 7072

November 20, 1970

est
RECEIVED

NOV 24 1970

Department of Water Administration

State of Idaho
Department of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707

ATTN: R. Keith Higginson
Director

Dear Mr. Higginson:

Thank you for your recent decision on Water Permit
No. 36-7072.

We now ask you for your authority to transfer this
Permit #36-7072 to Aquaculture Industries, Inc.

We formed this corporation in March of 1970 for
the development of this permit. We own the majority
of the outstanding stock of this corporation. I, Norman
Standal, am the president and George Lemmon is the Vice-
President. There are three other significant stockholders
in Aquaculture Industries, Inc. Mr. Don Hinze, who is
Secretary of the Board, Mr. Ed Sandlin, Treasurer of the
Board, and Mr. C. K. Werth.

Upon your approval this permit will be transferred
at no profit to us of any kind. We will also transfer,
at cost, to this same corporation the property on which
the water arises and is put to beneficial use.

Your prompt action on this matter would be much
appreciated.

Sincerely,



Norman S. Standal



George H. Lemmon

NSS/as

36 7072

DON SAMUELSON, Governor
COMMISSION
ROBERT G. KALB, Sandpoint
PAUL C. KEETON, Lewiston
JOHN EATON, Cascade
R. J. HOLMES, Twin Falls
GLENN STANGER, Idaho Falls



JOHN R. WOODWORTH, Director

IDAHO FISH AND GAME DEPARTMENT

January 4, 1971

RECEIVED
POST OFFICE BOX 25
600 SOUTH WALNUT STREET
BOISE, IDAHO 83707

JAN 8 1971

Department of Water Administration

Mr. Robert A. Erkins
President, Thousand Springs
Trout Farms, Inc.
P. O. Box 232
Buhl, Idaho 83316

Re: Idaho Department of Water Administration
Permit No. 36-7072-Norman S. Standal & George Lemmon

Dear Bob:

Reference is had to your letter of October 26 regarding the above-mentioned application for permit to appropriate the public waters of the State of Idaho. I have had an opportunity to review and research the situation since that date.

? (This application was filed with the Department of Water Administration on July 17, 1969, and notice of the same was published in the Gooding Leader Newspaper on July 31 and again on August 7, 1969. The Idaho Fish and Game Department had no notice of the pending application until the following March, and thus was unable to file a protest within the statutory 60-day period from the last date of publication of the Notice of Application for Permit. This is simply another example of the need within our state for a mandatory permit system with proper notice being given by the Department of Water Administration to all other state agencies and departments which might be affected by the applied for water appropriation.

The Fish and Game Department examined the Standal and Lemmon project at Thousand Springs in March, 1970, after receiving a complaint over siltation of the Snake River from the construction work being performed at the proposed hatchery site. At the time of this examination by the representatives of the Fish and Game Department, construction was already well underway.

36 7072

It was determined that if the stream bottom over which Standal and Lemmon had constructed part of their raceways were determined to be a portion of the bed of the Snake River, then this matter would fall within the jurisdiction of the State Land Board, and particularly within the purview of Subsection 9 of Section 58-104, I.C., which holds that the State Land Board shall have the power:

"To regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams, to the natural or ordinary high water mark thereof, so as to provide for their commercial, navigational, recreational or other public use; provided, that the board shall take no action in derogation of or seeking to interfere with the riparian or littoral rights of the owners of upland property abutting or adjoining such lands; except that when necessary to provide for the highest and best use of such lands for commercial, navigational, recreational or other public purposes, the board may acquire the riparian or littoral rights of upland owners by purchase or gift. The term "natural" or ordinary high water mark" as herein used shall be defined to be the line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes. Provided that this definition shall not be construed so as to affect or change the vested property rights of either the state of Idaho or of riparian or littoral property owners. Lands lying below the meander line of a lake bed encompassing a national wildlife refuge as established under the authority of the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222), as amended, or the Fish and Wildlife Coordination Act (48 Stat. 401), as amended, or the Fish and Wildlife Act of 1956 (70 Stat. 1119), as amended (16 USC 742a through 742i), are not subject to the application of this act."

Further research into the matter reveals that the Land Board was alerted to the situation and looked into the same. We understand that the Land Board concluded that the raceway construction sites, while lying within the back waters of the upper Salmon Falls Dam, is not in the bed of a navigable river in as much as the construction site apparently lies above the high water mark of the Snake River prior to the construction of Salmon Falls Dam.

Robert Erkins

-3-

Jan. 4, 1971

If any further action is contemplated by either the State Land Board and/or the Fish and Game Department or is to be undertaken, I shall advise you immediately.

Very truly yours,



T. J. Jones, III

TJJ:pr

cc - R.L. Salter

Idaho Dept. of Water Administration
State Land Board

36 7072

November 23, 1970

Re: Permit No. 36-7072 - Norman S. Standal and George Lemmon
36-7085 - Robert H. Brailsford, President
Brailsford Brothers, Inc.

C
Mr. Earl Hardy
1220 Vista Avenue
Boise, Idaho

O
Dear Mr. Hardy:

Pursuant to your request, please find enclosed a copy of approved permit no.
36-7072 and 36-7085, as well as the order approving these permits.

P
If we may be of any further assistance in this matter, please do not
hesitate to contact us.

Very truly yours,

Y
Donald W. McEldowney
Appropriation Supervisor

DWM:CM

Enclosure

36 7072

STATE OF IDAHO

DEPARTMENT OF WATER ADMINISTRATION

Statehouse - Annex 2
Boise, Idaho 83707
(208) 384-2215



R. Keith Higginson
Director

Water Rights Administration
Water Resource Investigations
Dam and Reservoir Safety
Water Well Drilling
Flood Plain Management
Irrigation and
Flood Control Districts

November 20, 1970

Re: Permit Nos. 36-7072 - Norman S. Standal and George Lemmon
36-7085 - Robert H. Brailsford, President,
Brailsford Brothers, Inc.

Mr. T. J. Jones
Box 1003
Boise, Idaho 83701

Dear Mr. Jones:

Pursuant to your request, please find enclosed copies of the above referenced permits and the order approving these permits.

If we may be of any further assistance, please contact us.

Very truly yours,

Donald W. McEldowney
Appropriation Supervisor

36 7072

DWM/DG

Enc: copies of permits
copy of order

November 17, 1970

Re: Permit No. 36-7072

Mr. Norman S. Standal
Star Route
Bliss, Idaho 83314

Dear Mr. Standal:

Enclosed is a copy of your approved Application for Permit No. 36-7072. We direct your attention to the conditions of approval as listed on the fourth page.

Be sure to note that a special condition requiring you to install and maintain a measuring device at your point of diversion has been placed upon your permit. We are enclosing a letter describing different types of measuring devices accepted by this office.

Very truly yours,

C. Stephen Allred
Deputy Director

CSA:kh

Enclosures: Copy of permit
1 informational letter
Order
Receipt No. 3330 for \$100

cc. John C. Hepworth

36 7072

November 17, 1970

Re: Permit No. 36-7072

Mr. George Lemmon
Star Route
Bliss, Idaho 83314

Dear Mr. Lemmon:

Enclosed is a copy of your approved Application for Permit No. 36-7072. We direct your attention to the conditions of approval as listed on the fourth page.

Be sure to note that a special condition requiring you to install and maintain a measuring device at your point of diversion has been placed upon your permit. We are enclosing a letter describing different types of measuring devices accepted by this office.

Very truly yours,

C. Stephen Allred
Deputy Director

CSA:kh

Enclosures: Copy of permit
1 informational letter
Order

cc. John C. Hepworth

36 7072

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

IN THE MATTER OF THE APPLICATION FOR PERMIT)
NO. 36-7072, NORMAN STANDAL AND GEORGE) FINDINGS OF FACT
LEMMON, AND APPLICATION FOR PERMIT NO. 36-7085,) and
ROBERT BRAILSFORD, PRESIDENT OF BRAILSFORD) CONCLUSIONS OF LAW
BROTHERS, INC., an IDAHO CORPORATION.)

This matter came before the Director of the Department of Water Administration, State of Idaho, (formerly the Department of Reclamation), upon the protest of Robert Brailsford, to Application for Permit to Appropriate the Public Waters of the State of Idaho, Application No. 36-7072, filed by Norman Standal and George Lemmon, and upon the Protest of Norman Standal and George Lemmon, to Application for Permit to Appropriate the Public Waters of the State of Idaho, Application No. 36-7085, filed by Robert Brailsford. Hearings upon the respective Protests to the Applications were consolidated upon agreement of counsel. Norman Standal and George Lemmon were represented by John Hepworth of the firm of Hepworth, Walker, Nungester and Felton. Robert Brailsford was represented by John Roshalt of the firm of Parry, Robertson, Daly and Larson. A pre-hearing conference was held December 16, 1969, at which time the issues and facts in dispute were settled and incorporated into the Pre-hearing Conference Order entered by State Reclamation Engineer on April 27, 1970. Upon Stipulation of the parties received June 29, 1970, the parties herein agreed that the respective Protests to the Applications should be heard upon a stipulation of the facts therein contained, briefs, affidavits, and material on file with the State Reclamation Engineer's office in connection

36 7072

with this matter.

The record in this matter consists of Application for Permit to Appropriate the Public Waters of the State of Idaho, Application No. 36-7072, filed by Norman Standal and George Lemmon and the additional information provided in response to the Department's letter of September 26, 1969, which is considered part of the Application; the Protest to Application 36-7072 filed by Robert Brailsford; the Application for Permit to Appropriate the Public Waters of the State of Idaho, Application No. 36-7085, filed by Robert Brailsford and the additional information provided in response to the Department's letter of October 9, 1969, which is considered part of the Application; the Protest to Application 36-7085 filed by Norman Standal and George Lemmon; the Amendment to Application No. 36-7085 filed by Robert Brailsford and the Protest thereto filed by Norman Standal and George Lemmon; Application No. 36-7121 filed by Norman Standal and George Lemmon received February 24, 1970, from another water source for use in connection with the same facilities proposed in Application No. 36-7072; Stipulation between the parties received by the Department of Water Administration on June 29, 1970; the Affidavit of Norman Standal and George Lemmon, dated June 23, 1970; the Affidavit of Theodore Heikes, dated June 18, 1970; the Affidavit of Dave Erickson, dated June 25, 1970; the Affidavit of Norman Standal and George Lemmon, dated June 16, 1970; and the Affidavit of Richard Gooby, dated July 13, 1970. Each of the parties submitted an original brief and a reply thereto. The Director of the Department of Water

36 7072

Administration being fully advised in the premises hereby enters Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Norman Standal and George Lemmon, are signatories to Application for Permit to appropriate the Public Waters of the State of Idaho No. 36-7072 which was filed in the office of the Reclamation Engineer for the State of Idaho on the 17th day of July, 1969, at 2:00 o'clock P. M. In such application, Standal and Lemmon request permission to appropriate 215.2 cubic feet per second for fish propagation and domestic purposes, from the water source described as Thousand Springs, tributary of the Snake River, in Gooding County, the points of diversion more particularly described as:

Northwest Quarter of the Northwest Quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 8, the Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section 7, and the Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 6, all in Township 8 South, Range 14 East, Boise Meridian, Gooding County, Idaho.

Application No. 36-7072 indicated that the property at the point of diversion and the place of use was owned by the Idaho Power Company and that the applicants were negotiating for the purchase of said property. A protest against said application was filed by Brailsford Brothers, Inc., said protest dated the 11th day of August, 1969.

