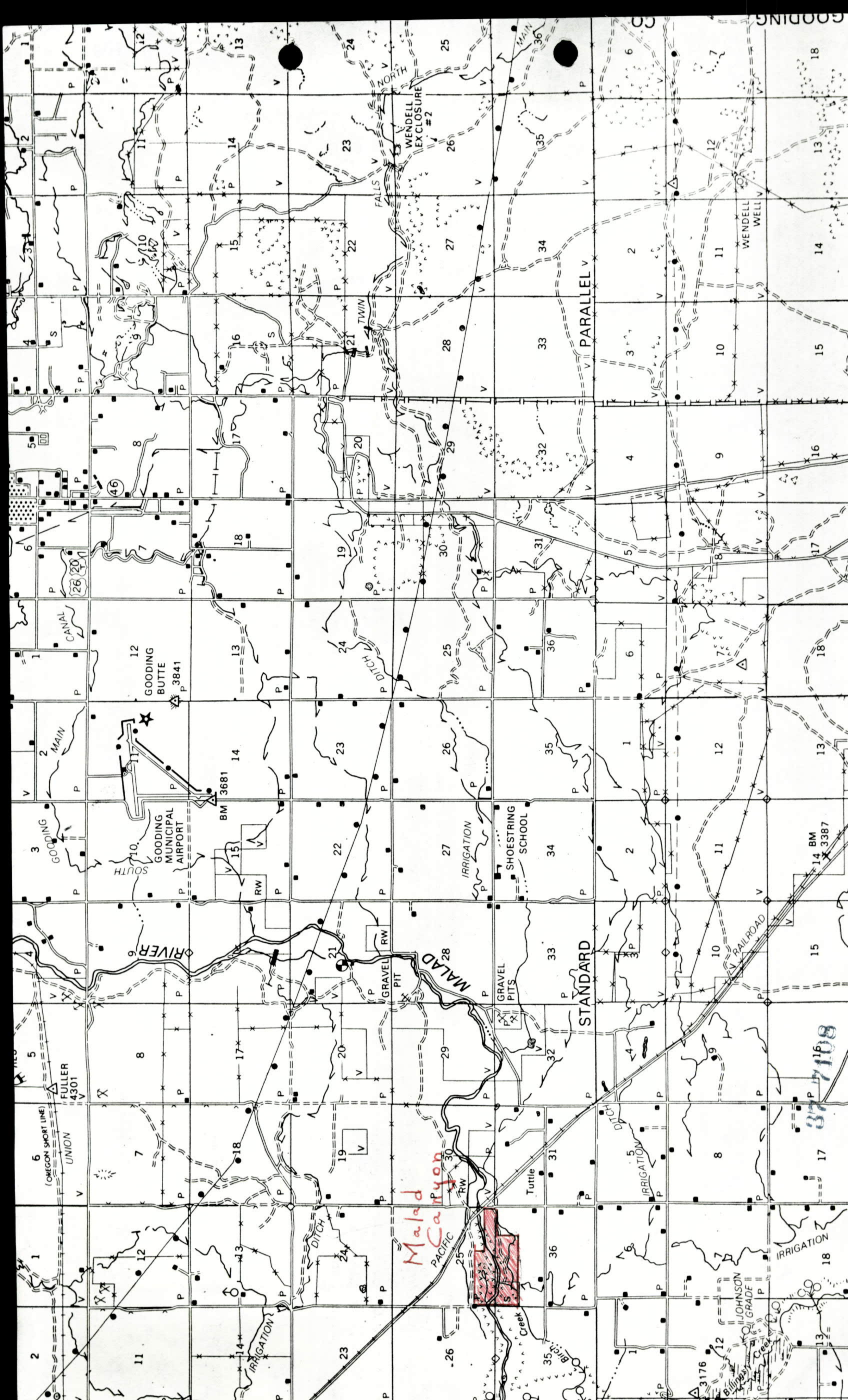




**NOTICE OF APPLICATION
FOR WATER PERMIT**

Notice is hereby given that the Idaho Department of Parks, Statehouse, Boise, Idaho, has on July 12, 1971 submitted Application No. 37-7108 for a permit to appropriate 1,260 cubic feet per second of water from springs (tributary of Snake River) arising in Malad Canyon within the S $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 25; N $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T. 6S, R. 13E, B.M., Gooding County, to be used from January 1 to December 31 for scenic beauty and recreational purposes. The water will not be diverted, but will be preserved in its natural state in trust for the people of the State of Idaho, pursuant to Chapter 207, 1971 Session Laws.

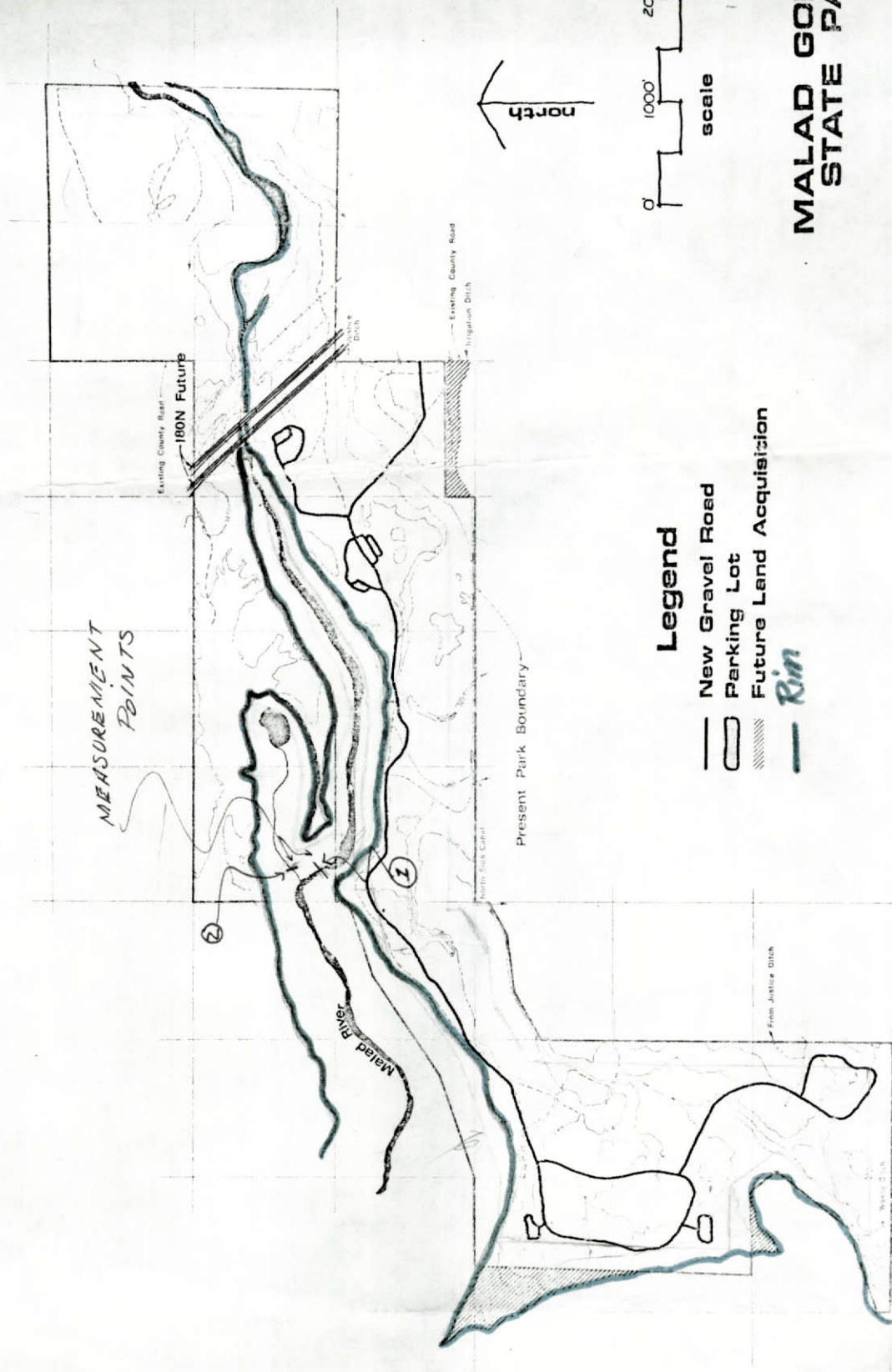
Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, Statehouse, Boise, Idaho 83707, on or before September 20, 1971.

R. Keith Higginson
Director

*9-2-2tc



MICROFILMED



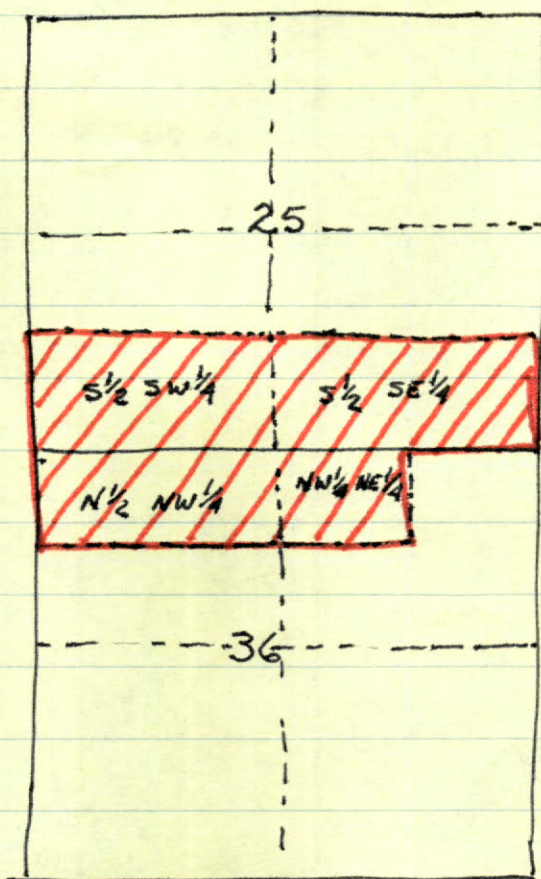
- Legend**
- New Gravel Road
 - - - Parking Lot
 - Future Land Acquisition
 - Rim

MALAD GORGE
STATE PARK

CONCEPT FOR
PHASE 1
CONSTRUCTION 2

Mylar Overlay indicating areas of water appropriation under H.B. 69

Malad Canyon



Niagra Springs

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

License of Water Right No. 37-7108 Priority July 12, 1971 Amount 900.0 cfs

THIS IS TO CERTIFY, that State of Idaho, Department of Parks and Recreation
of Boise, Idaho, has complied with the terms and conditions of Permit
No. 37-7108 issued pursuant to Application for Permit dated July 12, 1971,
and has submitted proof to the Department of Water Resources on November 15, 1979,
that he has applied water to a beneficial use; an examination by the Department indicates that the works have a
capacity for the diversion of 900.0 cfs of water from Malad Canyon Springs,
tributary to Big Wood River, and that the permit holder has applied to a beneficial use and
established a right to use water as follows:

Beneficial Use	Period of Use	Rate of Diversion	Annual Volume
Scenic beauty and recreation	from January 1 to December 31	at 900.0 cfs and n/a	
	from to at cfs and		
	from to at cfs and		

(both dates inclusive)

Subject, however, to the condition that no more than 900.0 cfs of water be diverted at any one time, and
that the amount of water so diverted and to which such right is entitled and confirmed is for the purpose
aforementioned and is limited to the amount which can actually be beneficially used and shall not exceed
n/a acre feet per year, said waters to be diverted within the *S₁SW₄, S₁SE₄, Section 25;
N₁NW₄, NW₁NE₄, Section 36, Twp. 6S, Rge. 13E in the County of Gooding

Description and location of place of use:

Twp.	Range	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
6S	13E	25											X	X			X	X	
		36		X			X	X											

Total number of acres irrigated _____

*No physical diversion required pursuant to the Director's Order dated
January 17, 1975.

NOTE: Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho
Code, or the applicable Idaho Law. This right may be forfeited by five years of non-use.

The right to the use of the water hereby confirmed is restricted and appurtenant to the lands or place of use
herein described, as provided by the laws of Idaho.

Witness the seal and signature of the Director, affixed at Boise, Idaho, this 31 day of
August, 19 82.

Director

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

IN THE MATTER OF APPLICATION FOR PERMIT NO.)
37-7108 in the name of the STATE OF IDAHO,)
DEPARTMENT OF PARKS (MALAD CANYON SPRINGS))

ORDER

WHEREAS, on July 12, 1971, the Idaho Department of Parks filed Application for Permit No. 37-7108 to appropriate the springs in Malad Canyon for the purpose of scenic beauty; and,

WHEREAS, on July 6, 1972, the Director, Department of Water Resources (formerly the Department of Water Administration) rejected such application on the grounds that a physical diversion was not identified as required by statute; and,

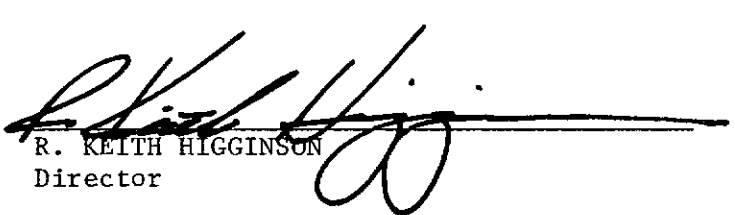
WHEREAS, the applicant appealed this decision to the District Court which Court overruled the Director's decision; and,

WHEREAS, the District Court's opinion was appealed to the Idaho Supreme Court which Court ruled that:

- 1) A State agency could appropriate water without violating Article 15, Sec. 3 of the Idaho Constitution;
- 2) Recreation and scenic beauty are beneficial uses of water in Idaho; and,
- 3) A physical diversion is not required in this particular instance since the legislature did not intend that a diversion be made.

IT IS, THEREFORE, ORDERED that the decision previously entered in this matter on July 26, 1972, is rescinded and Application for Permit No. 37-7108 is hereby APPROVED subject to the condition that this appropriation is subject to all prior water rights.

Dated this 17 day of January, 1975.


R. KEITH HIGGINSON
Director

MICROFILMED

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State of)
Idaho, Department of Parks)
(Malad Canyon Springs).)

DECISION

Idaho Code, Section 67-4307 was enacted as Section 1 of Chapter
207 of the 1971 Idaho Session Laws. That Section provides as follows:

"The state park board is hereby authorized
and directed to appropriate in trust for the
people of the state of Idaho the unappropriated
natural spring flow arising upon the area
described as follows, to-wit:

The south half of the southwest quarter,
and the south half of the southeast
quarter, of section twenty-five, township
six south, range thirteen east of the
Boise Meridian; and

The north half of the northwest quarter,
and the northwest quarter of the northeast
quarter, of section thirty-six, township
six south, range thirteen east of the
Boise Meridian.

The preservation of water in the area described
for its scenic beauty and recreational purposes
necessary and desirable for all citizens of
the state of Idaho is hereby declared to be
a beneficial use of such water.

No fee shall be required in connection with
said appropriation by the state park board
or the permit issued in connection therewith,
but license shall issue at any time upon
proof of beneficial use to which said waters
are now dedicated.

37 7108

The park board, or its successor, shall be deemed to be the holder of such permit, in trust for the people of the state, and the public use of the unappropriated water in the specific area herein described is declared to be of greater priority than any other use except that of domestic consumption.

The unappropriated lands belonging to the state of Idaho between the high water mark on one bank to the high water mark on the opposite bank, of the area described, are hereby declared to be devoted to a public use in connection with the preservation of the area in its present condition as a place of recreation for the citizens of the state of Idaho."

Pursuant to the direction contained in that Statute, the Idaho Parks Department filed an Application for a Permit to appropriate the public waters of the State, more particularly, to appropriate the unappropriated waters of the springs in Malad Canyon. This application was protested by the Twin Falls Canal Co., the North Side Canal Co., the Idaho State Reclamation Association, the Boise Project Board of Control, the Owyhee Project South Board of Control, and the Gem Irrigation District. A meeting was had between representatives of the Applicant, the Protestants, the Attorney General's office and this Department, at which all participants agreed that there were no issues of fact which would require determination at a hearing. The parties further agreed that the Protestants had standing to protest, that the subject waters are waters of a natural stream, that the unaugmented, natural spring flow of the Malad Canyon Springs was nine hundred forty (940) cubic feet per second, and that a large map of the area, now marked as "Exhibit B", accurately portrays the land and its ownership in the area of the proposed appropriation and a preliminary plan for a park through which the waters are to be used pursuant to Section 67-4307.

All parties further agreed that there were only three (3) substantial issues of law which constituted the entire basis of the protests herein. These are:

A. Is it Constitutional in Idaho for a state agency to appropriate, without explicit constitutional authorization, the waters of a natural stream and thereby to obtain a water right having a priority over water rights of private persons who have appropriations on said stream made subsequent in time to that of the state agency?

B. Are the uses described in Idaho Code Section 67-4307 "beneficial uses" so as to support an appropriative water right under the Idaho Constitution?

C. Can there be created a valid appropriative water right in Idaho without an actual, physical reduction of the water claimed to possession through an actual diversion of the water from, or artificial control of the water in, the water's natural locus or condition?

Each of these agreements concerning matters of fact and law has been reduced to written stipulation, as has a stipulation that there be no formal hearing for oral argument on the matters of law which have been fully briefed by the Applicant and the Protestants. These things all having been done, we do now hereby render our Decision in this matter.

I.

The first question of law relates to the power of an agency of the State to appropriate waters of a natural stream. This question exists only because of dictum in State Water Conservation Board v. Enking, 56 Idaho 722, at 731-33, 58 P.2d 779 (1936). In that case the Supreme Court of Idaho was confronted with a challenge to the constitutionality of the fledging Water Conservation Board (which was effectively destroyed by the opinion in that case). The Court there held only that the Statute creating the Board was unconstitutional as an attempt to create a corporation by special legislation. That is the only holding on a constitutional law issue in that action.

In the course of supporting that holding, the Enking

Court discussed the relationship between Section 3 of Article 15 of the Idaho Constitution and the powers which had been accorded the Board. It undertook this discussion only in an effort to illustrate a legislative intention to create a special corporation and not a mere branch of government. That Court reasoned that, if an agency of the State could appropriate any or all of the waters of the State, it could preclude private parties from gaining a better priority. The agency could, therefore, effectively deny the right to appropriate water to the citizens of the State. That, the Court concluded, would probably be unconstitutional under Article 15, Section 3. Having reached that conclusion, the Court held that the Legislature would not be presumed to have done an unconstitutional act and, therefore, that the power to make an appropriation was evidence that the Board was in fact a corporation.

This conclusion, indeed treatment of this entire issue, was unnecessary for the decision in the Enking case. There were many other substantial reasons for the Court to hold that the Board was in fact a corporation. It need not have discussed the Article 15, Section 3 issue at all. Following the usual precepts of constitutional interpretation, it should not have even considered them. The discussion at 56 Idaho 731-33 is, therefore, only dictum and not a binding interpretation of the Constitution.

The evils which concerned the Enking Court are not present in this instance. Upon reading the Enking opinion, one has to be struck by the Court's fear that the Board was empowered to obtain, by appropriation or condemnation, rights to all or most of the State's unappropriated water, which it could then sell to water users. The Court correctly understood that the purpose of Section 3 of Article 15 was to insure that water would always be a commodity free to users. It was, therefore, the Court's position that the loosely drawn Statute in Enking, because it permitted the State to obtain a monopoly on and to sell water

as if a utility, was opposed to the intendment of the constitutional provisions.

While the Enking case speaks to monopoly, the application before us raises none of those problems. The Parks Board is not seeking to tie up undefined, unlimited quantities of water. It is nowhere authorized to do so. All it seeks is to appropriate a discreet amount of water for a non-consumptive use on and in relation to its own land. The threat foreseen by the Enking Court and which led to the expansive Enking dictum are simply not present here. The reasoning of that case is not, therefore, available to Protestants here.

A formal distinction exists between the Enking situation and this one. In the Enking case the Board was authorized to act to regulate water resource management generally. Its supposed power was, thus, related to the police power and represented state action in a sovereign capacity. The Parks Board seeks this appropriation in order to benefit its lands. It is not seeking any regulatory end. It is, therefore, acting in a proprietary capacity only. Article 15, Section 3 appears to preclude state sovereign action. It prohibits "denials" of the right to appropriate. A denial connotes an exercise of authority and not an act of property management. As long as the Parks Board is seeking an appropriation in the same way as any other water user, as long as it is acting in a proprietary and not a sovereign capacity, it is not in conflict with Article 15, Section 3.

It should also be noted that the Enking case is an erratic in our law. It is alone in its interpretation of our Constitution or of any of the constitutions of the other western states which have provisions analogous to Article 15, Section 3. Not only were no cases cited in Enking on this question, no cases have followed the Enking dictum despite the fact that Sections 67-4301 -- 4306 have

raised the issue since 1925. No similar cases have been found in other states.

It should be noted here, that it certainly could not have been the intent of the framers of the Constitution, nor the Court in Enking to deprive State agencies of the right to appropriate and use water in the same manner as a private individual. If it is decided that State agencies cannot appropriate water, the result would be unrealistic and chaotic. For example, how would the Parks and Highway Departments obtain the water necessary to maintain our State Parks and roadside rest areas where it is necessary to provide water for the use of the general public. The Fish and Game Department would be unable to continue the beneficial job of planting fish in our streams because the water necessary at the fish hatcheries would be unavailable. The State's institutions of higher learning would not be able to appropriate the water necessary for the obvious consumption required for their existence. These are only a few examples, but they amply illustrate the necessity that various State agencies have for appropriation of water, and indicate the practical needs of State agencies for appropriation of water. A need which cannot be overlooked.

For all the reasons set out above, we decide that the Protests, to the extent that they are founded on challenges to the power of the Parks Board to make the appropriation, shall be and hereby are denied.

II.

The second issue of law raised is whether the preservation of the water in the spring flow of the Malad Canyon Springs for recreational and aesthetic purposes is a beneficial use of water under the Constitution of the State of Idaho. It should be noted at the outset that there is no problem of statutory construction,

because Idaho Code, Section 67-4307 specifically provides that it is a beneficial use of the water.

Article 15, Section 3 of our Constitution describes five (5) categories of beneficial uses of water. It subjects water use for power generation to regulation and limitation and specifies that, for purposes of condemnation, priorities exist between domestic, mining, agricultural, and manufacturing purposes. It is urged that these five (5) categories exhaust the classes of beneficial uses which will support an appropriative water right in Idaho.

An examination of the history of Article 15, Section 3 reveals that no such exhaustive list was intended in that Section. The draftsmen of the Constitution apparently feared that important consumptive uses of water might be precluded by prior but less important water consuming enterprise. Thus they felt compelled to provide for condemnation of water rights having less importance. At the same time, they expressed fear that by establishing these priorities they might destroy the entire concept of rewarding diligence which underlies the entire appropriative water rights system. The history of the Constitution reveals that the drafters compromised their concerns by establishing priorities among some of the possibly competing consumptive uses. At the same time there was a strong negative reaction to too many priorities and too much specificity. See 2 IDAHO CONST. CONV., PROCEEDINGS AND DEBATES, 1115-48, 1154-64, 1330-33, 1140-42 (1912). Thus the listing in Article 15, Section 3 was probably meant to be not exhaustive and clearly only relates to consumptive uses.

This conclusion is buttressed by the fact that the mention of water used for power, a non-consumptive use, is unrelated to the list of priorities. If this list was understood to have been exhaustive, then surely power generation would have been given a priority when its mention was inserted in Section 3.

The most recent authoritative text on water law lists the recognized beneficial uses of water as including,

"Domestic, municipal, irrigation, stock watering, power generation, mining, milling, manufacturing, general railroad use, refrigeration, preservation and propagation of fish and wildlife, fire protection, public parks, recreation, scenic attraction, navigation, recovery of minerals from navigable waters, and recharging ground water reservoirs."
1 R. CLARK, WATER AND WATER RIGHTS 89 (1967).

We agree with Professor Clark's treatise that "recreation" and "scenic attraction" can be found to be beneficial. See also Wes Outdoor Advertising Co. v. Goldberg, 55 N.J. 347, 262 A₂ 199 (1970). The legislature has made such a finding.

Our attention has been directed to no clause in the Constitution or in the Idaho Code which specially limits, defines, or otherwise treats as a term of art the expression "beneficial use of water" or its equivalent. We are, therefore, constrained to interpret the word "beneficial" in its usual sense as meaning:

"Conferring benefits; useful; profitable; helpful; advantageous; serviceable; contributing to a valuable end. . . ." WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 137 (1890)
(This older edition has been used to preclude any suggestion that "beneficial" had a more restricted meaning in the last one-fifth of the Nineteenth Century, when our Constitution was drafted and adopted.)

Having found no basis for a Decision that "beneficial", "beneficial use of water", or an equivalent phrase has an unusual meaning in our water law, we are compelled to adhere to the reasonable judgment of the Legislature that use of water for scenic and recreational purposes is a beneficial use of water adequate to support an appropriate water right. To the extent that the protests to this application are founded on the belief that "beneficial uses of water" are in some way constitutionally limited so as to preclude uses for scenic or recreational purposes, those protests must be and hereby are denied.

III.

The final question is whether the application before us can begin the process of obtaining an appropriative water right if it lacks a proposed physical diversion or reduction of water to possession.

It has long been held or assumed that there can be created no water right in the arid states without an "appropriation", and that there cannot be an appropriation without some act, some diversion, physically reducing the claimed water to possession and control. Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P.144 (Cal. App. 1920); Colorado River Water Conserv. Dist. V. Rocky Mt. Power Co., 406 P.2d 798 (Colo. 1965); City & County of Denver v. Northern Colo. W.C. Dist., 276 P.2d 992 (Colo. 1954); see Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909); cf. Cantlin v. Carter, 88 Idaho 179, 397 P.2d 761 (1964). The fundamental requirement of a reduction of the water used to possession is recognized in our Statutes governing permits and licenses. E.g. Idaho Code, Sections 42-202, 42-217, and 42-225.

The reasons underlying this essential feature of the law of prior appropriation are many, but the single most important purpose when related to appropriations for purposes of the sort with which we are concerned here is to give an adequate notice of the appropriation to all the world and to the administrator. Without such notice on the ground there would be few safeguards against abuse of non-consumptive use appropriations not evidenced by some actual physical control of measurable extent. Much of the remaining stream water in Idaho could be claimed to be tied up in "appropriations" for recreation purposes, and each of these claims would have to be litigated before any further water development could take place. Thus, instead of providing an orderly and neutral legal environment -- one rewarding

diligence -- for the management of our water resources, the appropriative water rights regime could become an invitation to speculation and obstruction if appropriation could be obtained without diversion or control. We believe, therefore, that the requirement of physical control -- a "diversion" -- is a fundamental and necessary requirement of an appropriation.

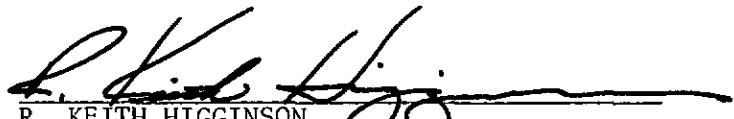
It may be possible for the Legislature to provide for specific appropriative water rights to be created without creation of a physical diversion, but so substantial a departure from normal water law doctrine would have to be effected by a clear and unambiguous statement. Idaho Code, Sections 67-4307 and 67-4312 are not so unambiguous as to support a conclusion that the Legislature intended to depart from normal water law procedure. At no point in either of those Sections is there an explicit statement that the Statute was meant to create a water right without the usual requisites of an appropriation. In fact the Legislature specifically directed the Park Board "to appropriate" the water in question, and, as is noted above the verb "to appropriate" has always included the act of diversion and control as it has been used in western water law. Furthermore the Legislature has specifically keyed the appropriation process to the normal statutory permit and license procedure, which, as we have stated, specifically recognizes the requirement of the construction of non-natural diversion or control structures.

For these reasons we must conclude that Idaho Code, Sections 67-4307 and 67-4312 are not so explicit, clear, or unambiguous as to permit us to conclude that the Legislature intended to depart significantly from normal concepts of western water law by creating an appropriation without a physical diversion. Accord Colorado River Water Conserv. Dist. v. Rocky Mt. Power Co., 406 P.2d 798 (Colo. 1965). We are, therefore, compelled to reject this application and to refuse to issue a permit for it.

It should be here noted that our Decision in this regard will not affect the lake water appropriations provided in other Sections of Chapter 43 of Title 67. In the case of each of those lakes there is an outlet control structure which diverts the lake water from its normal flow and which reduces it to physical possession.

NOW THEREFORE IT IS ORDERED that Application For Permit Number 37-7108 be and hereby is rejected and a permit therefor is refused.

DATED this 6TH day of July, 1972.


R. KEITH HIGGINSON
Director, Idaho Department of Water Administration

CERTIFICATE OF SERVICE

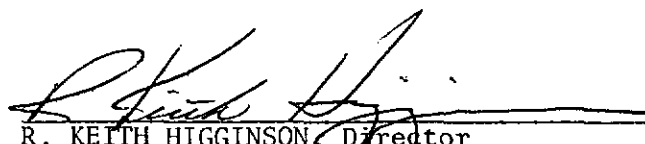
I HEREBY CERTIFY that on the 7th day of July, 1972,
I served the attached DECISION by placing true and correct copies
thereof in postpaid envelopes addressed to the persons hereinafter
named, at the places and addresses stated below, which are their last
known addresses, and by depositing said envelopes with contents in
the regular United States Mail at Boise, Idaho.