II.

On September 29, 1969, Brailsford Brothers, Inc., an Idaho Corporation with their principal place of business in Buhl, Idaho, submitted Application for Permit to appropriate the Public Waters of the State of Idaho No. 36-7085, which application was received in the State Reclamation Engineer's office at 9:00 A.M.

In said application, Brailsford Brothers, Inc., sought authority to divert 150.0 cubic feet per second of the water from the Bickel Springs, tributary of the Snake River in Gooding County, Idaho. The points of diversion were specified as (Lot 1) Northwest Quarter Northwest Quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$), Section 8; (Lot 8) Southeast Quarter Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$), Section 6; Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$), Section 8; all property described being in Township 8 South, Range 14 East, Boise Meridian, Gooding County, Idaho. The application specified that Brailsford Brothers, Inc., owned the property at the place of use and that the property at the point of diversion was owned by the Idaho Power Company, and further specified that the applicant would either purchase property at the point of diversion from the Idaho Power Company at public auction, negotiate for lease with the successful purchaser, or file a condemnation action to gain access to the intended points of diversion. Application No. 36-7085 indicated that 150.0 cubic feet per second of water would be used for the irrigation of 2,542 acres of land owned by the Brailsford Brothers, Inc., and that 50 cubic feet per second of water would be used for fish culture or fish propagation purposes. On October 28, 1969, a protest against the issuance of a permit under Application No. 36-7085 was filed by Norman Standal and George Lemmon.

III.

On October 8, 1969, Norman Standal and George Lemmon submitted the highest and best bid to the Idaho Power Company for the purchase of the property described in Application No. 36-7072 and on October 20, 1969, did enter into a contract for

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a period up to ten years with interest at 8% per annum with the Idaho Power Company for payment of the unpaid balance of the purchase price.

IV.

On December 10, 1969, Brailsford Brothers, Inc., filed with the State Department of Reclamation an Amended Application for Permit. This amended application asked for authority to reduce the amounts requested under the original application No. 36-7085 from 150.0 cubic feet per second to 100.0 cubic feet per second from the Bickel Springs, tributary of the Snake River. Only two points of diversion were listed in the amended application, being, (Lot 1) Northwest Quarter Northwest Quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 8; and (Lot 8) Southeast Quarter Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 6; both in Township 8 South, Range 14 East, Boise Meridian, Gooding County, Idaho. The amended application indicated that Brailsford Brothers, Inc., owned the property at the intended place of use and that the property at the point of diversion was then owned by Standal and Lemmon, and further specified that the applicant would negotiate for the lease of an appropriate right of way or file a condemnation action if necessary. The amended application specified that 20 cubic feet per second would be used for irrigation purposes on 1,007.16 acres of land and that 80 cubic feet per second would be used for fish culture or propagation purposes on 20 acres of land.

V.

At all times during 1969, George Lemmon served as water-master for Water District 63 which district includes the Hagerman Valley including those points of diversion in the application herein referred to.

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VI.

That Norman Standal and George Lemmon on June 1, 1969, contacted a representative of the Idaho Power Co. for the purpose of purchasing the property which is referred to in their Application as the place of use. The power company was unwilling to negotiate a sale with these Applicants at this time because of their existing plans to make a sale under sealed bids. No agreement was reached for the sale, lease, or use of these lands by the Applicants until after their Application had been filed.

VII.

That in September of 1969, the Idaho Power Company gave notice of intent to sell the lands by bid on October 8, 1969, and that the Applicants, George Lemmon and Norman Standal bid for the purchase of the lands over which a use was to be made under their Application and a contract of sale was consummated on October 18, 1969. That under the contract of sale Norman Standal and George Lemmon purchased approximately 62 acres at the location of the place of use named in their Application and that of the 62 acres purchased approximately 15 acres are suitable for fish ponds.

VIII.

That Norman Standal and George Lemmon have, since the purchase of land from Idaho Power Co., purchased and hatched eggs for approximately one-quarter million fish to be raised on the property. Approximately 75% of the work necessary to prepare the ponds, ditches and other facilities is completed. That these Applicants are in the process of completing the project.

IX.

That the only evidence presented tending to show that the Application of Norman Standal and George Lemmon was filed for speculative purposes is that at the time of the filing, the Applicants did not own or have any right to the use or occupancy of the land where they intended to use the water, nor had they been assured of any right thereto by the owner. There is no evidence in the record which would show that;

(1) The Applicants did not intend to proceed under their Application toward acquiring the land necessary for placing the water to beneficial use,

(2) That the Applicants did not intend to proceed under their Application without assuming the financial responsibility therefore,

(3) That the Applicants filed the Application with the intent to sell the permit to another without proceeding toward commencement of the work necessary under the Application to put the water into beneficial use or,

(4) That the Applicants did not have the financial resources available with which to proceed under the Application.

X.

That the Application of Norman Standal and George Lemmon, No. 36-7072, and the Application of Robert Brailsford, No. 36-7085, are competing applications for the same source of water, commonly known as Bickel Springs which has an apparent average flow of approximately 215 cubic feet per second. There is insufficient water to satisfy the demands of both Application 36-7072 and Application No. 36-7085.

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XI.

There is no evidence in the record which would indicate that either the Application of Standal and Lemmon, No. 36-7072, or the Application of Brailsford, 36-7085, calls for a quantity of water in excess of what can be beneficially used. The Affidavit of Lemmon and Standal, dated June 23, 1970, which is uncontradicted by the Protestant Brailsford, states that approximately 15 acres of land, purchased from the power company, is available for fish ponds. The Application of Lemmon and Standal bases its demand upon a facility with water requirements of 215.2 c.f.s., 5.2 c.f.s. for domestic use in the hatchery and for hatchery troughs and 210 c.f.s. for use in 27 large fish ponds. The large fish ponds as planned have a total capacity of approximately 1,071,700 cubic feet. The rate of turnover of water as proposed is well below the amount advocated by the Protestant's affiant, Erickson.

In addition to Application 36-7072, Lemmon and Standal have applied for a second permit from another source, Application No. 36-7121, received February 24, 1970, for an additional 150 c.f.s. of water for use in the facility proposed in Application 36-7072 making a total demand of 365.2 c.f.s. This quantity of water is also within the amount considered necessary by the Protestant's affiant, Erickson, when considered in light of the plans for development as proposed by Lemmon and Standal.

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CONCLUSIONS OF LAW

I.

Application No. 36-7072 is not void for having been filed by one of two individuals who is a water master of the State of Idaho elected to his position under Chapter 6, Title 42, Idaho.

Under Article XV, Section 3 of the Idaho Constitution it is provided that the right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. In the case of Tappan v. Smith, 92 Idaho 451, 444 P. 2d 412 (1968), it was held that the right to appropriate water as granted in the Idaho Constitution was subject to reasonable regulation by the legislature. However, there does not appear to be a statute restricting or preventing a water master from initiating a right to the appropriation of water. Absent any such legislation and in light of the authority contained in Idaho Code, Section 42-202, permitting any person, association or corporation to file a permit to appropriate the public waters of the State, George Lemmon, as a duly elected water master of the State of Idaho, would not be prohibited from filing an application to appropriate public waters of the State.

II.

The application of George Lemmon and Norman Standal, No. 36-7072, for a permit to appropriate the public waters of the State is not void for having been filed without the applicants owning or possessing any right to the land where

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the point of diversion is located or the place of use is to be made.

No provision is found in the statutes relating to the permit procedure which requires the applicant to own either the land upon which his point of diversion is located or the land upon which his place of use is to be accomplished. It appears to be universally held by the states following the appropriation doctrine that, except for the State of Arizona (Tattersfield v. Putnam, 45 Ariz. 156, 41 P.2d 228 (1935), ownership of the land upon which the place of use is to be made is not in and of itself a prerequisite to either filing an application for a permit to appropriate water or finally consummating that right upon diversion and application to beneficial use. The important consideration is that all steps taken in connection with the appropriation must be taken in a lawful manner.

It is stated in 2 Kinney, Irrigation and Water Rights § 686 (2d ed. 1912), as follows:

"In the discussion of the Arid Region Doctrine of appropriation it must be borne in mind that the ownership of water rights, in the Western States, does not depend upon a legal title, or, in fact, any title to lands bordering upon a stream, or upon the title or ownership to any lands elsewhere, but is simply a possessory right, acquired by an appropriation and diversion of the waters of a stream and consummated by its application to some beneficial use or purposes, either by the appropriator himself or by some consumer acquiring his right from the appropriator. The appropriator need not be the owner of any land in order to make a valid appropriation. Corporations may be organized for the express purpose of appropriating the waters of some stream and selling the right to use the water to consumers, without the title or ownership of any land, except for the bare easement over the lands of others for their ditches and other works." (Citations omitted.)

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The law of appropriation developed through the activities of persons who were originally trespassers on the public domain. The right to use the water was later recognized by congress against the claims of subsequent entrymen. 14 Stat. L. 253, § 9 (1866); 16 Stat. L. 218 (1870); 19 Stat. L. 377 (1877). It is further stated in 2 Kinney, Irrigation and Water Rights, § 687 (2d ed. 1912), as follows:

"A squatter or settler upon the unsurveyed lands of the United States has never been regarded as a trespasser, and in many instances the settlement upon the lands has been the inception of his title, a preference right being given him to make his proper filing within a specified time after the lands are opened for settlement. Again, no title to the land being required to obtain the right to make appropriations of water, a squatter may make a valid appropriation of the waters of the natural streams for the purpose of irrigating the public lands occupied by him, or for any other beneficial use or purpose." (Citations omitted)

It is further stated in 2 Kinney, Irrigation and Water Rights, Sec. 688 (2d ed. 1912), as follows:

"Even trespassers upon the lands owned by others may make valid appropriations of water, provided that the appropriation has the requisite priority, and the water is used for some beneficial purpose. The water may be used for the irrigation of the lands trespassed upon while the trespasser has possession of the same, and after he has been ejected he may change the place of use to other lands. As was said by the Utah Court (Patterson v. Ryan, 37 Utah 410, 108 P. 1118); "But the authorities are to the effect that even trespassers upon land may acquire the exclusive right to the use of water that is used either to irrigate such land or is used thereon for other purposes, and that such a right, when once acquired, is paramount to the rights of the true owner or claimant, when he is dispossessed of the land, and the water claimant may divert and use the water elsewhere than on the land if he can so divert and use it." (Citations omitted)

Of similar import is the conclusion of Hutchins, Misc. Pub. No. 418 U. S. Dept. Of Agr., Selected Problems in the Law of Water Rights in the West, p. 311 (1942), wherein he states:

"The general rule, in any event, is that one at least rightfully in possession of land, even though not the owner, may make a valid appropriation in connection with such land, which water right remains his property and does not become the property of the landowner. The appropriative right is property distinct from an estate in land, and it exists without private ownership in the soil or without perfect title thereto, as against all persons except the Government or its grantees. As the right can be acquired separate and apart from the land, an uncompleted title to the land on which beneficial use is to be made does not bar the acquisition of the right. A lessee, then, can make an appropriation in his own behalf, which is his property unless he is acting as agent for the lessor; and his right to transfer the appropriation to other land on the conclusion of his lease will then depend upon the State rule governing transfers of place of use and perhaps point of diversion and upon the physical feasibility of making the change." (Citations omitted).