Raymond D. Givens, Esq.
GIVENS & GIVENS
P.O. Box 964
Boise, Idaho 83701

Maurice H. Greene, Esq.
P.O. Box 4402
Boise, Idaho 83705

John A. Rosholt, Esq.
PARRY, ROBERTSON, DALY, & LARSON
P.O. Box 525
Twin Falls, Idaho 83301

State of Idaho
Office of the Attorney General
STATEHOUSE MAIL


R. KEITH HIGGINSON, Director
Department of Water Administration

Identification No. 37-7108

AMENDED Application No. _____

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION

APPLICATION FOR PERMIT

To Appropriate the Public Waters of the State of Idaho
(TYPE OR PRINT IN INK)

APPROVED

1. Name of applicant Idaho Dept. of Parks, in trust for the people of the State of Idaho
post office address Statehouse, Boise, Idaho
2. Source of water supply Springs in Malad Canyon which is a tributary of Snake River
area upon which the springs arise _____
3. a. Location of ~~point of diversion~~ point of diversion 1/4 of 1/4 of Section _____ Township _____
Range _____ B.M. _____ County; additional points of diversion if any: _____
S $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 25; N $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T. 6S, R. 13E, B.M.
- b. If water is not consumed, it will be discharged into _____ at a point in _____ 1/4
of _____ 1/4 of Section _____ Township _____ Range _____ B.M. _____
4. Water will be used for the following purposes:
Amount 1,260 for scenic beauty purpose from 1-1 to 12-31 (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
5. Total quantity to be appropriated:
a. 1,260 cubic feet per second and/or
b. _____ acre feet per annum.
6. Proposed diverting works:
a. Description of ditches, flumes, pumps, headgates, etc. Water is to be preserved in its
natural state without diversion as provided in Chapter 207, 1971 Session Laws.
- b. Height of storage dam _____ feet, active reservoir capacity _____ acre feet; total reservoir
capacity _____ acre feet, materials used in storage dam: _____
Period of year during which storage will occur _____ to _____ inclusive.
(Mo. Day) (Mo. Day)
- c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.
7. a. Time required for the completion of the works and application of the water to the proposed beneficial use
is _____ years.
b. Estimated construction cost is \$ _____.
8. Description of proposed uses:
a. If water is **not** for irrigation: S $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 25; N $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.6S, R.13E,B.M.
(1) Give the place of use of water: _____ 1/4 of _____ 1/4 of Section _____ Township _____
Range _____ B.M. _____
(2) Amount of power to be generated: _____ hp under _____ feet of head.
(3) List number of each kind of livestock to be watered _____

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

APPROVED

37 7108

b. If water is for irrigation, indicate acreage in each subdivision in the tabulation below:

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	

Total number of acres to be irrigated _____

c. Describe any other water rights used for the same purposes as described above. _____

9. a. Who owns the property at the point of diversion Water is not to be diverted.

b. Who owns the land to be irrigated or place of use _____

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing Filing is directed by House Bill 69 (Chapter 207, 1971 Session Laws)

10. Remarks This application is filed for the purpose of carrying out legislative intent as expressed in House Bill 69 (Chapter 207, 1971 Session Laws). The quantity of water filed on in paragraph 4 is the quantity believed to have been the flow of the Malad Canyon Springs prior to augmentation through return flows from irrigation in the area above the springs. The actual quantity, whether more or less than this amount, is to be based "... upon the determination by the Director of Water Administration of the historical water flow and he shall issue a permit for only that amount." This application is intended to prevent any diversion of waters from within the spring area which would "... detract from or interfere with the geological interpretive value, historical significance, or the scenic attraction for public use under the administration of the State Park Board of the stream from the natural high water mark on one bank to the natural high water mark on the opposite bank, or of the springs specifically described as they arise upon the lands listed ..."

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

[illegible]

Scale: 2 inches equal 1 mile

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

Earl Gurnell
(Applicant) : Chairman

37 7108

Proposed priority - 7-12-71 8:00 am
Amended application Received by ej Date 8-10-71 Time 10:30 am

Preliminary check by DWM Fee \$ No fee required

Received by _____ Date _____

Publication prepared by cr Date 8-25-71

Published in Gooding County Leader

Publication dates 9-2 & 9-9-71

Publication approved dr Date 9-15-71

Priority reduced to _____ Reason _____

Protests filed by: See list in file

Copies of protests forwarded by dr 9-24-71

Hearing held by _____ Date _____

Recommended for approval denial by_____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER ADMINISTRATION

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 37-7108, and said application is hereby APPROVED

1. Approval of said application is subject to the following limitations and conditions:

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before January 1, 1980.
- c. Other: Pursuant to Order dated January 17, 1975.

2. Denial of said application is for the following reasons: _____

~~Pursuant to Memorandum Decision,~~

Witness my hand this 6th day of July 1972.

4501 or 4502 100

References: 204 3 59 76

60. 3 1 1 1

Director

Identification No. _____

Application No. _____

STATE OF IDAHO
- DEPARTMENT OF WATER ADMINISTRATION
APPLICATION FOR PERMIT -

To appropriate the Public Waters of the State of Idaho
(TYPE OR PRINT IN INK)

REPLACED BY
AMENDED APPLICATION
DATED 8-10-71.

1. Name of applicant Idaho Department of Parks
post office address Statehouse, Boise, Idaho
2. Source of water supply As H.B. 69 described which is a tributary of -----
3. a. Location of point of diversion is ----- $\frac{1}{4}$ of ----- $\frac{1}{4}$ of Section ----- Township -----
Range ----- B.M. ----- County; additional points of diversion if any: -----
As described by H.B. 69 - 41st legislature
- b. If water is not consumed, it will be discharged into NA at a point in ----- $\frac{1}{4}$
of ----- $\frac{1}{4}$ of Section ----- Township ----- Range ----- B.M. -----
4. Water will be used for the following purposes:
All unappropriated
Amount water for recreation purpose from Jan. 1 to Dec. 31 (both dates inclusive)
(cfs or acre-feet per annum)
Amount ----- for ----- purpose from ----- to ----- (both dates inclusive)
(cfs or acre-feet per annum)
Amount ----- for ----- purpose from ----- to ----- (both dates inclusive)
(cfs or acre-feet per annum)
5. Total quantity to be appropriated:
a. All unappropriated water
----- cubic feet per second and/or
b. ----- acre feet per annum.
6. Proposed diverting works:
a. Description of ditches, flumes, pumps, headgates, etc. NA

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

(4) Name of municipality to be served -----, or number of families to be
supplied with domestic water -----.
(5) If water is to be used for other purposes describe: For the beneficial uses of recreation
as prescribed by H.B. 69 enacted by the 41st legislature.

b. If water is for irrigation, indicate acreage in each subdivision in the tabulation below:

[illegible]

Total number of acres to be irrigated_____

c. Describe any other water rights used for the same purposes as described above. See 8(5)

See Page 916, Idaho Session Laws, 1971,

9. a. Who owns the property at the point of diversion. ~~Sec. 67-4311, Third paragraph (H.B. 69)~~

b. Who owns the land to be irrigated or place of use NA

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing. NA

-10. Remarks _____

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

[illegible]

Scale: 2 inches equal 1 mile

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

W. m. Beeters

(Applicant)
Wilhelm M. Beckert, Director
Idaho Dept. of Parks

Amos T. Brown

(Applicant)
Harold T. Brown, Chairman
Idaho Park Board

37 7108

Received by J Date 7/12/71 Time 8:00 A
Preliminary check by _____ Fee \$ _____
Receipted by _____ Date _____
Publication prepared by _____ Date _____
Published in _____
Publication dates _____
Publication approved _____ Date _____
Priority reduced to _____ Reason _____

Protests filed by: _____

Copies of protests forwarded by _____
Hearing held by _____ Date _____
Recommended for approval denial by _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER ADMINISTRATION

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. _____, and said application is hereby _____.

1. Approval of said application is subject to the following limitations and conditions:

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before _____, 19____.
- c. Other: _____

2. Denial of said application is for the following reasons: _____

Witness my hand this _____ day of _____ 19____.

Director

declaration shall not affect the validity of remaining portions of this act.

SECTION 19. This act shall be in full force and effect on and after May 31, 1971. An operator shall not be required to perform the reclamation activities referred to in this act as to any surface mining operations performed prior to May 31, 1972, and further, shall not be required to perform such reclamation activities as to any pit or overburden pile as it exists prior to May 31, 1972.

Approved March 24, 1971.

CHAPTER 207

(H. B. No. 69)

AN ACT

AMENDING CHAPTER 43, TITLE 67, IDAHO CODE, BY THE ADDITION OF A NEW SECTION TO BE KNOWN AS SECTION 67-4307, IDAHO CODE, AUTHORIZING THE STATE PARK BOARD TO APPROPRIATE AND HOLD IN TRUST FOR THE PEOPLE OF THE STATE ALL THE UNAPPROPRIATED WATER IN THE MALAD CANYON AREA DESCRIBED, AND DECLARING THE PRESERVATION OF THE WATER IN SAID AREA TO BE OF BENEFICIAL USE, DECLARING THE LAND BETWEEN THE HIGH WATER MARK ON ONE BANK TO THE HIGH WATER MARK ON THE OPPOSITE BANK TO BE DEVOTED TO THE PUBLIC USE; AMENDING CHAPTER 43, TITLE 67, IDAHO CODE, BY THE ADDITION OF A NEW SECTION TO BE KNOWN AS SECTION 67-4308, IDAHO CODE, AUTHORIZING THE STATE PARK BOARD TO APPROPRIATE AND HOLD IN TRUST FOR THE PEOPLE OF THE STATE ALL THE UNAPPROPRIATED WATER IN THE NIAGRA SPRINGS AREA DESCRIBED, AND DECLARING THE PRESERVATION OF THE WATER IN SAID AREA TO BE OF BENEFICIAL USE; AMENDING CHAPTER 43, TITLE 67, IDAHO CODE, BY THE ADDITION OF A NEW SECTION TO BE KNOWN AS SECTION 67-4309, IDAHO CODE, AUTHORIZING THE STATE PARK BOARD TO APPROPRIATE AND HOLD IN TRUST FOR THE PEOPLE OF THE STATE ALL THE UNAPPROPRIATED WATER IN THE BIG SPRINGS AREA DESCRIBED, AND DECLARING THE

PRESERVATION OF THE WATER IN SAID AREA TO BE OF BENEFICIAL USE; AMENDING CHAPTER 43, TITLE 67, IDAHO CODE, BY THE ADDITION OF A NEW SECTION TO BE KNOWN AS SECTION 67-4310, IDAHO CODE, AUTHORIZING THE STATE PARK BOARD TO APPROPRIATE AND HOLD IN TRUST FOR THE PEOPLE OF THE STATE ALL THE UNAPPROPRIATED WATER IN THE BOX CANYON AREA DESCRIBED, AND DECLARING THE PRESERVATION OF THE WATER IN SAID AREA TO BE OF BENEFICIAL USE, DECLARING THE LAND BETWEEN THE HIGH WATER MARK ON ONE BANK TO THE HIGH WATER MARK ON THE OPPOSITE BANK TO BE DEVOTED TO THE PUBLIC USE; AMENDING CHAPTER 43, TITLE 67, IDAHO CODE, BY THE ADDITION OF A NEW SECTION TO BE KNOWN AS SECTION 67-4311, IDAHO CODE, BY AUTHORIZING THE STATE PARK BOARD, UPON CESSATION OF THE USE OF WATER FOR ELECTRICAL GENERATION, TO APPROPRIATE AND HOLD IN TRUST FOR THE PEOPLE OF THE STATE ALL THE UNAPPROPRIATED WATER IN THE THOUSAND SPRINGS AREA DESCRIBED, AND DECLARING THE PRESERVATION OF THE WATER IN SAID AREA TO BE OF BENEFICIAL USE; PROVIDING SEVERABILITY; AND PROVIDING FOR THE DIRECTOR OF WATER ADMINISTRATION TO DETERMINE THE AMOUNT OF WATER FOR PERMIT TO BE ISSUED AND LIMITING SUBSEQUENT DIVERSION AND DIRECTING THE STATE PARK BOARD TO FIRST SEEK A PERMIT FOR THOSE WATERS ARISING ON LANDS ADMINISTERED, CONTROLLED OR OWNED BY THEM.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 43, Title 67, Idaho Code, be, and the same is hereby amended by the addition thereto of a new section, to be known and designated as Section 67-4307, Idaho Code, and to read as follows:

67-4307. MALAD CANYON - APPROPRIATION OF WATERS IN TRUST FOR PEOPLE - LANDS DEVOTED TO RECREATIONAL USE. - The state park board is hereby authorized and directed to appropriate in trust for the people of the state of Idaho the unappropriated natural spring flow arising upon the area described as follows, to-wit:

The south half of the southwest quarter, and the south half of the southeast quarter, of section twenty-five, township six south, range thirteen east of the Boise Meridian; and

The north half of the northwest quarter, and the northwest quarter of the northeast quarter, of section thirty-six, township six south, range thirteen east of the Boise Meridian.

The preservation of water in the area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state of Idaho is hereby declared to be a beneficial use of such water.

No fee shall be required in connection with said appropriation by the state park board or the permit issued in connection therewith, but license shall issue at any time upon proof of beneficial use to which said waters are now dedicated.

The park board, or its successor, shall be deemed to be the holder of such permit, in trust for the people of the state, and the public use of the unappropriated water in the specific area herein described is declared to be of greater priority than any other use except that of domestic consumption.

The unappropriated lands belonging to the state of Idaho between the high water mark on one bank to the high water mark on the opposite bank, of the area described, are hereby declared to be devoted to a public use in connection with the preservation of the area in its present condition as a place of recreation for the citizens of the state of Idaho.

SECTION 2. That Chapter 43, Title 67, Idaho Code, be, and the same is hereby amended by the addition thereto of a new section, to be known and designated as Section 67-4308, Idaho Code, and to read as follows:

67-4308. NIAGRA SPRINGS - APPROPRIATION OF WATERS IN TRUST FOR PEOPLE. - The state park board is hereby authorized and directed to appropriate in trust for the people of the state of Idaho the unappropriated natural spring flow arising upon the area described as follows, to-wit:

That portion of lot one, of section ten, and lot three, of section eleven, township nine south, range fifteen east of the Boise Meridian, which is locally known as the Niagra Springs and limited to that portion of Niagra Springs upstream from the present existing diversions to the headwaters of the springs.

The preservation of water in the area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state of Idaho is hereby declared to be a beneficial use of such water.

No fee shall be required in connection with said appropriation by the state park board or the permit issued in connection therewith, but license shall issue at any time upon proof of beneficial use to which said waters are now dedicated.

The park board, or its successor, shall be deemed to be the holder of such permit, in trust for the people of the state, and the public use of the waters in the specific area herein described is declared to be of greater priority than any other use except that of domestic consumption.

SECTION 3. That Chapter 43, Title 67, Idaho Code, be, and the same is hereby amended by the addition thereto of a new section, to be known and designated as Section 67-4309, Idaho Code, and to read as follows:

67-4309. BIG SPRINGS - APPROPRIATION OF WATERS IN TRUST FOR PEOPLE. - The state park board is hereby authorized and directed to appropriate in trust for the people of the state of Idaho the unappropriated natural spring flow arising upon the area described as follows, to-wit:

That portion of the southwest quarter of the southwest quarter of section twenty-one and lot one of section twenty-eight, township eight south, range fourteen east of the Boise Meridian, which constitutes the Big Springs, but, excluding the stream known as the Snake River.

The preservation of water in the area described, known locally as Big Springs, Heart, or Blue Heart Springs, for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state of Idaho is hereby declared to be a beneficial use of such water.

No fee shall be required in connection with said appropriation by the state park board or the permit issued in connection therewith, but license shall issue at any time upon proof of beneficial use to which said waters are now dedicated.

The park board, or its successor, shall be deemed to be the holder of such permit, in trust for the people of the state, and the public use of the waters in the specific area herein described is declared to be of greater priority than any other use except that of domestic consumption.

SECTION 4. That Chapter 43, Title 67, Idaho Code, be, and the same is hereby amended by the addition thereto of a new section, to be known and designated as Section 67-4310, Idaho Code, and to read as follows:

67-4310. BOX CANYON - APPROPRIATION OF WATERS IN TRUST FOR PEOPLE - LANDS DEVOTED TO RECREATIONAL USE. - The state park board is hereby authorized and directed to appropriate in trust for the people of the state of Idaho the unappropriated natural spring flow arising upon the area described as follows, to-wit:

Only that portion of the stream which is known as Box Canyon Creek, situated in the northwest quarter of section twenty-seven, township eight south, range fourteen east of the Boise Meridian; and

The east half of the northeast quarter, in section twenty-eight, township eight south, range fourteen east of the Boise Meridian.

The preservation of water in the area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state of Idaho is hereby declared to be a beneficial use of such water.

No fee shall be required in connection with said appropriation by the state park board or the permit issued in connection therewith, but license shall issue at any time upon proof of beneficial use to which said waters are now dedicated.

The park board, or its successor, shall be deemed to be the holder of such permit, in trust for the people of the state, and the public use of the waters in the specific area herein described is declared to be of greater priority than any other use except that of domestic consumption.

The unappropriated lands belonging to the state of Idaho between high water mark on one bank to the high water mark on the opposite bank, of the area described, are hereby declared to be devoted to a public use in connection with the preservation of the area in its present condition as a place of recreation for the citizens of the state of Idaho.

SECTION 5. That Chapter 43, Title 67, Idaho Code, be, and the same is hereby amended by the addition thereto of a new section to be known and designated as Section 67-4311, Idaho Code, and to read as follows:

67-4311. THOUSAND SPRINGS - APPROPRIATION OF WATERS IN TRUST FOR PEOPLE - LANDS DEVOTED TO RECREATIONAL USE UPON CESSATION OF ELECTRICAL GENERATION. - Upon cessation of the use of the waters arising upon the land described herein, for electrical generation, the state park board is hereby authorized and directed to appropriate in trust for the people of the state of Idaho the unappropriated natural spring flow arising upon the area described as follows, to-wit:

The west half of the southeast quarter, of section eight, township eight south, range fourteen east of the Boise Meridian.

The preservation of water in the area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state of Idaho is hereby declared to be a beneficial use of such water.

No fee shall be required in connection with said appropriation by the state park board or the permit issued in connection therewith, but license shall issue at any time upon proof of beneficial use to which said waters are now dedicated.

The park board, or its successor, shall be deemed to be the holder of

such permit, in trust for the people of the state, and the use of the unappropriated water in the specific area herein described is declared to be of greater priority than any other use except that of domestic consumption.

SECTION 6. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act.

SECTION 7. The permits for the waters described in this act shall be issued upon the determination by the director of water administration of the historical water flow and he shall issue a permit for only that amount. Any future appropriation of the waters specifically described in this act that are granted above the flow limits set by the director shall not involve any diversion that shall detract from or interfere with the geological interpretive value, historical significance, or the scenic attraction for public use under the administration of the state park board of the stream from the natural high water mark on one bank to the natural high water mark on the opposite bank, or of the springs specifically described as they arise upon the lands listed in this act.

The state board shall apply first for those permits for water arising upon land which, at the time of enactment, the board administers, controls, or owns.

Approved March 24, 1971.

CHAPTER 208

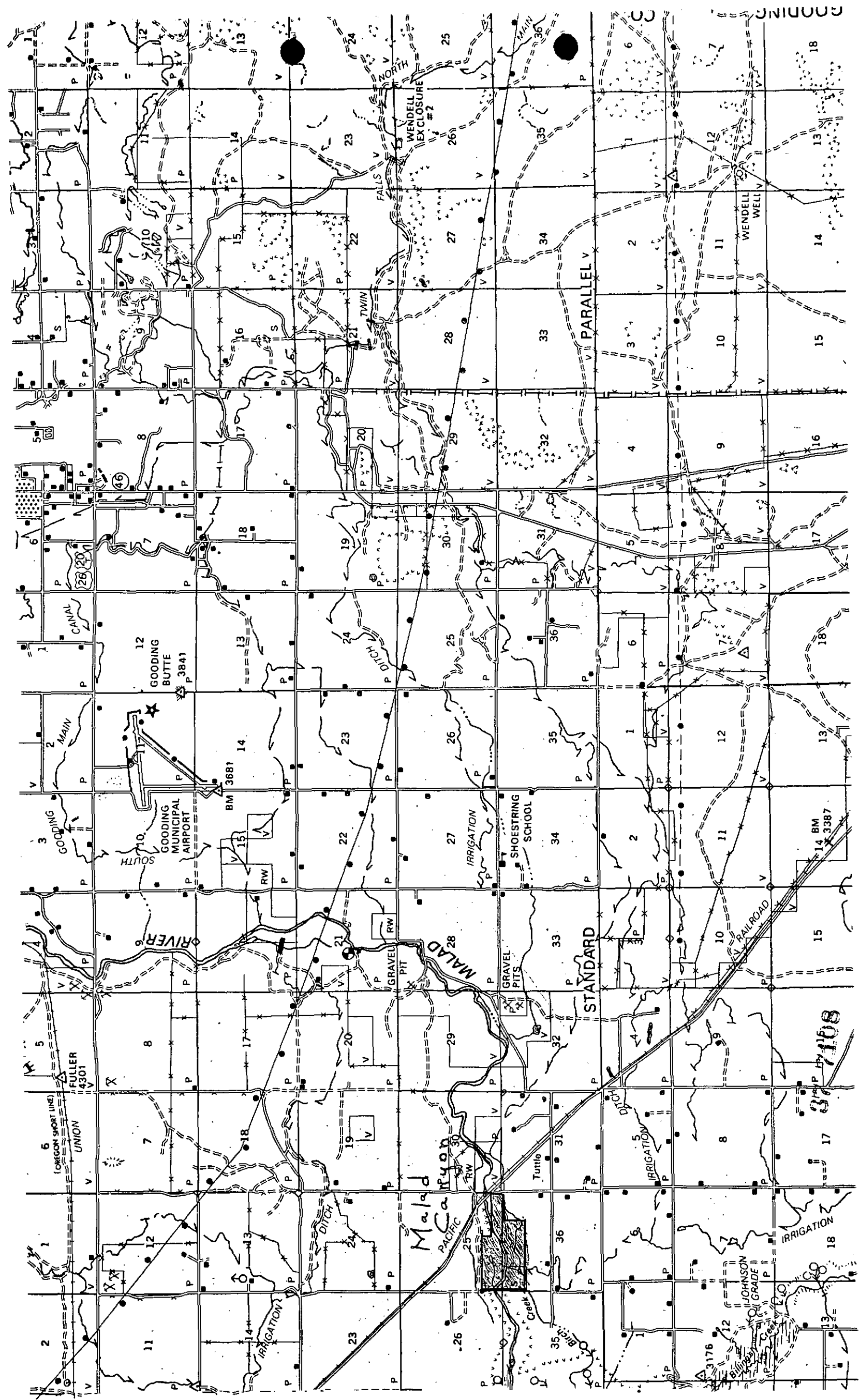
(H. B. No. 87)

AN ACT

AMENDING CHAPTER 13, TITLE 47, IDAHO CODE, BY THE ADDITION OF A NEW SECTION TO BE KNOWN AND DESIGNATED AS SECTION 47-1324, IDAHO CODE, PROVIDING FOR ISSUANCE OF AN INJUNCTION AGAINST OPERATING A DREDGE OR PLACER MINE WITHOUT A PERMIT.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 13, Title 47, Idaho Code, be, and the same is hereby amended by the addition of a new section, to be known and designated as Section 47-1324, Idaho Code, and to read as follows:



RECEIVED

SEP 2 1971

STATE OF IDAHO

Department of Water Administration

DEPARTMENT OF WATER ADMINISTRATION

BDF

In the Matter of the Applications)
for Permit No. 36-7198, 36-7199,) PROTEST
36-7200 & 37-7108 of the Idaho)
Department of Parks.)

COMES NOW, the Twin Falls Canal Company, an irrigation organization, deposes and says:

1. That the Twin Falls Canal Company, is a Carey Act irrigation operating company which has existing water rights under Idaho State law, and delivers the water represented thereby to some 202,000 acres in Twin Falls County.

2. That the Twin Falls Canal Company represents an integrated farming operation and has been able to acquire and supply adequate water for continued agricultural use.

3. The canal company's Board of Directors have authorized the officers to file official protests to those applications for permit filed pursuant to House Bill 69, as passed by the First Regular Session of the Forty-First Idaho Legislature.

NOW, THEREFORE, the Twin Falls Canal Company protests Applications Numbers 36-7198, 36-7199, 36-7200 and 37-7108, and prays that they be denied as follows:

1. That Applications for Permits Number 36-7198, 36-7199, 36-7200 and 37-7108, be denied as violative of the Idaho Constitution, Article 15, Section 3, as interpreted by the Idaho Supreme Court in the case of State Water Conservation Board of the State of Idaho v. Enking, 56 Idaho 722, 58 Pac. 2d 779 (1936).

2. That House Bill 69, and a permit issued pursuant to Application No. 36-7198, 36-7199, 36-7200 and 37-7108 would allow the appropriation of water in Idaho without the necessity of a diversion of the water, contrary to Idaho State law.

37 7108

3. That House Bill 69 and Application No. 36-7198, 36-7199, 36-7200, and 37-7108 filed pursuant thereto would establish both "scenic beauty" and "recreational purposes" as beneficial uses of water under the provisions of said application, neither of which alleged beneficiary uses are recognized by the Constitution and Statutes of the State of Idaho, and the issuance of a permit for those purposes would be contrary to Idaho law.

4. That the enactment of House Bill 69 by the First Regular Session of the Forty-First Idaho Legislature and the issuance of a permit as per Applications No. 36-7198, 36-7199, 36-7200, and 37-7108 would establish precedent from which one could logically conclude that a State agency or a member of the general public could appropriate all existing waters in the State of Idaho, in their natural state, over and above existing water rights, for aesthetic purposes, ultimately blocking the future development of consumptive water uses in Idaho.

5. That House Bill 69 as passed by the First Regular Session of the Forty-First Idaho Legislature and the issuance of a permit pursuant to Applications No. 36-7198, 36-7199, 36-7200, and 37-7108 might possibly be interpreted as eroding valid and existing water rights by the precedent that public uses are highest as among uses to the exclusion of other uses, and give rise to the argument that waters in Idaho were being used for aesthetic purposes prior to any consumptive use, possibly depriving existing water right holders of their just entitlements.

DATED: September 20, 1971.

TWIN FALLS CANAL COMPANY

By: Tom Olmstead
President

ATTEST:

Robert L. Clay
and Secretary

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STATE OF IDAHO)
County of Twin Falls) ss.

Tom Olmstead, being duly sworn on behalf of
Twin Falls Canal Company, a corporation, says:

That he is the President of said corporation; that he has
read the foregoing Protest, knows the contents thereof, and
believes the same to be true.

Tom Olmstead

SUBSCRIBED AND SWORN TO BEFORE ME, this 2/5 day of
September, 1971.

John A. Rosholt
NOTARY PUBLIC IN AND FOR IDAHO
Residing at: Twin Falls

(SEAL)

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SEP 21 1971

STATE OF IDAHO

DEPARTMENT OF WATER ADMINISTRATION

Department of Water Administration

In the Matter of the Applications)
for Permit No. 36-7198, 36-7199,) PROTEST
36-7200 & 37-7108 of the Idaho)
Department of Parks.)

COMES NOW, the North Side Canal Company Limited, a
non-profit irrigation organization, deposes and says:

1. That the North Side Canal Company Limited is a Carey
Act irrigation operating company which supplies irrigation water
for more than 160,000 acres of land in Jerome, Gooding and Elmore
Counties.

2. That the canal company has acquired water rights under
existing state law and by the delivery of the water represented
thereby, have fostered the irrigation and agricultural development
of the lands above referred to.

3. The canal company's Board of Directors have authorized
the officers to file official protests to those applications for
permit filed pursuant to House Bill 69, as passed by the First
Regular Session of the Forty-First Idaho Legislature.

NOW, THEREFORE, the North Side Canal Company Limited protests
Applications Numbers 36-7198, 36-7199, 36-7200 and 37-7108, and
prays that they be denied as follows:

1. That Application for Permit Number 36-7198, 36-7199,
36-7200 and 37-7108 be denied as violative of the Idaho Constitu-
tion, Article 15, Section 3, as interpreted by the Idaho Supreme
Court in the case of State Water Conservation Board of the State
of Idaho v. Enking, 56 Idaho 722, 58 Pac. 2d 779 (1936).

2. That House Bill 69, and a permit issued pursuant to
Applications No. 36-7198, 36-7199, 36-7200, and 37-7108 would
allow the appropriation of water in Idaho without the necessity
of a diversion of the water, contrary to Idaho State law.

37 7108

1 3. That House Bill 69 and Application No. 36-7198, 36-7199,
2 36-7200, and 37-7108 filed pursuant thereto would establish both
3 "scenic beauty" and "recreational purposes" as beneficial uses
4 of water under the provisions of said application, neither of
5 which alleged beneficiary uses are recognized by the Constitution
6 and Statutes of the State of Idaho, and the issuance of a permit
7 for those purposes would be contrary to Idaho law.

8 4. That the enactment of House Bill 69 by the First
9 Regular Session of the Forty-First Idaho Legislature and the
10 issuance of a permit as per Application No. 36-7198, 36-7199, 36-7200,
11 and 37-7108 would establish precedent from which one could logically
12 conclude that a State agency or a member of the general public
13 could appropriate all existing waters in the State of Idaho,
14 in their natural state, over and above existing water rights,
15 for aesthetic purposes, ultimately blocking the future development
16 of consumptive water uses in Idaho.

17 5. That House Bill 69 as passed by the First Regular
18 Session of the Forty-First Idaho Legislature and the issuance
19 of a permit pursuant to Application No. 36-7198, 36-7199, 36-7200 and
20 37-7108 might possibly be interpreted as eroding valid and existing
21 water rights by the precedent that public uses are highest as
22 among uses to the exclusion of other uses, and give rise to the
23 argument that waters in Idaho were being used for aesthetic purposes
24 prior to any consumptive use, possibly depriving existing water
25 right holders of their just entitlements.

26 DATED: September 20, 1971.

27 NORTH SIDE CANAL COMPANY LIMITED

28 By: C. J. Marshall
 President

29 ATTEST:

30 Joe L. Johnson
31 Secretary
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STATE OF IDAHO)
 Jerome) SS.
County of ~~Twin Falls~~)

C. J. Marshall, being duly sworn on behalf of
North Side Canal Company Limited, a corporation, says:

That he is the President of said corporation; that he has
read the foregoing Protest, knows the contents thereof, and
believes the same to be true.

C. J. Marshall

SUBSCRIBED AND SWORN TO BEFORE ME, this 20 day of
September, 1971.

William J. Deibel
NOTARY PUBLIC IN AND FOR IDAHO
Residing at: Jerome

(SEAL)

RECEIVED

SEP 20 1971

STATE OF IDAHO

Department of Water Administration.

DEPARTMENT OF WATER ADMINISTRATION

In the Matter of the Application)
 for Permit No. 37-7108 of the) PROTEST
 Idaho Department of Parks.)

COMES NOW, the Idaho State Reclamation Association, a non-profit corporation, deposes and says:

1. That the Association represents irrigation organizations and individuals who irrigate more than two million acres of land in Idaho.

2. That the Association is dedicated to the protection of existing water rights duly established under Idaho State law, and favors the acquisition of adequate water supplies for lands already under cultivation, as well as the orderly and optimum development of the water resources within Idaho.

3. The Association's Board of Directors have authorized the officers to file official protests to those applications for permit filed pursuant to House Bill 69, as passed by the First Regular Session of the Forty-First Idaho Legislature.

NOW, THEREFORE, the Idaho State Reclamation Association protests Application Number 37-7108 and prays that it be denied as follows:

1. That Application for Permit Number 37-7108 be denied as violative of the Idaho Constitution, Article 15, Section 3, as interpreted by the Idaho Supreme Court in the case of State Water Conservation Board of the State of Idaho v. Enking, 56 Idaho 722, 58 Pac. 2d 779 (1936).

2. That House Bill 69, and a permit issued pursuant to Application No. 37-7108 would allow the appropriation of water in Idaho without the necessity of a "diversion of the water, contrary to Idaho State law.