Hutchins, The California Law of Water Rights, P. 71 (1956) states as follows:

"The California Supreme Court held in one of its earliest cases dealing with water rights that the right to running water exists "without private ownership of the soil-- upon the ground of prior location upon the land, or prior appropriation and use of the water." (Hill v. Newman, 5 Calif. 445, 446 (1855). The ownership of water "as a substantive and valuable property" is "distinct, sometimes, from the land through which it flows." (McDonald v. Bear River & Auburn Water & Min. Co., 13 Calif. 220, 232 (1859). Title or the right to acquire title in the place of intended use has never been a necessary element of the right to appropriate water. (Santa Paula Water Works v. Peralta, 113 Calif. 38, 43, 45 Pac. 168 (1896). And so, said the supreme court in 1929: (Joerger v. Pacific Gas & Elec. Co., 207 Calif. 8, 34, 276 Pac. 1017 (1929).

'There can be no question that an appropriator of water may acquire a prescriptive right to divert and use the same from a stream on land that he does not own, and this user may be either by the claimant or by one holding under him, as a lessee or tenant.'"

The rule as announced by the above authorities appears to be the rule adopted in Idaho. It was held by the Idaho Supreme Court in the Case of Mahoney v. Neiswanger, 6 Idaho 750, 59 P. 561 (1899), that one who was technically a trespasser could

initiate a water right by diversion and application to beneficial use on the public domain even though the land was subsequently acquired by another.

In the case of First Security Bank v. State, 49 Idaho 740, 291 P. 1064 (1930), an application to change point of diversion and place of use was filed on behalf of one who purchased the water right from an individual who had diverted and applied water to land he did not own. The original appropriator had applied the water to beneficial use on school land prior to the time that it was surveyed by the federal government and continued to apply the water to beneficial use after survey and execution of a lease with the State. The State subsequently sold the land to another individual and claimed that the water applied to the land by the original appropriator was appurtenant and passed with the conveyance. The Court held that the original appropriator or his successor could, absent any agreement with the State to the contrary, transfer the place of use to other lands reasoning that the water appropriated for beneficial use was the sole property of the appropriator. The Court stated as follows:

Water may be appropriated for beneficial use on land not owned by the appropriator and this water right becomes the property of the appropriator. (Sarrett v. Hunter, 32 Ida. 536, 185 Pac. 1072; Sanderson v. Salmon River Co., 34 Ida. 145, 199 Pac. 999; Kinney, supra, secs. 686, 689, 767.) This has been held in cases where the water was appropriated for use on land on which the appropriator was a mere trespasser (Seaward v. Pacific Live Stock Co., 49 Or. 157, 88 Pac. 963); where the appropriator had leased the land on which he intended to use the water (Hays v. Buzard, 31 Mont. 74, 77 Pac. 423; Cooper v. Shannon, 36 Colo. 98, 118 Am. St. 95, 85 Pac. 175); and where the appropriator was a lessee of state school lands. (Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389. See, also, Sowards v. Meagher, 37 Utah, 212, 108 Pac. 1112; St. Onge v. Blakely, 76 Mont. 1, 245 Pac. 532; First State Bank v. McNew, 33 N. M. 414, 269 Pac. 56;

Long on Irr., sec 176; secs. 2339, 2340, Rev. Stats. U. S. C. S., secs. 4647, 4648); 30 U. S. C. A., secs. 51, 52; 43 U. S. C. A., sec. 661).

In the case of Sarret v. Hunter, 32 Idaho 536, 185 P. 1072 (1919), it was contended that one could not obtain a permit to appropriate water when he had no interest in the land upon which he proposed to divert and use the water.

"In determining whether a valid appropriation of water has been made, or the respective priorities of contending appropriators, the law does not concern itself with disputes relative to the title to the lands for which it is claimed the water was appropriated. The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use. (Kinney on Irrigation, 2d ed., sec. 725). When one diverts water hitherto unappropriated and applies it to a beneficial use, his appropriation is complete, and he acquires a right to the use of such water, which is at least co-extensive with his possession, and so when one makes application for a permit to divert and appropriate water, the query is not upon whose lands does he intend to apply it, but upon what lands he intends to apply it and to what use does he expect to put it when so applied. His right to possession, or the character of his occupancy as between claimants to the right to the use of the public waters of the state, is not in issue.

Title to land will not be determined in fixing priorities to water between water claimants. One may initiate a right to the use of water upon vacant lands by securing a permit therefor, and when the application for such permit is bona fide and coupled with a present intention that the water which it is sought to appropriate under the permit is to be applied to a beneficial use, if the water is so applied during the limitations of the permit, the appropriation is valid and relates back to the date of the permit.

We hold that a water right may be acquired by completion of works under a permit and the application of water to a beneficial use, and that when this is properly done, the priority will date from the issuance of the permit without regard to whether the permit-holder was at the date of his application in any way connected with the legal title to the land upon which he proposed to apply the water." (32 Idaho at 541-543).

The Court's holding in the case of Sarrett v. Hunter was followed in the case of Sanderson v. Salmon River Canal Co.,

34 Idaho 145, 199 P. 999 (1921).

The reasoning in the Sarrett v. Hunter case is similar to that of the case of Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910), where in it was contended that a permit could not issue to an individual who had no interest in the property upon which he intended to place the water to beneficial use. In the Sowards case, the application was filed at a time when no one could lawfully enter upon, occupy, possess, cultivate, farm or otherwise use the land proposed to be irrigated. The court stated as follows:

If, therefore, an application is made with a present design and an actual bona fide intention to appropriate unappropriated public waters for the irrigation of certain designated lands, a beneficial purpose, at a time when the applicant has no present right, title, or interest in or to the lands proposed to be irrigated therewith, and, too, when such lands are then unoccupied and unclaimed and a part of a reservation, but it fairly is made to appear that when the proposed diverting channels and work prosecuted with reasonable diligence and dispatch are completed within the time fixed by the statute, or allowed by the engineer, the lands may then be lawfully claimed and occupied, and the water applied to the beneficial purpose for which the appropriation is proposed, we see no good reason why the application should not be received and the applicant protected in his inceptive right. One filing an application under such circumstances, commencing the construction of the works within six months from the approval of his application, prosecuting such proposed works to a completion within the time fixed by the statute or allowed by the engineer, and incurring the necessary expense to divert and conduct the water to the lands proposed to be irrigated, takes the risk that when such works are so completed, and the water diverted and conducted to such lands, they may then be lawfully claimed and occupied by some one who is willing to take the water and use it and apply it to the beneficial purpose for which the application was made to appropriate it.

In the case of Bassett v. Swenson, 51 Idaho 256, 5 P. 2d 722 (1931), the Court held that a permit could be issued to one who did not own the land where the point of diversion was located if there had been no trespass by the applicant in preparing

the application as distinguished from the case where the applicant had obtained the information for the application by trespassing across the land, Marshall v. Niagra Springs Orchard Co., 22 Idaho 144, 125 P. 208 (1912). In the Marshall Case it was stated that the initiation of the right to appropriate public water on private land is void as against the landowner and that a permit from the state engineer was of no effect if the facts stated in the application were secured by entrance upon the land in trespass. In the Bassett Case the application was filed by obtaining the necessary information without trespassing across the land. The Court, however, made the broad statement that a water right initiated in trespass was void.

"It is quite generally held that a water right initiated by the trespass is void. That is to say, one who diverts water and puts it to beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void." (51 Idaho at 259).

The above language is dictum and was not necessary for the Court to reach its decision. The language is in conflict with the prior opinions of the Supreme Court cited above. The point actually decided was that the attempted appropriation was void as against the owner of the land upon which the trespass was committed.

It should be further noted, that the issuance of a permit does not confirm the existence of a water right or grant any right to the holder to trespass across the land either over which he seeks to divert the water or where he seeks to place it to beneficial use. A permit only gives the holder the right to initiate a water right which, upon completion of the terms and conditions of the permit, allows the holder to receive a priority

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as of the date of the filing of the application.

Under the above cases and under Idaho Code, Section 42-202, there appears to be no requirement that the permit holder have, at the time of filing of the application, either the consent of the owner of the land where his proposed point of diversion is located or where his proposed place of use is located.

It may well be said that the fact that an applicant does not own land at either the point of diversion or the place of use or have any right to the possession of such land is evidence which might be cited for the proposition that the application was filed for speculative purposes. However, absent any showing that the applicants did not intend to place the water to beneficial use, did not intend to proceed toward acquiring a right to the use of the land at the point of diversion and place of use were located, had insufficient financial resources available with which to place the water to beneficial use, or intended to sell the permit to another without attempting to comply with the terms and conditions of the permit, there is insufficient evidence upon which to conclude that the application was filed for speculative purposes.

It is further noted that under the provisions of Idaho Code, Section 42-301, that any person holding a permit postdating another permit may petition the Department of Water Administration to cancel the earlier permit for failure of the permit holder to complete one-fifth of the construction work within one-half the time allowed for completion of the project or for failure to complete all of the construction work for the project

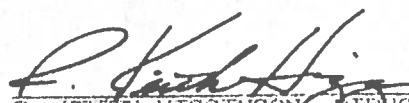
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within the time allowed by the permit. Such a remedy would further permit a subsequent permit holder the opportunity of contesting the permit in the event that the holder is not proceeding to acquire the necessary interests in the land at the point of diversion or the place of use.

III.

The application of Robert Brailsford, 36-7085, for a permit to appropriate the public waters of the State is not void for having been filed without the applicant owning the land upon which the point of diversion is proposed.

DATED this 9TH day of November, 1970.


R. KEITH HIGGINSON, DIRECTOR
DEPARTMENT OF WATER ADMINISTRATION

36 7085

LAW OFFICES

HEPWORTH, NUNGESTER, AND FELTON

PROFESSIONAL CENTER
1020 MAIN

AREA CODE 208
PHONE 543-4368

BUHL, IDAHO -- 83316

JOHN C. HEPWORTH
WM. L. NUNGESTER
MICHAEL H. FELTON

November 5, 1970

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Department of Water Administration

Dept. of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707

Atten: Keith Higginson Re: Application for Permit No. 36-7072

Dear Mr. Higginson:

I am replying to your letter dated October 28, 1970, regarding the above application, which letter was directed to Mr. Norman Standal and George Lemmon. This letter is further confirmation of our conversation regarding the same subject.

My clients are relying both upon their application and on the constitutional method of appropriation. Obviously they are looking primarily to the application filed with the department. The reasons for relying primarily on that application are so obvious, that to restate them at length would seem both redundant and unnecessary. As I have expressed to you many times in the past, I think that people who rely on the constitutional method of appropriation are very foolish. However, in a situation like this, we certainly would not wish to abandon either theory of appropriation since if we were not successful in our application with the Department, we would be compelled to rely upon our constitutional method of appropriation.

I might mention that the reasons my clients proceeded with construction were not for the purpose of establishing a priority date under the constitutional method but rather for the more practical reasons of, (1) making their investment productive, and (2) demonstrating to the Department that theirs was not a speculative filing.

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Dept. of Water Administration

November 5, 1970

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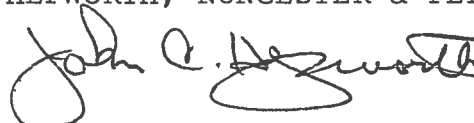
My clients and I are fully appreciative that the Department could not take earlier action with the protests pending and I must concede that the delay in hearing which was occasioned after I entered the picture was largely due to my own delay. Therefore, I certainly appreciate that the Department has acted as punctually as possible but now that the only protest, to wit, the Brailsford Brothers', which was acted upon, is before the Department, we would certainly appreciate the Department entering its decision as soon as possible.