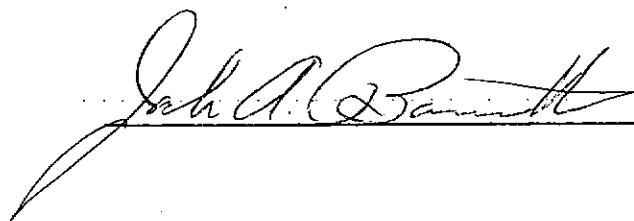
37 7108

1 3. That House Bill 69 and Application No. 37-7108 filed
2 pursuant thereto would establish both "scenic beauty" and "recrea-
3 tional purposes" as beneficial uses of water under the provisions
4 of said application, neither of which alleged beneficiary uses
5 are recognized by the Constitution and Statutes of the State of
6 Idaho, and the issuance of a permit for those purposes would be
7 contrary to Idaho law.

8 4. That the enactment of House Bill 69 by the First
9 Regular Session of the Forty-First Idaho Legislature and the
10 issuance of a permit as per Application No. 37-7108 would establish
11 precedent from which one could logically conclude that a State
12 agency or a member of the general public could appropriate all
13 existing waters in the State of Idaho, in their natural state, over
14 and above existing water rights, for aesthetic purposes, ultimately
15 blocking the future development of consumptive water uses in
16 Idaho.

17 5. That House Bill 69 as passed by the First Regular
18 Session of the Forty-First Idaho Legislature and the issuance
19 of a permit pursuant to Application No. 37-7108 might possibly
20 be interpreted as eroding valid and existing water rights by the
21 precedent that public uses are highest as among uses to the
22 exclusion of other uses, and give rise to the argument that waters
23 in Idaho were being used for aesthetic purposes prior to any con-
24 sumptive use, possibly depriving existing water right holders of
25 their just entitlements.

26 DATED: September 20, 1971.

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37 7108

1 STATE OF IDAHO)
2) ss.
3 County of Ada)

4 JACK A. BARNETT, being duly sworn on behalf of
5 Idaho State Reclamation Association, a corporation, says:

6 That he is an officer of said corporation; that he has
7 read the foregoing Protest, knows the contents thereof, and
8 believes the same to be true.

9 *Jack A. Barnett*
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11
12 SUBSCRIBED AND SWORN TO BEFORE ME, this 20 day of
13 September, 1971.

14
15 (SEAL)

16
17 *Donald R. Eldon*
18 NOTARY PUBLIC IN AND FOR IDAHO
19 Residing at: *Boise, Idaho*
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37 7108

GAYLE JOHNSON
CHAIRMAN OF THE BOARD
ISAAC BLICKENSTAFF
VICE CHAIRMAN OF THE BOARD
ROYSE VAN CUREN
PROJECT MANAGER
W. J. FARRELL
SECRETARY-TREASURER

REFERENCE—FIRST SECURITY BANK OF IDAHO—BOISE
THE IDAHO FIRST NATIONAL BANK—BOISE
BUREAU OF RECLAMATION—BOISE, IDAHO; WASHINGTON, D. C.

OPERATING AGENCY FOR 187,000
ACRES FOR THE FOLLOWING
IRRIGATION DISTRICTS:
NAMPA & MERIDIAN DISTRICT
BOISE-KUNA DISTRICT
WILDER DISTRICT
NEW YORK DISTRICT
BIG BEND DISTRICT

BOISE PROJECT BOARD OF CONTROL

(FORMERLY BOISE U. S. RECLAMATION PROJECT)

214 BROADWAY

BOISE, IDAHO 83701

September 20, 1971

SEP 20 1971

Department of Water Administration

Mr. R. Keith Higginson, Director
State of Idaho, Department of Water Administration
Statehouse
Boise, Idaho

re: Applications 36-7198
36-7199
36-7200
37-7108

Dear Mr. Higginson:

In order to bring the issue to a focus, the Boise Project Board of Control does hereby protest the Idaho State Parks Department's filing of applications to appropriate water for scenic and recreational uses from springs in the Thousand Springs area. Recognizing that the recently passed House Bill 69 instructed the Parks Department to file applications, there still appears to be too much departure from constitutional right, many earlier statutes, and tradition of long standing.

Hopefully the end result of this protest, and there should be many more if the irrigation people have kept in touch, would be a public hearing relating to the applications. Possibly to completely erase any doubt, the instruction in House Bill 69 should be tested in court.

Please accept our thanks in advance for whatever consideration you can give this matter.

Sincerely,

Gayle Johnson
Gayle Johnson
Chairman

RVC:jb

CC: Raymond D. Givens
Big Bend Irrigation District
Boise-Kuna Irrigation District
New York Irrigation District
Nampa and Meridian Irrigation District
Wilder Irrigation District

37 7108

South Board of Control, Owyhee Project

Homedale, Idaho 83628

Phone 337-3760

Beverly Fisher
Treasurer

Tom Cotton
Secy.-Mgr.

September 17, 1971

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

Dear Mr. Higginson,

The Gem Irrigation District and the South Board of Control, Owyhee Project; wish to protest the following Notice of Application for Water Permitt, application No. 37-7108, Springs in Malad Canyon, 1260 cu. ft./sec.; No. 36-7198, Box Canyon Creek, 850 c.f.s.; No. 36-7200, Niagra Springs, 264 c.f.s.; No. 36-7199, Big Springs, 100 c.f.s.

The applications are made in the name of Idaho Dept. of Parks, in trust for the people of the State of Idaho whose address is Statehouse; Boise, Idaho.

Our objections to these applications are as follows: (1) There is no point of diversion (Idaho Code, 42-202 point 4); (2) Scenic beauty and recreation is not a recognized beneficial use listed in the Idaho Constitution; (3) The application is vague and indefinite in that it does not state what use the water would perform, how the area would be maintained and administered, provisions for access to the mentioned sites or actual quantity of water to be filed on; (4) Constitutional question as to whether the State has right to appropriate water; (5) The Dept. of Parks does not mention financial ability to develop these areas and probably cannot at this time since there has been no appropriation made for such and no assurance that there will be.

Yours very truly,

Tom Cotton

Tom Cotton, Secty.-Mgr.
Gem Irrigation District and
South Board of Control
Box 67

Homedale, Idaho 83628 37 7108

PROTESTANTS:

1. REM VIEW TROUT COMPANY, INC.
2903 West Idaho Street
Boise, Idaho 83702
Attorney:
Jay F. Bates - 342-8915
Bakes, Ward & Bates
612 Hays Street
Boise, Idaho 83702
2. BOISE PROJECT BOARD OF CONTROL -344-1141
Gayle Johnson, Chairman
214 Broadway
Boise, Idaho 83702
3. GEM IRRIGATION DISTRICT -and-
SOUTH BOARD OF CONTROL, OWYHEE PROJECT
Tom Cotton, Sec.-Mgr.
Box 67 - 337-3760
Homedale, Idaho 83628
4. IDAHO STATE RECLAMATION ASSN.
Jack A. Barnett - 344-1541
520 Idaho Bldg.
Boise, Idaho 83702
5. AL DAISS - 543-4578
P.O. Box 643
Buhl, Idaho 83316
6. LESTER BORNT
Holtville, California
Attorney:
John A. Rosholt - 733-3722
Parry, Robertson, Daly & Larson
P.O. Box 525
Twin Falls, Idaho 83301
7. JOE GORMAN - 543-5866
Route # 2
Buhl, Idaho 83316
8. MOUNTAIN VIEW IRRIGATION CO., INC.
Twin Falls, Idaho 83301
Attorney:
T. V. Behm - 543-4397
P.O. Box 306
Buhl, Idaho 83316
9. EDNA WERTH - 543-4720
Route # 2
Buhl, Idaho 83316
10. EARL M. HARDY & RICHARD KASTER
1220 Vista Ave., Boise & Hagerman, Idaho
Attorney:
John A. Rosholt- 733-3722
Parry, Robertson, Daly & Larson
P.O. Box 525
Twin Falls, Idaho 83301
11. NORTH SIDE CANAL CO., LTD.- 324-2319
921 North Lincoln
Jerome, Idaho 83338
12. DEL KOHTZ - 733-1358
439 Van Buren
Twin Falls, Idaho 83301
13. TWIN FALLS CANAL COMPANY - 733-6731
Tom Olmstead, Pres.
Twin Falls, Idaho 83301
163 - 2nd Ave. West

36-7198 - Box Canyon Creek

2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13

36-7199 - Big Springs

2, 3, 4, 11, 13

36-7200 - Niagra Springs

1, 2, 3, 4, 6, 11, 13

37-7108 - Springs in Malad Canyon

2, 3, 4, 11, 13

37 7108

John Rosholt - 733 3722



UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WATER RESOURCES DIVISION
Room 365, Federal Building
550 West Fort Street
Boise, Idaho 83702

July 20, 1971

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

Dear Mr. Higginson:

The following tabulation is provided in response to your request for data on flow of some Snake River canyon springs prior to development on the Snake River Plain.

<u>Spring</u>	Year	
	<u>1902</u> (cfs)	<u>1969</u> (cfs)
Niagara spring at gage	107	264
Box Canyon Springs at mouth	300	850
Big, Blue Heart, or Blue Spring ($\frac{1}{2}$ -mile below mouth of Box Canyon Spring)	48	100
Thousand Springs group - total (includes diversion from Sand Springs)	840	1,120
Malad Springs	<u>940</u>	<u>1,260</u>
Total	2,235	3,594

We hope the above information fulfills your need. If we can provide additional spring flow data, do not hesitate to call on us.

Sincerely yours,

Fred

Alfred H. Harder
Acting District Chief

37 7108

Affidavit of Publication

State of Idaho, }
County of Gooding } ss.

Mrs. Alfred E. Hagen, being first duly sworn, deposes and says that he is the printer (publisher) of the Gooding County Leader, a newspaper published every week in Gooding, County of Gooding, State of Idaho; that said newspaper has been continuously and uninterruptedly published for a period of seventy-eight consecutive weeks prior to the first publication of the annexed notice and is a newspaper qualified to publish legal notices as provided by act of the 1919 session of the legislature of the State of Idaho, known as House Bill 145; that the annexed advertisement

was published once each week for 2 consecutive issues in said newspaper proper and not in a supplement; that the date of the

first publication of said advertisement was on the 2 day

of Sept, 1921, and the date of the last publication

was on the 9 day of Sept, 1921

Mrs Alfred E Hagen
Subscribed and sworn to before me this 9

day of September, 1921

Andrew C. Belcher
NOTARY PUBLIC

GOODING COUNTY LEADER

Gooding, Idaho

COST OF PUBLICATION

Number of Lines in Notice.....

Number of Insertions

Lines at 14¢

Lines at 10¢

TOTAL COST.....

COPY OF NOTICE

Title of Notice
Water Application

Title of Notice
#37-7108

Plaintiff Attorney

Park Dept.

Defendant

Plaintiff

Bill to

Water Dept.

PUBLICATION RATES:

(Idaho Code, (Rev. Statutes) 1956
7 pt. per line, straight 14c
7 pt. per line, tabular 20c
7 pt. per line, successive
insertions.....10c
6 pt. per line, straight 15c
6 pt. per line, tabular 20c
6 pt. per line, successive
insertions.....10c

No 1266

37 7108

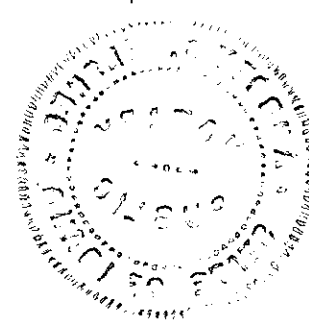
**NOTICE OF APPLICATION
FOR WATER PERMIT**

Notice is hereby given that the Idaho Department of Parks, Statehouse, Boise, Idaho, has on July 12, 1971 submitted Application No. 37-7108 for a permit to appropriate 1,260 cubic feet per second of water from springs (tributary of Snake River) arising in Malad Canyon within the S $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 25; N $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T. 6S, R. 13E, B.M., Gooding County, to be used from January 1 to December 31 for scenic beauty and recreational purposes. The water will not be diverted, but will be preserved in its natural state in trust for the people of the State of Idaho, pursuant to Chapter 207, 1971 Session Laws.

Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, Statehouse, Boise, Idaho 83707, on or before September 20, 1971.

R. Keith Higginson
Director

*9-2-2tc



INTER-DEPARTMENT MEMO — 1

FROM Dave T

DATE 5/12/82

TO Jim

SUBJECT 37-7108

Documentation in the field exam and in Alan's memo indicates that the largest rate of flow from springs, measured in the area defined in the permit, is 899 cfs. Please ~~prep~~ prepare a license for this quantity, to be consistent with our standard licensing system. We will pass this on for review before mailing a letter to the permit holder.

Dave

SIGNATURE

MEMO

TO: Alan Robertson through Dave Tuthill *DET THRU Glen Saxton* April 30, 1982
FROM: Jim Johnson *Jim*
RE: Average spring flow arising in Malad Canyon

Pursuant to Section 67-4307, Idaho Code, the Idaho Department of Parks and Recreation filed for Permit No. 37-7108. The intent of the permit was to appropriate all unappropriated natural spring flow arising upon a described area - see Section 67-4307 for description.

It appears that the USGS provided the Director the quantity of spring flows identified on the permit in a letter dated July 20, 1971 (see file). This permit has undergone a great deal of controversy but it is now ready to be licensed.

The question of determining the quantity of water that should be recognized on a license may still be cloudy. It appears that the legislature desired a quantity that was limited to the historical flow of said springs as determined by the Director of the Department of Water Resources. From measurements made on March 5, 1982, the Department's field examiners determined that a flow of 709.59 cfs was being generated from the springs and have recommended this amount to be recognized as the quantity for the license. The problem with using this quantity is that the one time measurement may not reflect historical flow and it is substantially different from the amount on the permit.

Please determine from available records an estimate of historical spring flows arising in Malad Canyon.

(See field exam for locations of measurements)

JJS
5-4-82

INTER-DEPARTMENT MEMO — 1

FROM Jim J.

DATE 5-11-82

TO Dave T.

SUBJECT ATTACHED IS AN MEMO FROM ALAN Robertson
RESPONDING TO MY REQUEST OF 4-30-82.

IT APPEARS THAT THE 1260 cfs ON THE PERMIT
DOES APPROXIMATE HISTORICAL SPRINGS FLOW ARISING IN
THE MALAD CANYON, AND BASED UPON SHORTCOMINGS OF
THE MEASUREMENTS MADE BY FIELD EXAMINERS AS ADDRESSED
IN ALAN'S MEMO WE SHOULD USE EITHER 900 CFS OR THE
1260 cfs. ALAN ATTEMPTS TO JUSTIFY THE 1260 cfs.

CONSIDERING THAT THE SOURCE IS SPRING water I don't see where
JUNIOR WATER RIGHTS WOULD BE IMPACTED IF THE 1260 cfs IS USED.

SIGNATURE

ACTION

6-7-82

A 10 DAY LETTER
SHOULD BE PREPARED
AFTER AN IN HOUSE REVIEW
IS MADE OF PROPOSED
AMOUNT FOR LICENSE

Jim

RECEIVED

State of Idaho

Department of Water Resources

ROUGH DRAFT

10 Day

APR 9 1982

Department of Water Resources

WATER RIGHT LICENSE

License of Water Right No. 37-7108 Priority 7-12-1971 Amount 709.59 cfs

THIS IS TO CERTIFY, that State of Idaho
Department of Parks & Recreation
of Boise, Idaho, has complied with the terms and conditions of Permit
No. 37-7108 issued pursuant to Application for Permit dated 7-12-1971
and has submitted proof to the Department of Water Resources on 11-15-1979
that he has applied water to a beneficial use; an examination by the Department indicates that the works have a
capacity for the diversion of 709.59 cfs of water from Malad Canyon Springs
tributary to Malad River, and that the permit holder has applied to a beneficial use and
established a right to use water as follows:

Beneficial Use	Period of Use	Rate of Diversion	Annual Volume
Scenic beauty & Recreation	from <u>1-1</u> to <u>12-31</u>	at <u>709.59 cfs</u> and	<u>N/A</u>
	from _____ to _____	at _____ cfs and	
	from _____ to _____	at _____ cfs and	

(both dates inclusive)

Subject, however, to the condition that no more than 709.59 cfs of water be diverted at any one time, and
that the amount of water so diverted and to which such right is entitled and confirmed is for the purpose
aforementioned and is limited to the amount which can actually be beneficially used and shall not exceed
N/A acre feet per year, said waters to be diverted within the * 5 1/2 SW 1/4, 5 1/2 SE 1/4 Sec. 25;
N 1/2 NW 1/4, NW 1/4 NE 1/4 Sec. 36 T.6S., R.13E., B.M. in the County of Gooding

Description and location of place of use:

Town	Range	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
6S.	13E.	25											X	X			X	X	
6S.	13E.	36		X			X	X											

* No physical diversion required pursuant to the Director's Order dated
January 17, 1975.