I am heeding your request to answer the letter and again wish to emphasize that we are relying primarily upon the application now pending before your department but certainly do not wish to abandon any rights that we may wish to claim under the constitutional method. Of course, if we had intended to rely entirely upon the constitutional method, my clients would not have gone to the very substantial expense they have incurred in engineering and legal fees, much of which were primarily to satisfy the legal requirements under the statutory method of appropriation through your department.

I would certainly appreciate your letting us hear from you as soon as possible.

Very truly yours,

HEPWORTH, NUNGESTER & FELTON

A handwritten signature in dark ink, appearing to read "John C. Hepworth", with a long horizontal flourish extending to the right.

John C. Hepworth

JCH:bh

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H.
October 28, 1970

Re: Application for Permit No. 36-7072

Mr. Norman S. Standal
Mr. George Lemmon
Star Route
Bliss, Idaho 83314

Gentlemen:

At the meeting recently held in Twin Falls it was brought to our attention that you have already commenced the construction and are partially diverting water as proposed in your Application for Permit No. 36-7072. This is apparently being done under the provisions of the Idaho Constitution and interpretations of Article XV, Section 3 which allow an appropriation to be made "by diversion and application to beneficial use" without obtaining a permit. If this is the theory under which you are operating, then we must assume that you have already made the appropriation which is proposed in Application No. 36-7072 and that there is no additional water subject to appropriation. In such case you should withdraw Application No. 36-7072 to remove it from our records or this office should take positive action to reject it.

If, however, you do not intend to claim a "constitutional" appropriation, your premature construction and diversion of water has prejudiced the consideration of Application No. 36-7072 by this office. As you are well aware, the department has authority to reject an application or to approve it in its entirety or partially approve the application or grant the permit upon conditions. You are also aware that many protests were received to the granting of the permit. Until such time as hearings can be scheduled and held, we cannot proceed to grant any permit. It is unfortunate that you felt it necessary to begin without the benefit of the approval of this office. Such action has made it impossible for us to take into consideration the questions raised by the protestants concerning the stream channels, minimum flows, recreation, aesthetics, pollution, etc. It is our feeling that proper consideration of these items may require conditions of approval of a permit.

Norman S. Standal
George Lemmon

- 2 -

October 28, 1970

In the event that you are not relying upon a "constitutional" appropriation of water but instead desire to appropriate water pursuant to your Application No. 36-7072, you are hereby directed to cease all construction of works and diversion of the water until a permit is issued to you.

If we fail to hear from you within ten days we will take action on the application.

Very truly yours,

C
R. KEITH HIGGINSON
Director

RKH:cc

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PARRY, ROBERTSON, DALY & LARSON

AUG 20 1970

R. P. PARRY
T. M. ROBERTSON
JOHN H. DALY (1913-1968)
BERT LARSON
C. G. MCINTYRE
JOHN R. COLEMAN
THOMAS G. NELSON
JOHN A. ROSHOLT
FRED D. DECKER
ROBERT C. PAINE

LAWYERS
FIDELITY BANK BUILDING
P. O. BOX 525
TWIN FALLS, IDAHO 83301

Department of Water Administration

TELEPHONE
(208) 733-3722

August 18, 1970

Mr. R. Keith Higginson, Director
Department of Water Administration
Statehouse -- Annex 2
Boise, Idaho 83701

RE: Brailsford Brothers - 36-7085 & 36-7072

Dear Keith:

Enclosed is our Reply Brief in the above matter. This date I have mailed a copy to John Hepworth.

Thanks for your cooperation in this matter.

Sincerely,



JOHN A. ROSHOLT

JAR/clm
Encl.

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AUG 20 1970

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER ADMINISTRATION
OF
THE STATE OF IDAHO.

In the Matter of Application for Permit)
No. 36-7085, Robert H. Brailsford,)
President of Brailsford Brothers, Inc.,)
an Idaho Corporation, and Application)
for Permit No. 36-7072, Norman S.)
Standal and George Lemmon)

REPLY BRIEF OF
BRAILSFORD BROTHERS, INC.

ARGUMENT

In the brief submitted by Applicants Standal and Lemmon on July 20, 1970, in support of their Application No. 36-7072 and in opposition to Application No. 36-7085 of Brailsford Brothers, Inc., four disputed facts were briefed and argued. Summarized they are; speculative purposes, insufficient water, inability to apply the water requested to beneficial use, and that George Lemmon is not a proper applicant, the latter point relating again to speculation.

Idaho Code Section 42-203 specifically enumerates the criteria from which the Director of the Department of Water Administration may use his discretion in approving, denying, or conditioning an Application for Permit to Appropriate the Waters of the State of Idaho. The appropriate portion of Idaho Code Section 42-203 is as follows:

"The state reclamation engineer shall find and determine from the evidence presented to what use or uses the waters sought to be appropriated can be and are intended to be applied, and where such proposed use is such that it will reduce the quantity of water under existing water rights, or that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or that the applicant has not sufficient financial resources with which to complete the work involved therein, the state reclamation engineer may reject such application and refuse issuance of permit therefor, or may partially approve and grant permit for a less quantity of water than applied for, or may grant permit upon conditions."

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1 There is a dearth of case law and precedent on the appropriate
2 portion of this section which presently binds the Department of Water
3 Administration.

4 The language referred to in the above quote was first included in
5 the Idaho Code in 1935 by an amendment to the then Section 41-203. Said
6 Section as amended is found in the Idaho Session Laws of 1935, Chapter 145,
7 at page 357-360. Prior to 1935, the language above quoted, which is now
8 a portion of Idaho Code Section 42-203, was not included. The amendment
9 made in 1935 by the Idaho Legislature to then Section 41-203, included for
10 the first time, the following language:

11 "* * * * * or that the water supply itself is insuf-
12 ficient for the purpose for which it is sought to be appropriated,
13 or where it appears to the satisfaction of the department
14 that such application is not made in good faith, is made for
15 delay or speculative purposes, that the applicant has not suf-
 ficient financial resources with which to complete the work
 involved therein or if a renewal permit, that such applicant
 has not proceeded diligently in applying the waters involved
 therein to any beneficial use or purpose, * * * * *

16 All of the criteria which have been disputed concerning
17 Applications No. 36-7072 and 36-7085 were included by the 1935 amendment.
18 Prior to this time, no Idaho statute included such criteria as speculation,
19 insufficient unappropriated water available for the purpose, financial
20 resources, or diligence in applying the water to a beneficial use.

21 In the case most heavily relied on by Standal and Lemmon,
22 Sarrett v. Hunter, 32 Ida. 536, 185 Pac. 1072 (1919) a contention similar
23 to the contention of Brailsford Brothers, Inc. was raised. However, in that
24 case the applicant was in fact the holder of a desert entry, which of course
25 gave him some right to exclude all members of the general public from that
26 desert entry so long as he complied with the then current requirements of the
27 B.L.M. Although Hunter had no recordable legal title until patent was obtained,
28 he still had more right in the property than any other person. Hunter in
29 fact had a better right to that portion of the public lands as a desert entrymen
30 than Standal and Lemmon had in our present analogous case at the time they
31 made their application. On the date of Application No. 36-7072 submitted by
32 Lemmon and Standal, the only right they had was to submit a competitive bid

1 some months. We submit that every member of the public had the same right.
2 In the Hunter case, the following quote is found at page 539:

3 "All of the lands involved herein were, at the date
4 of the issuance of the various permits to the parties to this
5 litigation a part of the Lemhi Forest Reserve and
unsurveyed public land. The respondents filed homestead
entries and the appellants made desert entries."

6 The Hunter case was decided in 1919. Hunter predated by 16
7 years the appropriate language of the Idaho Code which is in question here.
8 In 1919 it was certainly to the benefit of Idaho to promote reclamation
9 development. In fact, today, the particular situation of the desert entry is a
10 unique one. In order to promote continued reclamation development, the
11 Director's office will issue permits to the entrymen so that a water right may
12 be developed to enable said entrymen to obtain patent to the lands from the
13 Bureau of Land Management. The B.L.M. cannot patent lands to an entrymen
14 without a water right, and by the statutes of the State of Idaho the Director
15 of the Department of Water Administration cannot issue a permit without
16 the applicant having some property interest in the property at the place of
17 beneficial use. However, in only this particular situation, the Director
18 has allowed permits to be issued so as to promote continued reclamation
19 development in Idaho. Brailsford Brothers, Inc. contend that a bona fide
20 desert entrymen has a license to develop the desert entry lands to the
21 exclusion of every other person so long as he complies with the provisions
22 of the statute. These are not situations where a potential desert entrymen
23 obtains a permit to appropriate water and then competes with some number of
24 other applicants so as to enter the described lands.

25 Lemmon and Standal cite the case of Sanderson v. Salmon River
26 Canal Company, Ltd. 34 Ida. 145, 199 Pac. 999 (1921). In this case
27 Sanderson was a settler on a portion of land originally segregated to the State
28 under the Carey Act. At page 1000 of 199 Pac. the following quote appears:

29 "He owns, as against everybody except the United
30 States Government, and is in possession of, and entitled
31 to the possession of, a certain tract of land in the Carey
32 Act segregation known as the Salmon River Tract, and
watered by the irrigation system constructed by the
construction company and operated by the defendant."

1 The Court determined that the water right which Sanderson
2 owned was a vested right. In our case under consideration, we are not
3 dealing with vested rights but merely with applications to obtain permits.
4 Brailsford Brothers, Inc. argue that the interest of Sanderson in public lands
5 in the 34 Idaho case was indeed more than applicants Lemmon and Standal
6 had until they became the successful bidder and contract purchasers of the
7 Bickel Springs land. Sanderson proceeded under rights given him through the
8 Carey Act and through the Department of Interior. Had he been a mere
9 trespasser, he would have had more interest in that property than Standal
10 and Lemmon had in the Bickel Springs land before their successful bid.

11 The case of First Security Bank of Blackfoot v. State and Wood
12 Livestock Company, 49 Ida. 740, 291 Pac. 1064 (1930) does not go to the
13 question of "standing" at the time of making the application but it is a case
14 concerning an application for a change of place of use. The question was
15 whether or not the water right could be perfected by a lessee of state land
16 for use in connection with that land. Brailsford Brothers, Inc. would contend that
17 a lessee has a certain property right, which would give him standing to make
18 an Application to Appropriate Water. Perhaps a mere trespasser who is in
19 possession would have this right. The prime question in the First Security
20 case was whether or not a water right was separable and could be transferred
21 from one point to another for use. We submit that a lessee of state lands
22 has some legal property interest in the lands as long as he is lessee. The
23 First Security case was also decided five years before the amendment of Idaho
24 Code Section 41-203.