Total number of acres irrigated _____

ROUGH DRAFT

NOTE: Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho
Code, or the applicable Idaho Law. This right may be forfeited by five years of non-use.

The right to the use of the water hereby confirmed is restricted and appurtenant to the lands or place of use
herein described, as provided by the laws of Idaho.

Witness the seal and signature of the Director, affixed at Boise, Idaho, this _____ day of

19 _____

Director



State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

May 5, 1982

MEMO

TO: Jim Johnson
FROM: Alan Robertson *R*
SUBJECT: FLOW OF MALAD SPRINGS (Permit 37-7108)

Malad Springs as measured by USGS includes groundwater discharge to the Big Wood River from SE $\frac{1}{4}$ Sec. 25, T6S R13E downstream "to the mouth". See the location description on the attached page from "Record of North-Side Springs and Other Inflow to the Snake River Between Milner and King Hill, Idaho, 1948-67", Water Information Bull. 6, IDR, 1968. The USGS method of determination of this gain is to sum the flow of Big Wood River below the head of the lower Malad power plant flume and the flow in the flume and deduct the flow of Big Wood River near Gooding (13152500) and measured irrigation return from the North Side Canal Company wasteway which enters the river in the NE $\frac{1}{4}$ Sec. 36, T6S, R13E. Thus, the permitted spring flow of 1260 cfs includes all gain to the river from USGS gage 13152500 to just below the head of the lower Malad power flume, but not to the mouth of the Big Wood River. Nearly all of this gain occurs in the area of use as described in the permit application and in approximately 0.8 mile of the river channel downstream to the head of the lower Malad power flume.

Based upon the measurements by Gary Funderburg and comments by Bob Harper of USGS, the gain is roughly 700+ cfs above the diversion to the upper Malad power canal and 500+ cfs in the reach from there to the head of the lower Malad flume. Rather dramatic gains have been measured in the upper part of this lower reach (100 cfs in a 500 ft. reach).

Following are estimates of groundwater discharge within the described place of use on two occasions in 1980:

1980
MAY 11 1982
11 11 1982

Estimated Gain to Big Wood River in cfs

<u>Date</u>	Big Wood R. at line between Secs. 25 & 26 ^{1/}	Upper Malad Power Canal ^{2/}	Irr. Water	Big Wood nr Gooding	Gain
	(+)	(+)	(-)	(-)	(=)
3/28/80	185	778	03/	70	893
8/20/80	243	903	504/	197	899

- ^{1/} Measurements by USGS.
^{2/} Computed by IPCo. from generation records.
^{3/} Estimate based on fact North Side Canal diversion began on April 26.
^{4/} Estimate based on typical waste in other years at this approximate date.

This is about 200 cfs greater than measured by Funderburg but includes an additional several hundred feet of river channel where gains are known to be large. Based upon the above I would conclude that the groundwater gain within the described place of use is at least 900 cfs and may be greater during part of the year or in years of above average conditions.

Because the river is gaining spring flow so rapidly at the western edge of the described place of use and because the actual "use" will include the entire river reach downstream to at least the heading of the lower Malad power flume (see Malad River Gorge Preliminary Master Plan map dated February 12, 1968) I believe this total gain in the larger reach is justified. Note the locations of the overlook point and the interpretive area. Spring flows by this definition are represented by the regular USGS measurements as illustrated on the attached sheet. The 1260 cfs originally permitted is a good representation of this flow.

Incidentally, note the river name identification discussed in "Remarks" on the attached sheet. It is now the Big Wood River not the Malad and the license should use that name.

ACR:mb

I Do not
 agree
 5/12/82

ML3-1534. Malad Springs near Hagerman, Idaho

Location.--Springs head in SE $\frac{1}{4}$ sec.25, T.6 S., R.13 E., and continue to accumulate and supplement Big Wood River to the mouth where it enters the right bank of Snake River at river mile 571.2, in NW $\frac{1}{4}$ sec.34, T.6 S., R.13 E., 3 miles north of Hagerman.

Records available.--1899, 1910-11, 1913, 1917, 1919, 1924, 1950-59, 1963-64, 1966-67: One or more sets of measurements each year for use in computing spring discharge (see tabulation in WSP 1463 for measurements prior to 1950).

Altitude.--Springs are between altitudes 2,900 and 3,100 ft (from topographic map).

Physical features.--Water issues directly from basalt in and near the floor of a deep canyon. Discharge from numerous openings above Big Wood River is visible, but much of the discharge occurs along the floor of the river channel and is apparent only as gain in flow in the reach, which extends about 2.5 miles above the mouth.

Remarks.--Almost the entire flow is diverted about 1 mile above mouth of Big Wood River for irrigation and power development. King Hill Irrigation Co. has an assigned right of 300 cfs; the power company, the remainder of the flow. Results shown herein are adjusted for diversion and surface inflow to approximate the total spring flow. In this report, usage conforms with the latest decision of the Board of Geographic Names, dated January through April 1960. According to this decision, the name Big Wood River applies to the entire reach of channel to Snake River, and Malad Springs discharge into Big Wood River (Nace and others, 1959, p. 14).

Discharge measured at the site during the years 1950-67,
adjusted for surface inflow and diversion

Date	Discharge (cfs)	Date	Discharge (cfs)	Date	Discharge (cfs)
4- 1-50	1,260	4- 2-54	1,210	4- 6-59	1,270
10-26-50	1,270	4- 7-55	1,210	3-29-63	1,220
3-29-51	1,240	7-25-56	1,360	6- 2-64	1,250
4-21-52	1,300	4- 1-57	1,350	5- 6-66	1,230
4-14-53	1,230	3-31-58	1,270	3- 8-67	1,220
11-21-53	1,260				



State of Idaho

DEPARTMENT OF WATER RESOURCES

STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS

Governor

C. STEPHEN ALLRED

Director

Mailing address:

Statehouse

Boise, Idaho 83720

(208) 334-4440

August 17, 1982

RE: Permit No. 37-7108

Idaho Dept. of Parks & Recreation
Statehouse
Boise, ID 83720

Gentlemen:

A representative of this Department has made an examination of the works covered by your Permit No. 37-7108, and has found the following:

Amount of water that can be recognized as beneficially used under
Idaho law: 900.0 cfs Source: Malad Canyon Springs

The maximum quantity diverted shall not exceed n/a acre feet per year.

Point(s) of diversion: *S $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 25; N $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36; Twp. 6S,
Rge. 13E, Gooding County

*No physical diversion required pursuant to the Director's Order dated 1/17/1975.

Beneficial use: Scenic beauty and recreation within the S $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$,
Sec. 25; NW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 36; Twp. 6S, Rge. 13E

Priority date established: July 12, 1971

Conditions (if any):

If you do not concur with these findings please contact us within 10 days, otherwise a water license will be issued as set forth above.

Sincerely,

JIM JOHNSON
Water Distribution Supervisor

September 22, 1982

RE: Permit No. 37-7108

Idaho Dept. of Parks and Recreation
Statehouse Mail
Boise, ID 83720

Gegelemen:

Enclosed herewith is a copy of the Water Right License issued on the above referenced Permit.

Sincerely,

Jeni Johnson

JIM JOHNSON
Water Distribution Supervisor

JJ:kw
Enclosure

Mr. J. B. Smith

State of Idaho
DEPARTMENT OF WATER RESOURCES
FIELD REPORTRECEIVED
APR 9 1982
Department of Water Resources37-7108
Permit No.

CONTACT WITH PERMIT HOLDER

	DATE	INITIALS	REMARKS
☐ Appointment letter mailed:	12-27-1979	AJ	
☐ Telephone call made: (List Telephone No. used)			
☐ Appointment scheduled for: (Date, time, location)			

EXAMINATION

Date 3-5 & 3-9 Accompanied by Reid Newby, Allen Merritt Total Q measured 709.587 C.F.S.
If source is surface water, estimate total flow of source ✓
Methods of measurement Double FA METER #090155 Meets Permit requirements? yes

Measurement calculations: See MEASUREMENT NOTES:

1. 765.986 C.F.S.
2. 46.601 C.F.S. } Gage Station Reading
812.587 C.F.S.
- 103.000 = 709.587 C.F.S.

WELL/DIVERSION* NO.	HP	MOTOR MAKE	MOTOR SERIAL NO.	PUMP MAKE	PUMP SERIAL NO.	MEASURING DEVICE TYPE	CONDITION OF MEAS. DEV.	REMARKS

System Description Springs are collected in the MAHON CANYON AND picked up by THE IDAHO POWER Co. before DISCHARGING INTO SNAKE RIVER

*Code with map on reverse side. Disregard code if only one.

RECOMMENDED AMOUNTS

USE	Irrigation requirement =	AFA/Acre	FROM	TO
Recreation & Scenic Beauty	Q (cfs) <u>709.587 C.F.S. ✓</u> V (afa) <u>-</u>	<u>N/A</u>	<u>JAN. 1</u>	<u>Dec. 31</u>
Total	<u>709.587 C.F.S. ✓</u>	<u>-</u>	<u>JAN. 1</u>	<u>Dec. 31</u>

Remarks MEASUREMENTS WERE TAKEN DURING OFF IRRIGATION SEASON TO EXCLUDE ANY WASTE WATER FROM ENTERING THE CANYON. WATER ABOVE THE SPRINGS ENTERING THE CANYON FROM THE LITTLE WOOD RIVER WAS MEASURED @ Gage Station # 21 @ 103.0 C.F.S. See DISCHARGE NOTES # 1.

Gage Station #21 located within
NE 1/4 NE 1/4 SW 1/4 Sec 21, T6S, R14E.

MAP (Attach Aerial Photo)

SCHEMATIC DIAGRAM OF SYSTEM

(Include distance from pump to measuring device, if applicable.)

Point(s) of diversion: S 1/2 SW 1/4, S 1/2 SE 1/4, Sec. 25; N 1/2 NW 1/4, NW 1/4 NE 1/4, Sec. 36
T. 6 S. R. 13 E.

Place(s) of Use

TWP.	RGE.	SEC.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
6S	13E	25											X	X			X	X	
		36		X			X	X											

Recommended Amendments:

- ☒ Change P.D. as reflected above ☐ Add P.D. as reflected above
☐ Change P.U. as reflected above ☐ Add P.U. as reflected above