25 The final case cited by Lemmon and Standal is the case of
26 Bassett v. Swenson, 51 Ida. 256, 5 Pac. 2d 722 (1931). The question was
27 whether or not a water right was initiated in trespass. The court did not get
28 to the question as to whether or not the application was void because of the
29 fact the applicant would have to condemn lands to divert and make use of the
30 water. However, this case was also decided 4 years prior to the amendment
31 of the Idaho Code Section which is concerned in the instant matter.
32

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Although some of the cases cited by Lemmon and Standal might be construed to be analogous to the instant dispute, they were all decided prior to the enactment of the language of the statute which the Director of the Department of Water Administration must construe. The amendment of an existing statute indicates that a change was intended. Hopson v. North American Insurance Company, 71 Ida. 461, 233 Pac. 2d 799 (1951) at page 464. Wright v. Headrick, 65 Ida. 149, 139 Pac. 2d 761 (1943). Stewart v. Common School District #17 of Owyhee County, 66 Ida. 118, 156 Pac. 2d 194 (1945). It is obvious from the reading of the language included in then Section 41-203 that the amendment made in 1935 was intended to give the State Reclamation Engineer additional authority over and above that which he previously possessed for the purpose of making a determination as to whether or not an Application to Appropriate Water should be permitted. Prior to 1935, the State Reclamation Engineer had no authority to deny an application although the same was speculative in nature. We submit that under the existing statute Director of the Department of Water Administration has said authority. We further submit that the applicants under No. 36-7072 do not meet all of the criteria of Section 42-203. They are mere speculators. They had no "standing" to file the application until they became the successful bidders for the purchase of the Bickel Springs property.

We submit that the application of Brailsford Brothers, Inc., 36-7085, being in good order, should be approved in all respects in accordance with the amended application 36-7085.

John A. Rosholt
 Parry, Robertson, Daly & Larson
 P. O. Box 525
 Twin Falls, Idaho 83301
 Attorneys for Brailsford Brothers, Inc.

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CERTIFICATE OF MAILING

I hereby certify that on the 18th day of August, 1970, I served the foregoing Reply Brief of Brailsford Brothers, Inc., by causing to be deposited a copy thereof in the post office at Twin Falls, Idaho, enclosed in an envelope with postage prepaid addressed to attorneys Hepworth, Nungester, & Felton at P. O. Box 259 in Buhl, Idaho.

John A. Rosholt

Of Parry, Robertson, Daly & Larson

RKA

LAW OFFICES
HEPWORTH, WALKER, NUNGESTER, AND FELTON
PROFESSIONAL CENTER
1020 MAIN
BUHL, IDAHO - 83316

JOHN C. HEPWORTH
LLOYD J. WALKER
WM. L. NUNGESTER
MICHAEL H. FELTON

July 20, 1970

RECEIVED
JUL 28 1970
OTHER OFFICES AT
Department of Water Administration
P. O. BOX 23
TWIN FALLS, IDAHO 83301
(208) 733-3083
SUN VALLEY, IDAHO 83353
(208) 726-5861

Department of Reclamation
Statehouse - Annex 2
Boise, Idaho 83707

Attention: R. Keith Higginson

Re: Standal and Lemmon vs.
Brailsford Brothers, Inc.

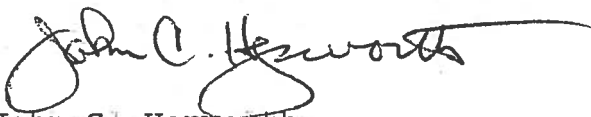
Dear Mr. Higginson:

I am enclosing an Affidavit of Norman S. Standal and George Lemmon and an Affidavit of Richard J. Gooby and a Brief in support of the petition of Standal and Lemmon. Copies of the same are this same date being sent to John Rosholt of Parry, Robertson, Daly & Larson.

You will recall that a stipulation was entered into between the applicants and protestants in this matter that the case would be submitted on affidavits and written briefs and the records now on file with the Department. John Rosholt and I have agreed that each shall have an additional 15 days within which to reply to the brief filed by the other. Thank you for your consideration.

Very truly yours,

HEPWORTH, WALKER, NUNGESTER & FELTON


John C. Hepworth

JCH/pw

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Enclosures

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JUL 23 1970

Department of Water Administration

BEFORE THE STATE RECLAMATION ENGINEER

OF THE

STATE OF IDAHO

* * * * *

IN THE MATTER OF THE APPLICATION FOR PERMIT)
NO. 36-7072, NORMAN S. STANDAL AND GEORGE)
LEMMON, AND APPLICATION FOR PERMIT NO. 36-7085,) AFFIDAVIT
ROBERT H. BRAILSFORD, PRESIDENT OF BRAILSFORD)
BROTHERS, INC., an IDAHO CORPORATION.)

* * * * *

STATE OF IDAHO)
) ss.
County of Twin Falls)

Richard J. Gooby, being first duly sworn on oath, deposes
and says as follows:

That your affiant holds the title of District Conserva-
tionist with the United States Soil Conservation Service and is
stationed at the Gooding Work Unit, Gooding, Idaho.

That your affiant was graduated from the University of
Idaho, with a degree in agriculture.

That your affiant is familiar with the filings numbered
36-7072 and 36-7071 filed before the State Reclamation Engineer
by Norman S. Standal and George Lemmon.

That your affiant is advised that the total of the two
(2) applications amounts to 365.2 c.f.s. of water and that your
affiant is fully familiar with the layout of ponds and structures
to be utilized by applicants Standal and Lemmon on the property
described in the aforementioned applications for permits.

That your affiant is familiar with the water and cite

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1 requirements for trout propagation and has been called upon on
2 numerous occasions to analyze, develop and plan fish propagation
3 facilities for residents of the Magic Valley and Idaho.

4 That based upon your affiant's education and his practi-
5 cal experience in the layout and development of fish propagation
6 facilities, he feels that the 365.2 c.f.s. of water can and will
7 be beneficially used pursuant to the drawings and specifications
8 of the applicants and further that said applicants have, in the
9 lands described in the said applications, more than sufficient
10 land to utilize the total water applied for in said applications
11 for the purpose of fish propagation.

12 Further your affiant saith not.

13 Dated this 13 day of July, 1970.

14

15

Richard J. Gooby
Richard J. Gooby - Affiant

16

17

18

SUBSCRIBED AND SWORN to before me this 13th day of
July, 1970.

19

20

W. E. Taylor
Notary Public for Idaho
Residing at Buhl, Idaho

21

22

Commission Expires 8-7-73.

23

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REPLY 82
RECEIVED
JUL 22 1969
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE

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BEFORE THE STATE RECLAMATION ENGINEER
OF THE
STATE OF IDAHO

* * * * *

IN THE MATTER OF THE APPLICATION FOR PERMIT)
NO. 36-7072, NORMAN S. STANDAL AND GEORGE)
LEMMON, AND APPLICATION FOR PERMIT NO. 36-7085,) AFFIDAVIT
ROBERT H. BRAILSFORD, PRESIDENT OF BRAILSFORD)
BROTHERS, INC., an IDAHO CORPORATION.)

* * * * *

STATE OF IDAHO)
) ss.
County of Twin Falls)

Norman S. Standal and George Lemmon, being first duly
sworn on oath, depose and say as follows:

That your affiants are the applicants in Application No.
36-7072 for permit to appropriate public waters of the State of
Idaho filed in the office of the reclamation engineer for the
State of Idaho on the 17th day of July, 1969.

That prior to the filing of the aforementioned applica-
tion for permit to appropriate water, your affiant George Lemmon,
on the 1st day of June, 1969, contacted Idaho Power Company and
discussed and negotiated for the purchase of the property known as
Bickle Springs, more properly described as the points of diversion
and application to beneficial use as shown in the aforementioned
application for permit. That the Idaho Power Company did tell your
affiant George Lemmon that said company was disposed to sell said
property, but at the time of said meeting, no formal agreement for
purchase and sale was entered into.

1 That on several occasions thereafter, one or both of
2 your affiants discussed the purchase of the property aforesaid in
3 said application for permit with representatives of the Idaho
4 Power Company and that finally, your affiants, on the 8th day of
5 October, 1969, bid for the purchase of said property and their
6 bid was accepted and shortly thereafter your affiants entered
7 into a formal, written contract for the purchase of said property
8 with representatives of the Idaho Power Company. That your
9 affiants, by virtue of said contract, purchased some sixty-two
10 (62) acres of property, the location of which is shown on said
11 application for permit to appropriate public waters of the State
12 of Idaho; of said sixty-two (62) acres, fifteen (15) acres are
13 suitable for fish ponds for fish propagation and are below the
14 level of the source of water identified in said application for
15 permit.

16 That the demand for water created by fifteen (15) acres
17 of fish ponds will be far greater than the 215.2 c.s.f. of water
18 can satisfy; that your affiants have filed another application
19 for permit to appropriate water being Permit No. 36-7121 for 150
20 c.s.f. of the waters of the State of Idaho and that the total of
21 the water applied for in both applications will still be insuffi-
22 cient to support the fish in the fish ponds to be constructed upon
23 the fifteen (15) acres of land owned by applicants and suitable
24 for the construction of fish ponds.

25 That your affiants, as aforesaid, were negotiating
26 diligently for the purchase of the aforementioned sixty-two (62)
27 acres prior to the filing of Application for Permit No. 36-7072
28

1 and filed said application for permit prior to entering into a
2 contract for the purchase of said land or otherwise the purchase
3 of said land would have been entirely speculative since the only
4 reasonable use for the property, considering the price paid there-
5 for, would be for the purpose of fish propagation.

6 Your affiants have, since the purchase of the hereinbe-
7 fore described real property from Idaho Power Company, purchased
8 and hatched eggs for approximately one and one-quarter (1¼)
9 million fish to be raised upon the property and with the water
10 described in application for permit no. 36-7072 and have completed
11 seventy-five percent (75%) of the work necessary to prepare ponds,
12 ditches, and other facilities for transporting the water to the
13 fish and raising the fish.

14 That your affiants are in the process of completing a
15 total project which will utilize the total water filed upon to
16 facilitate the raising of substantially more fish than the one
17 and one-quarter (1¼) million which they expect to raise to market-
18 able size within the next twelve (12) months.

19 That your affiants have been advised by United States
20 Soil Conservation Service engineers from Boise, Idaho, and Gooding,
21 Idaho, that the facilities planned for the land described in the
22 hereinbefore mentioned permit of affiants is capable of utilizing
23 in excess of the total water filed upon in permits no. 36-7072
24 and 36-7121.

25 Dated this 16th day of June, 1970.

26 Further your affiants saith not.

27
28


Norman S. Standal

Geo H. Lemmon
George Lemmon

IN WITNESS WHEREOF, I have hereunto set my hand and
seal the day and year in this certificate first above written.

John C. Hepworth
Notary Public for Idaho
Residing at Buhl, Idaho

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AUG 20 1970

Department of Water Administration

HEPWORTH, WALKER, NUNGESTER & FELTON
1020 Main, Buhl, Idaho 83316
Tel. No. 208-543-4368
Attorneys for Applicants Standal & Lemmon

BEFORE THE STATE RECLAMATION ENGINEER
OF THE
STATE OF IDAHO

* * * * *

IN THE MATTER OF THE APPLICATION FOR PERMIT	)	
No. 36-7072, NORMAN S. STANDAL AND GEORGE	)	REPLY BRIEF OF
LEMMON, AND APPLICATION FOR PERMIT NO. 36-7085,	)	STANDAL AND
ROBERT H. BRAILSFORD, PRESIDENT OF BRAILSFORD	)	LEMMON
BROTHERS, INC., AN IDAHO CORPORATION.	)	

* * * * *

FACTS

The facts are stipulated and are, therefore, not set forth in this reply brief. In Brailsford Brothers, Inc.'s, hereafter referred to as Brailsfords, brief, the following objections are raised:

- (1) That Standal and Lemmon's application should be denied because it is speculative;
- (2) That there is not sufficient unappropriated water available as applied for by Standal and Lemmon;
- (3) That Standal and Lemmon cannot apply the amount of water requested to a beneficial use;

(4) That George Lemmon is not a proper applicant and Standal and Lemmon's application is for speculative purposes.