☒ None
 Other _____

Examiner's Signature

Checked by

Approved by

Date

Date

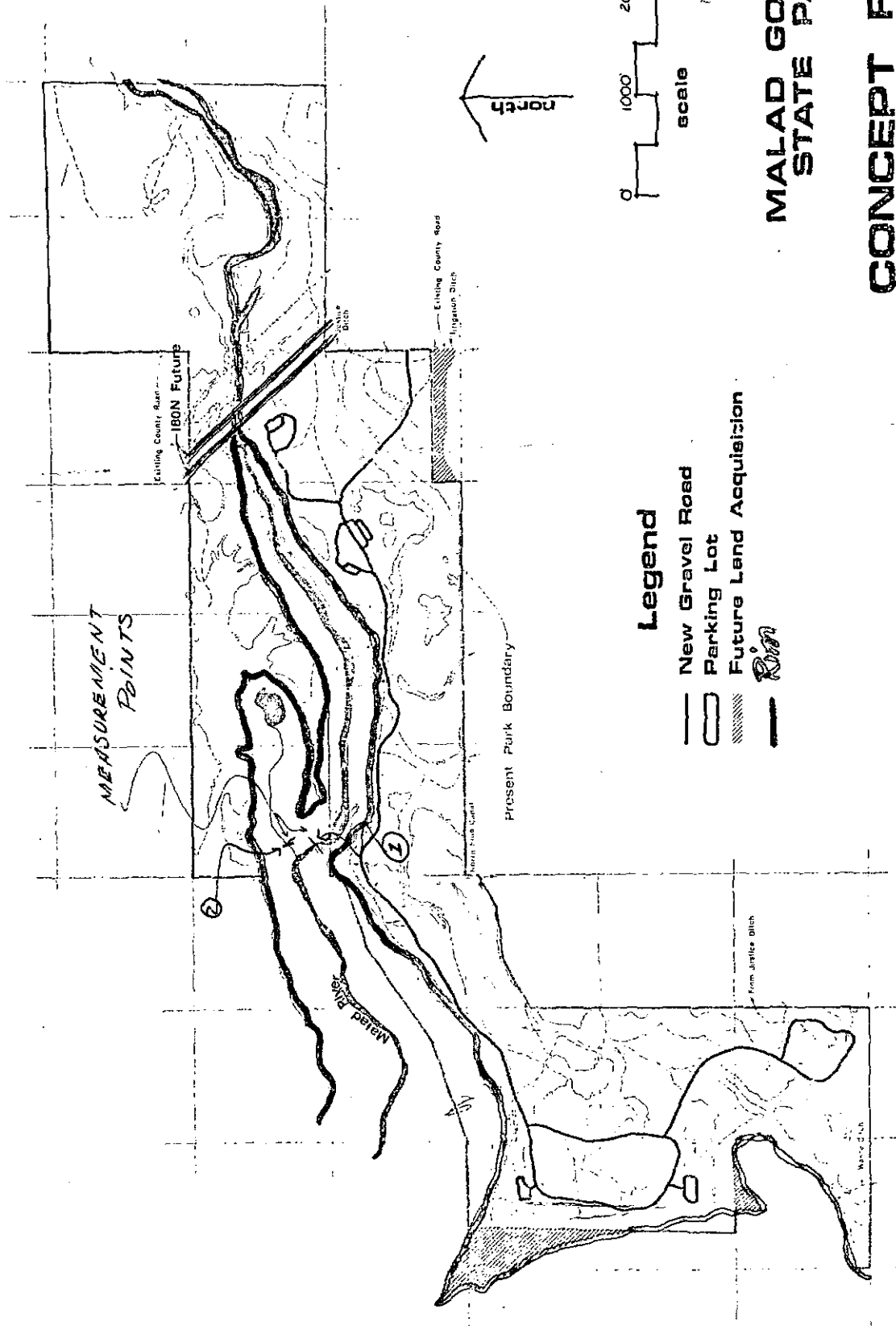
Date

3-18-1982

3-19-1982

4-27-1982

CH2M HILL



MALAD GORGE STATE PARK

CONCEPT FOR PHASE 1 CONSTRUCTION 2

CH2M
HILL

9-275
January 1952

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WATER RESOURCES DIVISION

Page 1 of 2

Date 3-5, 198/DISCHARGE MEASUREMENT NOTES

Molad

River at Above Tachah Power

Angle coef- ficient	Dist. from initial point	Width	Depth	Observa- tion depth	Revo- lutions	Time in sec- onds	VELOCITY		Adjust- ed for hor. angle or -----	Area	Discharge
							At point	Mean in ver- tical			
	<u>L. B.</u>		<u>12:50 pm</u>								
	<u>0.0</u>	<u>.30</u>	<u>8.90</u>		<u>1/28</u>	<u>.60</u>		<u>.83</u>		<u>2.67</u>	<u>2.22</u>
	<u>.60</u>	<u>.60</u>	<u>8.90</u>		<u>50</u>	<u>47</u>	<u>2.39</u>	<u>1.66</u>		<u>5.34</u>	<u>8.86</u>
					<u>20</u>	<u>49</u>	<u>.93</u>				
	<u>1.20</u>	<u>.70</u>	<u>8.90</u>		<u>80</u>	<u>50</u>	<u>3.57</u>	<u>4.50</u>		<u>6.23</u>	<u>28.04</u>
					<u>100</u>	<u>41</u>	<u>5.44</u>				
	<u>2.00</u>	<u>.90</u>	<u>8.90</u>		<u>150</u>	<u>56</u>	<u>5.97</u>	<u>6.06</u>		<u>8.01</u>	<u>48.54</u>
					<u>150</u>	<u>54</u>	<u>6.19</u>				
	<u>3.00</u>	<u>1.00</u>	<u>8.90</u>		<u>150</u>	<u>48</u>	<u>6.77</u>	<u>6.70</u>		<u>8.90</u>	<u>59.63</u>
					<u>150</u>	<u>52</u>	<u>6.43</u>				
	<u>4.00</u>	<u>1.00</u>	<u>8.90</u>		<u>150</u>	<u>48</u>	<u>6.77</u>	<u>6.89</u>		<u>8.90</u>	<u>61.32</u>
					<u>150</u>	<u>49</u>	<u>6.82</u>				
	<u>5.00</u>	<u>1.00</u>	<u>8.90</u>		<u>150</u>	<u>49</u>	<u>6.82</u>	<u>6.50</u>		<u>8.90</u>	<u>57.85</u>
					<u>150</u>	<u>54</u>	<u>6.19</u>				
	<u>6.00</u>	<u>1.00</u>	<u>8.90</u>		<u>150</u>	<u>54</u>	<u>6.19</u>	<u>6.31</u>		<u>8.90</u>	<u>56.16</u>
					<u>150</u>	<u>52</u>	<u>6.43</u>				
	<u>7.00</u>	<u>1.00</u>	<u>8.90</u>		<u>150</u>	<u>47</u>	<u>7.11</u>	<u>6.96</u>		<u>8.90</u>	<u>61.94</u>
					<u>150</u>	<u>49</u>	<u>6.82</u>				
	<u>8.00</u>	<u>1.00</u>	<u>8.90</u>		<u>150</u>	<u>50</u>	<u>6.69</u>	<u>6.44</u>		<u>8.90</u>	<u>57.32</u>
					<u>150</u>	<u>54</u>	<u>6.19</u>				
	<u>9.00</u>	<u>1.00</u>	<u>8.90</u>		<u>150</u>	<u>52</u>	<u>6.43</u>	<u>6.37</u>		<u>8.90</u>	<u>56.69</u>
					<u>150</u>	<u>53</u>	<u>6.31</u>				

No. _____ of _____ Sheets. Comp. by _____ Chk. by _____

MEASUREMENT LOCATION IPCO UPPER DIVERSION IN FLUME LEGAL DESCRIPTION SEC TMP RNG
 MEASURED BY GLF & RJN ON 3/5/1981 V = 2.218N + .022 FOR N <= 1
 V = 2.224N + .016 FOR N > 1

DISTANCE FROM INITIAL POINT	DEPTH	AREA	REVOLUTIONS	TIME	VELOCITY	DISCHARGE
FEET	FEET	SQ. FT.		SEC.	FT/SEC.	CFS.
.000	.000	.000	0	.000	.000	.000
.010	8.900	2.715	0	40.000	.022	.060
.600	8.900		50	47.000		
		5.296	20	49.000	1.654	8.760
1.200	8.900		80	50.000		
		6.230	100	41.000	4.507	28.079
2.000	8.900		150	56.000		
		8.010	150	54.000	6.083	48.725
3.000	8.900		150	48.000		
		8.900	150	52.000	6.698	59.612
4.000	8.900		150	48.000		
		8.900	150	49.000	6.895	61.366
5.000	8.900		150	49.000		
		8.900	150	54.000	6.509	57.930
6.000	8.900		150	54.000		
		8.900	150	52.000	6.312	56.177
7.000	8.900		150	47.000		
		8.900	150	49.000	6.969	62.024
8.000	8.900		150	50.000		
		8.900	150	54.000	6.441	57.325
9.000	8.900		150	52.000		
		8.900	150	53.000	6.370	56.693
10.000	8.900		150	50.000		
		8.900	150	52.000	6.559	58.375
11.000	8.900		150	51.000		
		8.900	150	52.000	6.494	57.797
12.000	8.900		150	49.000		
		8.900	150	~~51.000~~ 51.49.000	~~6.685~~ 6.584	~~60.334~~ 59.497
13.000	8.900		150	59.000		
		8.900	150	57.000	5.769	51.344
14.000	8.900		80	51.000		
		7.120	60	44.000	3.277	23.332
14.600	9.100		40	54.000		
		5.870	100	47.000	3.206	18.819
15.290	9.100		0	40.000	.022	.071
15.300	.000	.000	0	.000	.000	.000
TOTALS		136.372				~~767.723~~ 765.986

MOORE BUSINESS FORMS
 MOORE BUSINESS FORMS

9-275
January 1952
AA
METR 090155
Date 3/9 81
M212d Canyon Side Canyon
River at Head of Flume

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WATER RESOURCES DIVISION

2
1-GLF
11-ADM
Start: 11:00
Stop: 12:15

DISCHARGE MEASUREMENT NOTES

Angle coef- ficient	Dist. from initial point	Width	Depth	Observa- tion depth	Revo- lutions	Time in sec- onds	VELOCITY		Adjust- ed for hor. angle or	Area	Discharge
							At point	Mean in ver- tical			
	3.0	E/W				Left Bank					
	3.0	.25	3.0					0		.75	0
	3.5	.5	3.0	1.5	60	49					
				1.5	50	41	2.73	2.17		1.5	3.255
				6.0	30	42	1.61				
	4.0	.5	3.0	6.0	50	46	2.43	1.88		1.5	2.850
				1.5	30	51	1.33				
	4.5	.5	3.0	1.5	40	51	1.76	2.095		1.5	3.142
				6.0	50	46	2.43				
	5.0	.5	3.0	6.0	50	43	2.60	2.335		1.5	3.547
				1.5	40	42	2.13				
	5.5	.5	3.0	1.5	40	45	1.99	2.165		1.5	3.247
				6.0	50	46	2.43				
	6.0	.5	3.0	6.0	50	43	2.60	2.12		1.5	3.18
				1.5	30	41	1.64				
	6.5	.5	3.0	1.5	20	41	1.10	1.82		1.5	2.73
				6.0	50	44	2.54				
	7.0	.5	3.0	6.0	50	46	2.43	2.15		1.5	3.225
				1.5	40	48	1.87				
	7.5	.5	3.0	1.5	30	42	1.61	1.87		1.5	2.805
				6.0	40	42	2.13				
	8.0	.5	3.0	6.0	50	47	2.39	2.06		1.5	3.09
				1.5	40	52	1.73				
				Continued Next sheet							

No. 1 of 2 Sheets. Comp. by _____ Chk. by _____

9-275
January 1952

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WATER RESOURCES DIVISION

Date, _____, 19____ DISCHARGE MEASUREMENT NOTES

River at _____

Angle coef- ficient	Dist. from initial point	Width	Depth	Observa- tion depth	Revo- lutions	Time in sec- onds	VELOCITY		Adjust- ed for hor. angle or	Area	Discharge
							At point	Mean in ver- tical			
	8.5	.5	3.0	1.5	40	43	2.09	2.31		1.5	3.465
				6.0	50	44	2.54				
	9.0	.5	3.0	6.0	40	42	2.13	1.69		1.5	2.535
				1.5	30	54	1.25				
	9.5	.5	3.0	1.5	30	42	1.61	1.90		1.5	2.85
				6.0	40	41	2.19				
	10.0	.5	3.0	6.0	30	40	1.69	1.58		1.5	2.37
				1.5	30	46	1.47				
9	10.5	.5	3.1	1.5	30	46	1.47	1.14		1.55	1.71
				6.2	15	42	.814				
	11.0	.5	3.0	6.0	15	40	.854	.807		1.5	1.21
				1.5	15	45	.761				
	11.5	.5	3.0	1.5	15	52	.662	.956		1.5	1.284
				6.2	20	43	1.05				
	12.0	.25	3.0	E/W				0		1.75	0
	9.0	9.0									46.495

No. 2 of 2 Sheets. Comp. by _____ Chk. by _____

MEASUREMENT LOCATION ABOVE FLUME BELOW SCREEN
MEASURED BY GLF & ADM ON 3/9/81

LEGAL DESCRIPTION SEC TWP RNG
V = 2.218N + .022 FOR N <= 1
V = 2.224N + .016 FOR N > 1

DISTANCE FROM INITIAL POINT FEET	DEPTH FEET	AREA SQ. FT.	REVOLUTIONS	TIME SEC	VELOCITY FT/SEC	DISCHARGE CFS
3.000	.000	.000	0	.000	.000	.000
3.010	3.000	.765	0	40.000	.022	.017
3.500	3.000	1.485	50	41.000		
			30	42.000	2.167	3.218
4.000	3.000	1.500	50	46.000		
			30	51.000	1.880	2.820
4.500	3.000	1.500	40	51.000		
			50	46.000	2.097	3.146
5.000	3.000	1.500	50	43.000		
			40	42.000	2.368	3.552
5.500	3.000	1.500	40	45.000		
			50	46.000	2.213	3.320
6.000	3.000	1.500	50	43.000		
			30	41.000	2.123	3.185
6.500	3.000	1.500	20	41.000		
			50	44.000	1.823	2.735
7.000	3.000	1.500	50	46.000		
			40	48.000	2.151	3.227
7.500	3.000	1.500	30	42.000		
			40	42.000	1.820	2.805
8.000	3.000	1.500	50	47.000		
			40	52.000	2.055	3.083
8.500	3.000	1.500	40	43.000		
			50	44.000	2.314	3.471
9.000	3.000	1.500	40	42.000		
			30	54.000	1.694	2.541
9.500	3.000	1.500	30	42.000		
			40	41.000	1.896	2.844
10.000	3.000	1.500	30	40.000		
			30	46.000	1.577	2.366
10.500	3.100	1.550	30	46.000		
			15	42.000	1.141	1.769
11.000	3.000	1.500	15	40.000		
			15	45.000	.807	1.211
11.500	3.000	1.485	15	52.000		
			20	43.000	.858	1.274
11.990	3.000	.765	0	40.000	.022	.017
12.000	.000	.000	0	.000	.000	.000
TOTALS		27.050				46.601

Malad Canyon

IN THE SUPREME COURT OF THE STATE OF IDAHO
No. 11455

IN THE MATTER OF PERMIT APPLICATION
NO. 37-7108 IN THE NAME OF THE STATE
OF IDAHO DEPARTMENT OF PARKS (MALAD
CANYON SPRINGS)

STATE OF IDAHO, DEPARTMENT OF
PARKS,

Respondent,

IDAHO WATER USERS ASSOCIATION,
TWIN FALLS CANAL COMPANY and
NORTH SIDE CANAL COMPANY,

Respondents and
Cross Appellants,

v.S.

IDAHO DEPARTMENT OF WATER
ADMINISTRATION,

Appellant and
Cross Respondent.

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, Gooding County. Honorable Charles Scoggin,
District Judge.

Appeal from judgment appropriating certain waters to State
Department of Parks pursuant to statute for recreation and scenic
uses. Affirmed. *C.J. Shepard; J. Donaldson; J. Baker*

Nathan W. Higer, Deputy Attorney General, for
Department of Water Administration, Appellant and
Cross Respondent.

John A. Rosholt, of Parry, Robertson, Daly & Larson,
Twin Falls, for Respondents and Cross Appellants Idaho
Water Users Association, Twin Falls Canal Company and
North Side Canal Company.

W. Anthony Park, Attorney General, and Matthew J. Mullaney,
Deputy Attorney General, for Respondent Department of
Parks.

Boise January 1974 term

Filed: DEC 31 1974

R. H. Young, Clerk

History

Sec. 67-4307 TP 180

Conclusion

No different policy

*But probably Minimum Stream Flow
legislation*

MICROFILMED

SHEPARD, C.J.

This is an appeal and a cross-appeal from a judgment of the district court in an action wherein the Idaho Department of Parks, pursuant to statute, sought to appropriate in trust for the people of Idaho certain unappropriated waters of the Malad Canyon. The case presents for consideration three primary questions:

1. May an agency of the State of Idaho, without express constitutional authority, appropriate waters and obtain a priority water right;
2. Does the appropriation of water for the purposes of recreation and the preservation of scenic views constitute a "beneficial use";
3. In Idaho may there be created a valid appropriative water right in the absence of an actual physical diversion of the water from its natural locus or condition.

In 1971 the Idaho Legislature enacted I.C. § 67-4307.¹ In essence the statute directs the Department of Parks of the State of Idaho to appropriate in trust for the people of Idaho certain

I. 67-4307. MALAD CANYON--APPROPRIATION OF WATERS IN TRUST FOR PEOPLE--LANDS DEVOTED TO RECREATIONAL USE.--The state park board [park and recreation board] is hereby authorized and directed to appropriate in trust for the people of the state of Idaho the unappropriated natural spring flow arising upon the area described as follows, to-wit:

The south half (1/2) of the southwest quarter (1/4), and the south half (1/2) of the southeast quarter (1/4), of section twenty-five (25), township six (6) south, range thirteen (13) east of the Boise Meridian; and

The north half (1/2) of the northwest quarter (1/4), and the northwest quarter (1/4) of the northeast quarter (1/4), of section thirty-six (36), township six (6) south, range thirteen (13) east of the Boise Meridian.

The preservation of water in the area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state of Idaho is hereby declared to be a beneficial use of such water.

No fee shall be required in connection with said appropriation by the state park board [park and recreation board] or the permit issued in connection therewith, but license shall issue at any time upon proof of beneficial use to which said waters are now dedicated.

The park board [park and recreation board], or its successor, shall be deemed to be the holder of such permit, in trust for the people of the state, and the public use of the unappropriated water in the specific area herein described is declared to be of greater priority than any other use except that of domestic consumption.

The unappropriated lands belonging to the state of Idaho between the high water mark on one (1) bank to the high water mark on the

unappropriated natural waters of the Malad Canyon in Gooding County, Idaho. Additionally, it declares (1) that the preservation of the waters for scenic beauty and recreation uses is a beneficial use of water; (2) that the public use of those waters is of greater priority than any other use save domestic consumption, and (3) that the unappropriated state land located between the highwater marks on either bank of these waters is to be used and preserved in its present condition as a recreational site for the people of Idaho.

Pursuant to the statute the Idaho Department of Parks filed an application for a permit to appropriate the waters specified by the statute. The waters in question arise in part at least from springs in the canyon and are natural waters. There appears no argument but that there is unappropriated water available for appropriation.

That application was protested by the Idaho Water Users Association, Twin Falls Canal Company, and the North Side Canal Company under the provisions of I.C. § 42-203. Those parties are cross-appellants herein and are hereafter designated "Water Users." The parties stipulated that the answers to the following legal issues were dispositive of the matter.