Standal and Lemmon believe that none of the four objections are valid for the following reasons.

I.

Application for Permit No. 36-7072 to appropriate the waters is not speculative and should not be denied. An applicant can make application for a water permit before owning the land upon which the applicant intends to place the water.

The first case cited by Brailsfords was City and County of Denver vs. Northern Colorado Water Conservation District, 276 P2d 992 (Colo. 1954). Headnote number 22, which covered the speculative issue, reads as follows:

"Water claim, which had been made for speculative purposes by parties who did not have any expectation themselves of actually constructing works and applying waters to some useful purpose, did not give such parties any right against subsequent appropriations made in good faith."

The above is certainly a true and correct statement of the law which should be applied in this case. The appropriators who were the defendants in that Colorado case were truly speculators. At 276 P2d 1008, the court stated the criteria for determining whether or not their application was speculative as follows:

"Here, neither Galloway nor George had any 'claim of appropriation;' neither owned or intended to procure any land for irrigation or any power plant for power use. Neither represented any municipality for domestic use. Neither had an 'enterprise' for 'financing and construction'. Neither attempted to finance or intended to build the system of ditches, reservoirs

1 and tunnel which they platted. They did only token
2 work to give pretense of a right which they might
3 sell. Mr. Galloway testified: 'A. Did you price
4 the project to any of these people, or your interest
5 in it? A. No, we wanted them to construct it.'
6 Mr. George testified: 'Q. The whole purpose was to
7 develop the project for the purpose of eventually
8 disposing it to someone else? A. I think that is
9 right, yes, who could utilize the water.' They were
10 promoters and speculators - not appropriators. A
11 claim for mere speculative purposes by parties having
12 no expectation themselves of actually constructing works
13 and applying the waters to some useful purpose, gives
14 them no rights against subsequent appropriations made
15 in good faith."

9 The court went on to cite the Colorado case of Taussig
10 v. Moffat Tunnel Company, 106 P2d 363, which involved an applica-
11 tion to appropriate by a corporation with powers and purposes
12 allowing it to develop and construct ditches and reservoirs.
13 The Court held the application was valid and not speculative if
14 the applicant had entered into negotiations with ditch companies
15 and individuals for the sale of water for which it had applied.
16 In other words, the Colorado Supreme Court has rightly deter-
17 mined that the intent of the appropriators must be determined in
18 order to determine whether or not their applications were filed
19 for "speculative purposes". The defendants in the City and County
20 of Denver case had made an application to appropriate waters but
21 subsequent thereto, did not follow through by the construction
22 of diversions and conduits, but merely intended to acquire and
23 then sell a valuable water right. They did not endeavor to
24 negotiate with the owners of the land upon which the water would
25 be applied, but simply hoped that someone would come along to
26 buy their water right and develop a canal or ditch company to
27 carry the water from the river to the lands where the water would
28

1 necessarily be used. In the Taussig case, a water or canal
2 company made application prior to the time that work was done
3 to divert the water, it obviously did not own the lands upon
4 which the water was to be applied, but the difference is that
5 the canal company in the Taussig case had surveyed and platted
6 to determine that the project could be accomplished and further-
7 more had negotiated with the owners of the lands to which the
8 water would be applied. It seems that it is an inescapable con-
9 clusion that the standard is "diligence." We simply suggest
10 that the State Reclamation Engineer consider the cases of City
11 and County of Denver v. Northern Colorado Water Conservation
12 District and Taussig v. Moffat Tunnel Company and apply the rule
13 which necessarily will develop from such a comparison and that
14 it determines the "diligence" of the applicants, Standal and
15 Lemmon.

16 A person would be a complete and utter fool to make
17 expenditures toward construction of diversion works or purchase
18 of the place of beneficial use, which he did not already otherwise
19 own, unless and until he could justify such construction or
20 acquisition expenditures with the assurance that the water would
21 be available within the five (5) year period allowed to put it to
22 beneficial use. Standal and Lemmon would certainly be running
23 a high risk of losing many thousands of dollars if they were to
24 have first purchased the Bickel Springs property from Idaho
25 Power Company and then have found that all of the waters of Bickel
26 Springs had been applied for by Brailsford or others. Certainly,
27 not even Brailsford would contend that the price paid by Standal
28

1 and Lemmon for the Bickel Springs property would be justified for
2 any other use than for fish propagation purposes.

3 The second case cited by Brailsford is Scherk v. Nichols,
4 95 P2d 74 (Wyo., 1939). In that case, the plaintiff sued to have
5 the defendant's application and appropriation declared null and
6 void and judgment was rendered for the defendant, the Court
7 finding that his application was not made for "speculative
8 purposes." It appears that the defendant's predecessors in
9 interest who filed the original application for permission to
10 appropriate did not own the lands upon which their application
11 indicated that water would be beneficially applied. Interestingly
12 enough, in the Scherck case, the issue of trespass was raised.
13 The Idaho case of Bassett v. Swenson, 51 Idaho 256, 5 P2d 722,
14 was mentioned in that regard. The Court concluded as follows:

15 "A more correct statement is contained in Weil on
16 Water Right, third edition, section 221, in which
17 it is stated that an initiation of a water right by
18 trespass on another's land is void as against the
19 owner of the land. * * * In the case at bar, we
20 find no complaint on the part of the owner of the
21 land on which the springs and ditch rights are
22 located. In fact, the present owner thereof
23 testified that water is diverted with her consent.
24 The plaintiff is not the one to object."

21 The Court in Scherck cited as authority Sowards v.
22 Meagher, 108 Pac. 1112 (Utah). In that case, Meagher and an
23 assoiate filed an application with the State Engineer to appro-
24 riate water for lands embraced in an Indian reservation, which
25 was hoped or expected to be opened for settlement. The direct
26 question decided by the Court was stated as follows: "May an
27 application be made to appropriate water for a beneficial purpose
28

1 so contemplated in the future?" (Emphasis ours) The Court
2 answered the question in the affirmative as follows:

3 "We have, however, with some hesitancy, reached the
4 conclusion that such an application may properly be
5 made when it is made in good faith and with an actual
6 bona fide intention and a present design to appropriate
the water for a beneficial use, though contemplated
in the future, and when it is not made for the purposes
of mere speculation or monopoly.

7 "The Court considered the point that the applicant
8 might never be able to apply the water to his own
9 lands, quoted at length from an Oregon case (here-
after mentioned), which held that the intention of
10 an appropriator 'may comprehend the use to be made
11 by or through another person,' and further stated
12 that the applicant takes the risk that the lands
may fall into the hands of another who might or might
not be willing to take the water sought to be appro-
priated by the applicant."

13 The Court remarked further:

14 "In other words, if the proposed appropriator is
15 not able to complete and finally establish his appro-
16 priation by applying the water to, and using it for,
17 the beneficial purpose for which it was proposed
to be appropriated, either by himself or through
the agency of some user, his appropriation fails."

18 It seems that the lesson to be learned from the Scherck
19 case then is that you do not need to own the land which you
20 identify in your application as being the place of beneficial use,
21 that you may proceed to divert and apply to a beneficial use, and
22 that in the event you are not able to follow such plan through to
23 completion, then you will necessarily lose your water right.
24 Therefore, the application, if it does not appear to be specula-
25 tive on its face, must be judged upon the diligence and intent
26 of the applicant. We quote from the Scherck case on page 79
27 as follows:

1 "After all, as stated in Nevada Ditch Co., v. Bennett,
2 supra, that no matter who may initiate the right, if
3 it is perfected that general purpose of an appropri-
4 ation is accomplished. In Sowards vs. Meagher, supra,
5 the Court stated that 'the final step, and the most
6 essential element, to constitute a completed valid
7 appropriation of water is the application of it to
8 a beneficial purpose.' Our statute seems to lay the
9 main stress on the beneficial use, and in the case of
10 irrigation by direct flow from the stream, on the
11 place of use. Other elements seem to be of more or
12 less secondary importance, except, of course, that the
13 prior applicant and permittee, who is diligent other-
wise, has the prior right. No good reason, accordingly,
appears, if the law is complied with in other respects,
why a man should be forbidden to act as a volunteer
for another in connection with the steps leading up
to a perfected appropriation. If Hill wanted to act
as a benefactor of Ryan and Dickenson, and Ryan wanted
to act as a benefactor of Dickenson, sound policy does
not, we think, require that this should be forbidden
merely to give another who has no greater right to the
unappropriated waters of this state, and who has been
tardy, the chance to obtain it." (Emphasis ours)

14 The final case cited in the Brailsford's brief on the
15 issue of speculation is Toohey vs. Campbell, 60 Pac. 396 (Mont.
16 1900). In that case, the plaintiff brought an action to fore-
17 close a neighboring water user from the right to enjoy a joint
18 ditch fed by the East Gallatin River. Montana State Supreme
19 Court reversed the District Court which had foreclosed any right
20 of the defendant and allowed the defendant such right as he was
21 able to show that he had applied to beneficial use; however, he
22 was not allowed additional water where he was able to show no
23 more than a bare alleged intent to apply to beneficial use
24 additional water to additional lands some time in the future.
25 With this, of course, we agree entirely. We also agree with the
26 following quote from that case:

1 "One of the rules in the system of law of water
2 rights is that no one man can, by prior appropriation,
3 obtain exclusive control of an entire stream, unless
4 his appropriation is made for some beneficial purpose,
5 presently existing or contemplated. (Emphasis added)
6 He is restricted in the amount that he can appropriate
7 to the quantity needed for such beneficial purposes.
8 'The intention of the claimant is, therefore, a most
9 important factor in determining the validity of an
10 appropriation of water. (Emphasis ours) When that is
11 ascertained, limitation of the quantity of water
12 necessary to effectuate this intent can be applied
13 according to the acts, diligence, and needs of the
14 appropriator.' Power vs. Switzer, 55 Pac. 32 (Mont.).
15 The policy of the law is to prevent a person from
16 acquiring exclusive control of a stream, or any part
17 thereof, not for present and actual beneficial use,
18 but for mere future speculative profit or advantage,
19 without regard to existing or contemplated beneficial
20 uses. We recognize the doctrine that right to the
21 use of water may be owned without regard to the title
22 to lands upon which the water is to be used; that is,
23 that a right to the use of water is a possessory one,
24 that may be obtained by actual appropriation and
25 diversion, perfected by application of the water so
26 appropriated to a beneficial use then present or
27 contemplated, and made before appropriation and use
28 by another. But as every appropriation must be made
for a beneficial or useful purpose, it becomes the
duty of the courts to try the question of the
claimant's intent by his acts and circumstances
surrounding his possession of water, its actual or
contemplated use and the purposes thereof. * * *
Neither of them ever enclosed but few acres of the
Toohey ground, or irrigated more, or defined the
boundaries of any greater tract, or otherwise did
any act evincing an intent to use water upon any
larger area than the portion actually cultivated
from 1868 to 1876."

How then can Brailsford challenge the intent or the
"diligence" of Standal and Lemmon in view of the events which
have occurred subsequent to the filing of application for Permit
No. 36-7072?

See U.S. vs. Kettenbach 208 F. 209, 213 (Ida. 1913) for
definition of speculation; see also Webster's Dictionary for
definition quoted in the conclusion to this brief.

1 Standal and Lemmon needed the water before the land was
2 valuable to them for their intended purpose. They followed the
3 only procedure which any reasonable person could by first obtain-
4 ing the water permit and then purchasing the land. The reverse
5 would have been foolhardy and stupid.

6 II.

7 There is sufficient water available to fulfill Standal
8 and Lemmon's application.

9 With respect to the allegations of Brailsford that
10 there is insufficient, unappropriated water available to satisfy
11 the application of Standal and Lemmon under Application 36-7072,
12 we submit that it is the duty of the Reclamation Engineer to grant
13 the Application for Permit and issue a permit for any amount
14 applied for unless the evidence conclusively shows that such an
15 amount is not available and cannot be placed to a beneficial use.
16 In such an event, the permit must be granted for the amount which
17 the evidence shows is available and can be put to a beneficial
18 use. It should also be remembered that Standal and Lemmon use
19 is nonconsumptive. Certainly, the Engineer must consider the
20 plans and specifications submitted by the applicant and unless
21 and until the Application, on its face, shows that the water
22 applied for is either unavailable or cannot be utilized, the State
23 Reclamation Engineer should issue the permit with the thought
24 that either the proof of completion of works or proof of benefi-
25 cial use portions of the procedure will raise the deficiency in
26 the source of supply of water. As soon as the actual inability
27 of the applicants is established upon the completion of works or

1 proof of beneficial use, then the water license should reflect
2 only the amount which is diverted and put to beneficial use.

3 The prior right in the amount of 10 c.f.s. claimed by
4 Brailsford could, in no way, be prejudiced by granting applica-
5 tion No. 36-7072. The bare and unsupported allegations of
6 Brailsford with respect to the quantity of water available from
7 the springs identified in application No. 36-7072 should not be
8 considered by the State Reclamation Engineer in determining the
9 validity of said application. The record shows that there is
10 sufficient water available for Standal and Lemmon's intended use.

11 III.

12 Standal and Lemmon can apply all of the waters they
13 have applied for to beneficial use. Even if they cannot, the
14 time for this determination is when they must make their proof
15 of works and beneficial use.

16 With respect to the allegation of Brailsford that
17 applicants Standal and Lemmon have applied for more water than
18 they can put to a beneficial use, it seems that all of the
19 authority cited by the brief of Brailsford may be nullified in
20 light of the fact that none of the cases therein cited apply to
21 the facts in the case presently before the Reclamation Engineer.
22 In all of the cases cited, either the time for completion of
23 works or the time for proof of beneficial use had passed. In
24 our present case the time for proof of completion of works has
25 not expired. We agree with and support the cases cited by
26 Brailsford to the effect that when the time comes for proof of
27 beneficial use, then, and only then, must the State Reclamation

1 Engineer or the Court, as the case may be, determine whether the
2 applicant has properly applied the water to a beneficial use.

3 In the Washington State Sugar Company v. Goodrich case,
4 27 Idaho 26, 147 Pac. 1073 (1915) the Idaho Supreme Court did say:

5 "An appropriator of water after conducting the same
6 to the point of intended use has a reasonable time in
7 which to apply said water to such intended use."

8 No Idaho cases have been located by this writer which
9 hold that the works must be completed or that conclusive proof
10 must be offered that all of the water applied for may be "bene-
11 ficially" used before the time that proof of completion of works
12 and of beneficial use must be made under the terms of the permit.
13 The cases cited by Brailsford all involve facts where little or
14 no work has been done. In the case at bar thousands of dollars
15 have been expended toward the development of a large scale fish
16 propagation facility and hardly one year has expired since the
17 time of the filing of the application for the permit. The
18 inquiry invited by Brailsford might be justifiable if no work or
19 very little work had been done by applicants Standal and Lemmon.
20 Such is not the case.

21 Brailsford cites the 1909 case of Farmers' Co-op Ditch
22 Company v. Riverside Irrigation District, et al, 16 Idaho 525
23 102 Pac. 481, which is another illustration of the point we have
24 attempted to make. The Court will not, and the State Reclamation
25 Engineer should not, attempt to accelerate, by employment of
26 guesses or estimates the end result which will be secured by the
27 expiration of the time allowed in the permit to appropriate. In
28 the Farmers' Co-op case, the Supreme Court determined that the

1 record was quite incomplete, that accurate measurements were
2 available upon retrial of the case and that justice, therefore,
3 required that the case be retried with accurate measurements
4 being employed to determine just how much water was needed for
5 the land. In that case, the water had been applied to the soil
6 and the action was brought to determine priorities as to one
7 hundred thirty-five thousand (135,000) acres of farm land in the
8 Boise, Idaho, area. Likewise, applicants Standal and Lemmon
9 simply ask that they be given the amount of time allowed in their
10 permit in which to apply the water which they have filed upon
11 to a beneficial use.

12 In the affidavit of David Erickson and in his accompany-
13 ing attached letter which are relied upon by Brailsford, we do
14 not find exact measurements but simply approximations. The
15 affidavit of Richard J. Dooby states that Standal and Lemmon need
16 the water applied for. Standal and Lemmon are entitled to a
17 great deal more than Mr. Erickson's educated guess. Their own
18 expert, by affidavit, feels that the space available will permit
19 the application of all of the water applied for to a beneficial
20 use. We too cite Farmers Co-operative Ditch Company v. Riverside
21 Irrigation District, et al, supra, as authority that accurate
22 measurements should be made and "the duty of water" determined as
23 to this particular situation. Upon expiration of time for proof
24 of beneficial use, those waters applied for but not beneficially
25 used will be subject to applications for appropriation.

26 IV.

27 No statute or case of the State of Idaho says or holds
28 that a watermaster may not be the holder of a water permit.

1 Brailsford suggests that by virtue of the fact that
2 George Lemmon served as an assistant water master in the area in
3 which Bickel Springs is located a higher duty is placed on him
4 and inferentially would limit him to an inferior right in the
5 waters of Bickel Springs. We do not agree that the principles
6 announced by the cases as cited in subdivision 4 of Brailsford's
7 brief are in point nor do they support this conclusion. The
8 facts therein are not similar in any respect to the facts in the
9 case before the State Reclamation Engineer at this time.

10 Section 42-607 of the Idaho Code is entitled "Distribu-
11 tion of Water" and reads as follows:

12 "It shall be the duty of said water master to distribute
13 the waters of the public stream, streams, or water
14 supply, comprising his district, among the several
15 ditches taking water therefrom according to the prior
16 rights of each respectively, in whole or in part, and to
17 shut and fasten, or cause to be shut or fastened,
18 under the direction of the Department of Reclamation,
19 the headgates of the ditches heading from such stream,
20 streams or water supply, when in times of scarcity of
21 water it is necessary to so do in order to supply the
22 prior rights of others in such stream or water supply,
23 so long as the duly elected water master is charged
24 with the administration of the waters within a water
25 district, no water user within such district can adverse-
26 ly possess the right of any other water user."

20 From the foregoing, there is no limitation applied to
21 George Lemmon or any water master in applying for a water permit.
22 Chapter 6 of Title 42 of the Idaho Code also provides that there
23 is a limitation in payment of the assistant water masters in the
24 amount of \$5 per day. Had the Legislature intended that those
25 serving as water masters or assistant water masters could not
26 participate, personally, in the appropriation of the public
27 waters of this state, then the Legislature should and would have
28 specifically so provided by statute. There is no conflict between

1 that which is expected of George Lemmon and his acts in concert
2 with Norman Standal in applying for 365.2 c.f.s. of the waters
3 of Bickel Springs. The Idaho Supreme Court, in the case of
4 Nampa and Meridian Irrigation District v. Berkley, 56 Idaho 13,
5 42 P2d 916, demonstrated this as follows:

6 "A water master is only an administrative officer and
7 has no interest in the subject matter of litigation
8 involved in the water under his control. His only
9 duty is to distribute the waters of his district in
accordance with the respective rights of the appro-
priators, judicated rights having preference over
unjudicated rights."

10 Therefore, as long as the application of Standal and
11 Lemmon is not allowed to interfere with any prior rights of
12 Brailsford, the claimed ten inches of the waters of Bickel Springs,
13 then there is no conflict between Mr. Lemmon's position as
14 assistant water master and his application with Mr. Standal.

15 CONCLUSION

16 It is the hope of the protestants that application No.
17 36-7072 will fail upon the issue of "speculative purposes" as
18 set out in Section 42-203 of the Idaho Code as amended. Webster's
19 Third New International Dictionary defines speculation as follows:

20 "An act of speculating (as by engaging in business
21 out of the ordinary, by dealing with a view to
22 making a profit from conjectural fluctuations in
the price rather than from earnings of the
23 ordinary profit of trade, or by entering into a
business venture involving unusual risks for a
24 chance of an unusually large gain or profit) or
the condition of being speculated in, contrasted
with investment."

25 We note with interest the distinction made in the fore-
26 going definition between "making a profit from conjectural
27 fluctuations in the price rather than from earnings of the
28

ordinary profit of trade." Certainly, it cannot be argued that there is any evidence that Standal and Lemmon have had any intent or have done any act evidencing an intent to do anything other than to develop a fish propagation facility and thereafter to raise and sell fish. By virtue of the foregoing definition, it would seem that they would have need to have planned to secure a water right and then sell the same before setting about developing a facility.

The only case which this writer could find dealing with not support the allegation that the application of Standal and the theory of speculation concerning appropriation of property was the Idaho Federal District Court case of the United States v. Kettenbach, 208 F. 209, 213 (1913). In that case, the Court did not decide the case on the issue of speculation, but at least something might be garnered from the Court's consideration of that issue which we quote in full as follows, to wit:

"It is contended by the complainant in this Court that the patents described in these three cases should be declared fraudulent and void on the single ground that the evidence establishes the fact that the entrymen applied to purchase the lands described in their entrys for the purpose of speculation. Section 2 of the Act of June 3, 1878, does require the entryman to set forth in his sworn statement, among other things:

'That he does not apply to purchase the same (the land) on speculation, but in good faith to appropriate it to his own exclusive use and benefit.'

"The definition of the word 'speculation' is given by Webster as follows:

'The act or practice of buying land, goods, shares, etc., in expectation of selling at a higher price.'

"It may be conceded that, when the entryman made entry seems to be very much in point on the third issue raised by

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protestants, Brailsford.

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1 of the application for permit nor near the time for proof of
2 completion of works, but they all deal with factual situations
3 concerning the time for proof of beneficial use or times sub-
4 sequent thereto. As it was cited in the Washington State Sugar
5 Company v. Goodrich case, supra, "an appropriator does have a
6 reasonable time, after completion of works to apply the water to
7 a beneficial use." The cases simply hold that an applicant must
8 be "diligent" or be found in "abandonment" of the right which he
9 attempted to perfect. No applicant can be allowed to tie up
10 water indefinitely, but all applicants are given at least five
11 (5) years in which to place water to a beneficial use. It is
12 certainly obvious to anyone who might observe the Bickel Springs
13 development of Standal and Lemmon that they have been most
14 diligent in prosecuting the establishment of a substantial fish
15 propagation facility. The Engineer should take a "view" of the
16 facilities as the idea of a "view" is extensively recognized in
17 Idaho law and especially in the area of water rights cases. Cer-
18 tainly, such a view might be taken prior to the rendition of a
19 decision in this case so that the Engineer might thoroughly
20 familiarize himself with the extent of the work and the expendi-
21 tures made by the applicants under application No. 36-7072.

22 The observations of fisheries biologist, David Erickson,
23 are interesting, but are certainly not offered in satisfactory
24 depth supported by computations nor an expression of the affiant
25 Erickson that he has a sufficient thorough knowledge and under-
26 standing of the plans of the applicants in developing the Bickel
27 Springs property for the State Engineer to give any great weight
28 to the thoughts of said fisheries biologist.

Section 42-607 of the Idaho Code and the Idaho case of Nampa and Meridian Irrigation District v. Berkley, supra, demonstrated that the water master is an administrative officer but no statute nor any of the cases cited support the allegation that by virtue of his employment as an assistant water master, George Lemmon should be disqualified from individually and personally pursuing the development of a large hatchery and trout rearing facility. It is the stated intent of the legislature to encourage Idaho's citizens in developing the water resources of this state.

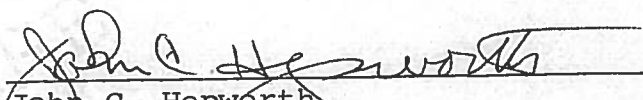
Allow me to close with just this one thought. What would be the case if Standal and Lemmon applied only for a minimum amount of water and then, after applying all applied for to a beneficial use, had additional lands upon which to construct ponds? What would be the reply of Brailsford if they were asked to allow an amendment of Standal and Lemmon's original application, to date back to the original date thereof, for additional waters?

Dated this 18th day of August, 1970.

Respectfully submitted,

HEPWORTH, WALKER, NUNGESTER & FELTON
Attorneys for Applicants Standal &
Lemmon

By


John C. Hepworth

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36 7072

1 BEFORE THE STATE RECLAMATION ENGINEER
2 OF THE
3 STATE OF IDAHO

4 * * * * *

5
6 IN THE MATTER OF THE APPLICATION FOR PERMIT) BRIEF OF
7 NO. 36-7072, NORMAN S. STANDAL AND GEORGE) APPLICANTS,
8 LEMMON, AND APPLICATION FOR PERMIT NO. 36-7085,) STANDAL AND
9 ROBERT H. BRAILSFORD, PRESIDENT OF BRAILSFORD) LEMMON
10 BROTHERS, INC., an IDAHO CORPORATION.)

11 * * * * *

12 F A C T S

13 Since the stipulation of the parties as to the disputed
14 facts has adequately set out the dates of the filing and other
15 pertinent related information, it appears that recitation of the
16 stipulated facts would be unnecessarily repetitious and for that
17 reason, this writter will confine himself, in this memo, to brief
18 observations concerning the four (4) items identified as disputed
19 facts in the aforementioned stipulation.

20 With respect to the claim that George Lemmon was water
21 master for District No. 63, which includes Hagerman Valley and
22 the points of diversion in the applications of Standal and Lemmon
23 we submit that there is no statutory prohibition against an
24 employee of the Department of Reclamation filing for a permit to
25 appropriate the waters of the State of Idaho. There being no such
26 prohibition, the applications of Standal and Lemmon are in no way
27 inferior to the application of Brailsford Brothers, Inc.

28 With respect to the allegation that there is insufficient
unappropriated water available as applied for, it appears that the

1 State Reclamation Engineer may take judicial knowledge of the
2 figures published by the Department relative to the water available
3 in the sources of supply identified in the applications for per-
4 mits herein involved.

5 With respect to the allegation that the applicants,
6 Standal and Lemmon, cannot apply the amount of water requested
7 to beneficial use, we must refer to the affidavits of the applicants
8 and of Richard J. Gooby, on file herein.

9 Finally, it is contended that the application of Standal
10 and Lemmon, No. 36-7072 was filed for speculative purposes. The
11 balance of this brief shall be devoted to consideration of that
12 question.

13
14 L A W

15 In the fall of 1968, the University of Idaho Law School,
16 Board of Editors of the University of Idaho Law Review, reviewed
17 and updated the comprehensive "Idaho Law of Water Rights" original-
18 ly published by Wells A. Hutchins. This work, at page 14, which
19 is found in volume 5 of the Idaho Law Review, discusses initiation
20 of water right upon land owned by another:

21 "Water may be appropriated for beneficial use on
22 land not owned by the appropriator, which water
right becomes a property of the appropriator."

23 The subdivision of the article entitled " Private Lands"
24 continues on page 15 thereof with a quote from the 1919 Idaho
25 Supreme Court case of Sarret vs. Hunter, 32 Idaho 536, 541-542:

26 "In determining whether a valid appropriation of
27 water has been made, or the respective priorities
of contending appropriators, the law does not concern

1 itself with disputes relative to the title to the
2 lands for which it is claimed the water was appropriated.
3 The test of a valid appropriation of water is its
4 diversion from the natural source and its application
5 to a beneficial use. * * * When one diverts water
6 hitherto unappropriated and applies it to a beneficial
7 use, his appropriation is complete, and he acquires a
8 right to the use of such water, which is at least
9 coextensive with his possession, and so when one makes
10 application for a permit to divert and appropriate water,
11 the query is, not upon whose lands does he intend to
12 apply it, but upon what lands he intends to apply it,
13 and to what use does he expect to put it when so
14 applied. His right to possession, or the character
15 of his occupancy as between claimants to the right to
16 the use of the public waters of the State, is not in
17 issue.

18 "Title to land will not be determined in fixing
19 priorities to water between water claimants. * * *

20 "We hold that a water right may be acquired by
21 completion of works under a permit and the applica-
22 tion of water to a beneficial use, and that when this
23 is properly done the priority will date from the
24 issuance of the permit without regard to whether the
25 permit holder was at the date of his application
26 in any way connected with the legal title to the
27 land upon which he proposed to apply the water."
28 (Emphasis added.)

1 In the Sarret case, it was successfully argued that it
2 is not necessary for the appropriator to have title to or a
3 legal interest in the intended place of beneficial use of the
4 water in order to properly qualify his application for permit
5 which, when perfected, would necessarily date back to the date
6 of his written application.

7 In the case now before the State Reclamation Engineer,
8 the applicants, Standal and Lemmon, did not own the real property
9 described in their application as being the place of beneficial
10 use at the time of the filing of the application; however, sub-
11 sequent to the filing of their applications for permits, they

1 submitted a sealed bid to the then owner, Idaho Power Company, and
2 were successful and did, on the 8th day of October, 1969, purchase
3 the lands described in their applications from Idaho Power Company,
4 which said lands, as purchased, contain the property described as
5 the points of diversion and the property described as the places
6 for beneficial use. Hence, applicants Standal and Lemmon were not
7 impaired by their nonownership of the property later purchased from
8 Idaho Power Company in making their applications for permits; how-
9 ever, any question raised by nonownership was taken care of when
10 they purchased both the points of diversion and application to
11 beneficial use shortly after the filing of their applications for
12 permits.

13 In the 1921 Idaho Supreme Court case of Sanderson vs.
14 Salmon River Canal Company, 199 Pacific 999, an action is reported
15 wherein the defendant canal company was sued upon its refusal to
16 deliver water to one who held shares of stock in said company but
17 did not own the land to which said shares were appurtenant. In
18 this case, the plaintiff had not secured a patent from the Federal
19 Government, which was the owner of the land in question. The Court
20 cited Sarret vs. Hunter as authority for its holding as follows:

21 "C. S. # 3018, providing that water rights to all
22 Carey Acts lands shall attach to and become
23 appurtenant to the land as soon as title passes
24 from the United States to the state, does not,
and cannot, have the effect of making the water
right an inseparable appurtenance of the land."

25 In 1930 the case of First Security Bank of Blackfoot vs.
26 State 49 Idaho 740, 291 Pacific 1064, in an action where the
27 lessee of state owned school lands attempted to secure a water
28

1 right for water used on the leased lands, it was said as follows:

2 "This Court has repeatedly held that a water right
3 is not necessarily appurtenant to the land on which
4 it is used and may be separated from it, and this
5 is the general rule."

6 With respect to the point of diversion, rather than the
7 place of beneficial use, the Idaho Supreme Court, in the case of
8 Bassett vs. Swenson, 51 Idaho 256, 5 Pacific Second 722 (1931)
9 determined that a case of diversion and application to beneficia
10 use for a nonconsumptive use, i.e., power purposes, the applican
11 had a right to make application for permit to put waterfall to
12 beneficial use although he had no right or title in land on which
13 waterfall was situated.

14 A R G U M E N T

15 From the case of Sarett vs. Hunter, Sanderson vs.
16 Salmon River Canal Company and First Security Bank of Blackfoot
17 vs. State, it can be seen that the Idaho Supreme Court has
18 repeatedly held that it is not necessary for one to be owner of
19 the place of beneficial use in order to make a valid application
20 to appropriate the waters of this State. It being acknowledged
21 public policy of the State of Idaho to completely develop the
22 material resources of the State and as said in Bassett vs.
23 Swenson, *supra*,

24 "We are convinced that power in the streams of
25 this State capable of being developed into
26 electric energy is one of the material resources
27 of this State and that the use of land necessary
28 to its development constitutes under our Con-
stitution a public use for which condemnation
will lie."

1 It logically follows that development of waters suitable
2 for fish propagation is also a public purpose favored by this
3 State.

4 The Bassett case was also authority for the contention
5 of Standal and Lemmon that it was not necessary that they own the
6 points of diversion as described in their applications for permits
7 to appropriate at the time that their permits were filed. They
8 had been negotiating with the Idaho Power Company for the purchase
9 of property as stated in their affidavit on file herein and
10 furthermore, their subsequent purchase of both the points of
11 diversion and application to beneficial use should settle the
12 matter once and for all.

13 It also follows that applicants Standal and Lemmon own
14 both the points of diversion and places of beneficial use while
15 applicants Brailsford Brothers, Inc., own only the places of
16 beneficial use identified in their application.

17 To review the other points hereinbefore considered in
18 this brief, it should stand to reason that since there is no
19 statutory prohibition restricting employees from the Department
20 of Reclamation from applying to beneficially use the waters of
21 this State, there cannot properly be raised any question as to
22 the propriety of Mr. Lemmon being a party to the applications of
23 Standal and Lemmon.

24 The contention that there is insufficient water to
25 satisfy the application of Standal and Lemmon, even if it be prior,
26 is not supported by tables promulgated by the Department of
27 Reclamation of this State showing the available water at the
28

1 points of diversion listed in Application for Permit No. 36-7072.
2 Further, there is an affidavit supporting the position of Standal
3 and Lemmon that there is adequate land available, and owned by
4 Standal and Lemmon, on which to beneficially use all of the water
5 for which they have applied. Hence, the application of Standal
6 and Lemmon should be approved and that of Brailsford Brothers,
7 Inc., should be denied.
8 Dated: July 16, 1970.

9 Respectfully submitted,

10 HEPWORTH, WALKER, NUNGESTER & FELTON

11
12 By John C. Hepworth
13 John C. Hepworth, of the firm
14 Attorneys for Applicants Standal
and Lemmon
Residing at Buhl, Idaho

15 CERTIFICATE OF MAILING

16 The undersigned, a resident attorney of the State of
17 Idaho, with offices in the Professional Center, 1020 Main, Buhl,
18 Idaho, 83316, and one of the attorneys for the applicants Standal
19 and Lemmon in this action, certifies that he caused to be mailed
20 a copy of the foregoing Brief of Applicants, Standal and Lemmon,
21 and a copy of the Affidavit of Richard J. Gooby to Parry,
22 Robertson, Daly & Larson, P. O. Box 525, Twin Falls, Idaho, 83301,
23 on the 20th day of July, 1970.

24 HEPWORTH, WALKER, NUNGESTER & FELTON

25
26 By John C. Hepworth
27 John C. Hepworth, of the firm