1. Is it constitutional for an Idaho State agency to appropriate, without express constitutional authorization, the waters of a natural stream, thereby obtaining a water right having priority over water rights on the same stream which may be subsequently appropriated by private parties?

I cont'd
opposite bank, of the area described, are hereby declared to be devoted to a public use in connection with the preservation of the area in its present condition as a place of recreation for the citizens of the state of Idaho. [I.C., § 67-4307, as added by 1971, ch. 207, § 1, p. 912].

2. Are the uses described in I.C. § 67-4307 (scenic beauty and recreational purposes) "beneficial uses" which support a water appropriation under the Idaho Constitution?

3. Can there be created in Idaho a valid appropriative water right without an actual physical reduction to possession of the claimed water through an actual diversion of the water from, or artificial control of the water in, the water's natural locus or condition?

Dept.
Division

The Department of Water Administration issued a decision July 6, 1972 holding that a state agency can lawfully appropriate waters of a natural stream and that recreation and aesthetic uses are beneficial uses of water, but found that in Idaho there can be no valid appropriation of water without at least a proposed physical diversion or reduction of water to possession. Finding that there was no proposed physical diversion or reduction to possession intended on the part of the Department of Parks, the Department of Water Administration refused to issue the permit.

The Department of Parks appealed this decision as to issue 3 to the district court, and the Water Users cross-appealed upon issues 1 and 2. The parties filed motions for summary judgment. The district court held that a valid appropriation can be effected without actual physical diversion or reduction of water to possession and granted the motion of Parks as to issue 3. The motions of the Department of Water Administration and Water Users as to issues 1 and 2 were denied. The Department of Water Administration has appealed the decision of the district court and the Water Users have cross-appealed.

I.

The Water Users are the only parties which assert that the district court erred when it held that a state agency can constitutionally appropriate unappropriated waters of natural streams. The Water Users argue that to allow such an appropriation would eliminate

the availability of that water for appropriation by private parties, thus violating article 15, section 3 of the Idaho Constitution. In pertinent part it is stated therein:

{ "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied * * * ."

Authority for the assertion of the Water Users is not found in the plain language of that constitutional provision since there is no limitation therein to "private parties" as distinguished from the state or a state agency. We deem it common knowledge and it is pointed out in the decision of the Department of Water Administration that in Idaho and throughout the western states, state agencies frequently appropriate water, i.e., the Fish and Game Department appropriates water for pisciculture, state universities appropriate and consume water, the Department of Parks utilizes water to maintain state parks. See also I W. A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, ch. 7, pp. 250-251 (1971). It is true, as argued, that if a state agency is allowed to appropriate water the quantity of unappropriated water is thereby reduced. Nevertheless, the same is true of any appropriation regardless of the identity of the appropriator. We have not been supplied, nor has our research discovered, any authority from our sister states having constitutional provisions analogous to ours which supports this contention of the Water Users.

The Water Users assert that their position is supported by State Water Conservation Board v. Enking, 56 Idaho 722, 58 P.2d 779 (1936). In Enking a state statute creating the State Water Conservation Board and defining its duties and powers was declared unconstitutional. We deem the dispositive issue in that case to be that the act in question had in effect created a corporation and was thus invalid under either article 3, section 19, or article 11, section 2 of the Idaho Constitution. In candor, however, we must state that Enking contains language supportive of the Water Users position herein. Nevertheless we deem such language to be arguably

dictum and only supportive of the court's conclusion that the Water Conservation Board therein was a corporation. Certain of the language from Enking, albeit probably dictum, could be construed to indicate that our constitution imposes an absolute prohibition against the state's appropriating water. The Water Users have adopted this view, asserting that the constitution must be amended prior to state agencies being allowed to appropriate water.

It is our opinion that the fears of the Enking court which prompted its construction of article 15, section 3, are totally inapplicable to the case at bar. The court in Enking speaks of that Board's power "to appropriate any or all the unappropriated public waters of the state" and "the settler [being] thereby forced to ultimately pay arbitrarily fixed water rates for the use of water." The court in Enking also expressed considerable alarm at the Board's authority to "condemn private water rights," to "monopolize" water rights, and to "appropriate and sell the unappropriated waters of the state." In contrast with the situation in Enking and the fears of the court expressed therein, I. C. § 67-4307, at issue herein, only authorizes the Department of Parks to appropriate, in trust for the public, certain clearly designated waters for non-consumptive use. We are of the opinion that the legislature in the instant case has not adopted an insidious scheme in an attempt to monopolize the state's unappropriated waters or to condemn already appropriated waters. Only in a geographical sense can there be said to be any interference with a future private appropriative right since the legislatively authorized use is nonconsumptive and once the waters have left the area delineated by the statute they are and will be subject to routine private appropriation.

We hold that I. C. § 67-4307 does not constitute a disobedience of the constitutional mandate that the "right to divert and appropriate the unappropriated waters * * * to beneficial uses, shall never be denied." The only authority contrary to that holding is the language we determine to be arguably dictum in Enking, and

Eck

to the extent that this^o opinion is inconsistent with that language
we overrule the latter.

II

The Water Users also assert error in the trial court's determination that the preservation of aesthetic values and recreational opportunities for the citizens of this state is a beneficial use in the sense that they will support an appropriative water right under the Idaho Constitution.

The foundation of the Water Users' argument is that the five uses specified in article 15, section 3 of the Constitution, i.e., domestic, agriculture, mining, manufacturing and power are exclusive and thus are the only uses that are cognizable beneficial uses under our Constitution. We reject that argument.

We find no support for the position of the Water Users in the discussions reported in II Idaho Constitutional Convention, Proceedings and Debate 1889 (1912), as pertaining to article 15; section 3. It appears that insofar as particular uses were mentioned in the debates, discussion was confined to the establishment of preferences for certain uses over others under certain circumstances. Such establishment of preferences appears to be a common feature of water law in the west. See 1 W. A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, supra. While it is well established in western water law that an appropriation of water must be made for a "beneficial use," nevertheless in Idaho at least the generic term "beneficial use" has never been judicially or statutorily defined. Our research does not disclose any case in which any court has attempted to define the term "beneficial use." Comment, Water Appropriation for Recreation, 1 LAND AND WATER LAW REVIEW 209, 210 (1966).

Consideration of the statute in question herein indicates clearly that the legislature has declared that "the preservation of water in the area described for its scenic beauty and recreational

purposes necessary and desirable for all citizens of the state * * * is hereby declared to be a beneficial use of such water." We note that numerous other western states have recognized through legislation that utilization of water for scenic or recreational purposes is a beneficial use. 1. W. A. HUTCHINS, WATER RIGHTS LAW IN THE NINETEEN WESTERN STATES, ch. 8, pp. 542 (1971). Such legislation in other states carries no binding effect on this court but, in the absence of persuasive case law to the contrary, it would appear to indicate that the use of water for providing recreational and aesthetic pleasure represents an emerging recognition in this and other states of social values and benefits from the use of water. See FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES BY THE NATIONAL WATER COMMISSION, Ch. 7, sec. E, p. 271 et seq. (1973). The statute in question herein recognizes aesthetic and recreational values and benefits which will accrue to the people of the state in respect to the waters of Malad Canyon. We find no basis upon which to disturb that declaration of the legislature that in this instance those values and benefits constitute "beneficial uses." The decision of the district court upon this issue is affirmed.

III.

We now reach the final issue as to whether there must be an actual physical diversion of the water in order to support an appropriation. This issue was raised upon appeal by both the Department of Water Administration and the Water Users, both of whom assert error in the trial court's determination that such physical diversion was not necessary.

The precise language of article 15, section 3, does not bear on this question but merely declares "the right to divert and appropriate the unappropriated waters of any natural stream to

beneficial use, shall never be denied * * * ." Certain language in the late case of Glenn Dale Ranches, Inc. v. Shaub, 94 Idaho 585, 494 P.2d 1029 (1972) and the earlier cases of Sandpoint Water and Light Company v. Panhandle Development Company, 11 Idaho 405, 83 P. 347 (1905), and Hutchison v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909) can be read as suggesting that our constitution requires an actual physical diversion of water in order to claim an appropriative right. However, a close reading of those cases indicates that the actual holdings of the cases insofar as they relate to the necessity of an actual physical diversion are based on statutory requirements.

3cc(2)Page 10
① We hold that our Constitution does not require actual physical diversion. We deem it clear that until the time of the enactment of the statute in question herein Idaho's statutory scheme regulating the appropriation of water has contemplated an actual physical diversion. See I.C. § 42-101, 42-201-202. See however Comment, The Prerequisite of a Man-Made Diversion in the Appropriation of Water Rights -- State ex rel. Reynolds v. Miranda [493 P.2d 409 N.M. (1972)]; 13 NATURAL RESOURCES J. 170 (1973).

We note that the Colorado constitution is similar to Idaho's article 15, section 3, and provides:

"Diverting Unappropriated Water * * * --The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied * * * " Article XVI, sec. 6, Constitution of Colorado.

In Genoa v. Westfall, 349 P.2d 370 (1960) the Colorado court held that an actual physical diversion was not necessary to a water appropriation so long as the appropriator intends to apply the waters to a beneficial use and actually applies them to that use. The rationale of Genoa became suspect after the decision of the Colorado court in Lamont v. Riverside Irrigation District, 498 P.2d 1150 (Colo. 1972), but the matter appears to have been now laid at rest following the 1973 Colorado legislation wherein its statutory law of appropriation was amended so as to permit

appropriation without actual diversion. 2 Colorado Session Laws, 1973, ch. 442. Further it does not appear that Colorado courts have relied upon their constitution to establish an actual physical diversion requirement.

2.D. required under
statutes
An examination of the statutory law of Idaho however reveals a different problem. As a general proposition one must set forth the location and description of a proposed physical diversion of water in an application for a permit to appropriate water. I.C. § 42-202. The Idaho legislature in 1971 made compliance with the statutory permit procedure mandatory. Idaho Session Laws, Ch. 177 (1971); See I.C. § 42-103, 42-201.

In the statute before us, I.C. § 67-4307, the Idaho legislature has clearly stated a policy at odds with its previous general statutory scheme of water appropriation. I.C. § 67-4307 directs parks "to appropriate [not] 'divert and appropriate'" the unappropriated natural spring flow" of the Malad Canyon and declares the "preservation of water in the area described for its scenic beauty and recreational purposes" is a beneficial use. Furthermore, the statute states that "license shall issue at any time upon proof of beneficial use to which said waters are now dedicated." We deem it clear that the legislature intended no physical diversion of water be required in the appropriation of the subject waters.

It is axiomatic that where a general statute and a specific statute deal with the same subject matter and are in conflict, the provisions of the specific statute must control. State v. Roderick 85 Idaho 80, 375 P.2d 1005 (1962); State ex rel. Taylor v. Taylor, 58 Idaho 656, 78 P.2d 125 (1938). It is also clear that where two statutes conflict the latest expression of the legislative will must prevail. Employment Security Agency v. Joint Class "A" School District No. 151, 88 Idaho 384, 400 P.2d 377 (1965).

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We deem it to be the intent of the Idaho Legislature to dispense with any physical diversion requirement in the case of the appropriation directed in I.C. § 67-4307. Any other construction would nullify the obvious purpose of I.C. § 67-4307. Courts

should if possible in construing a statute give it an interpretation which does not in effect nullify the statute. DeRousse v. Higginson, 95 Idaho 173, 505 P.2d 321 (1973).

The judgment of the district court is affirmed and the case is remanded to the Department of Water Administration for further proceedings consistent with the views contained herein. Costs to respondent.

DONALDSON, J., concurs.

BAKES, J., concurs specially in an opinion to follow.

McQUADE, J., dissenting.

I join in the dissent of Judge McFadden, but feel compelled to address myself to an issue which was not passed upon in his dissent. I do not agree with the majority's position that there may be created a valid appropriative water right in the absence of an actual physical diversion of the water from its natural locus or condition.

A diversion is generally required in order to perfect water rights by appropriation.¹ Hutchins in his treatise on water rights in the western states² quotes with approval the following language from a California case,

"To constitute a valid appropriation of water, three elements must always exist: (1) An intent to apply it to some existing or contemplated beneficial use; (2) an actual diversion from the natural channel by some mode sufficient for the purpose; and (3) an application of the water within a reasonable time to some beneficial use...."
[Emphasis added]

This Hutchins concludes, expresses the consensus of the western judiciary, not only when the opinion was written but currently.³

¹ See S. Wiel, Water Rights in the Western States §364-367 (3rd ed. 1911); Hutchins, Background and Modern Developments in State Water-Rights Law, in Waters and Water Rights §20.3, §22.2 (R. Clark ed. 1967).

² Hutchins, Water Rights Laws in the Nineteen Western States, Vol. 1, p. 366 (1971).

I believe the diversion requirement is clear from the statutory and constitutional language of this state. The majority opinion concedes that up until the time of the enactment of I.C. §67-4307 in 1971, "...Idaho's statutory scheme regulating the appropriation of water has contemplated an actual physical diversion." The opinion suggests that in 1971 when I.C. §67-4307 was enacted, the Legislature made a turnabout, and stated a policy at odds with its previous general statutory scheme of water appropriation. I do not agree with this interpretation. I am not convinced that in enacting I.C. §67-4307, the Legislature intended to abrogate a long standing requirement that a physical diversion be coupled with an intent to apply the water for a beneficial use before an appropriative right would be recognized.

In the same year I.C. §67-4307 was enacted, I.C. §42-103 was amended to read in pertinent part:

"The right to the use of the unappropriated waters...within this state shall hereafter be acquired only by appropriation under the application, permit and license procedures as provided for in this title, unless hereinafter in this title excepted." [Emphasis added]

The application, permit and licensing procedures for the appropriation of water all encompass a physical diversion.⁴ There has not been brought to our attention any exception to the application, permit and licensing requirements of I.C. §42-103. I.C. §67-4307 requires that a permit and license be issued in connection with these waters.

Article 15, sec. 3 of the Idaho Constitution reads in pertinent part,

³ Id. There is language in opinions of our sister states where the courts expressed the view that a diversion is necessary to support an appropriation. While this authority is not binding upon us, it is certainly persuasive as indicative of the thought in this area. See State of New Mexico, ex rel. Reynolds v. Miranda 83 N.M. 445, 493 P.2d 409 (1972); Gates v. Settlers' Milling, Canal & Reservoir Co., 19 Okla 83, 91 P. 856 (1907); Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938); Crawford v. Lehi Irrigation Company, 10 Utah 2d 165, 350 P.2d 147 (1960); McPhail v. Forney, 4 Wyo. 556, 35 P. 773 (1894); Hutchinson v. Stricklin, 146 Or. 285, 28 P.2d 225 (1933); Clough v. Wing, 2 Ariz. 371, 17 P. 453 (1888).

⁴ See I.C. §42-101, 42-201, et seq.

"The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied except that the state may regulate and limit the use thereof for power purposes." [Emphasis added]

It is significant that the conjunctive was used when the Constitution was written i.e., divert and appropriate rather than the disjunctive, i.e., divert or appropriate. In the absence of any contrary evidence, we should presume that the framers of the Idaho Constitution chose the conjunctive deliberately and that they intended it be accorded its ordinary meaning.

Finally, the constitutional underpinning of the diversion requirement has been recognized by this Court in past decisions. In Glen Dale Ranches, Inc. v. Shaub,⁵ this Court in passing upon appellant's charge that respondent failed to prove its prior appropriative right stated,

"Indeed, the record fails to show that respondent's predecessor in interest actually diverted the water in question and put it to beneficial use. Absent such a showing, respondent can not claim rights by appropriation antedating its ownership of the property."

The majority opinion is incorrect when it concludes that the actual holding in that case insofar as it relates to the necessity of an actual physical diversion was based on statutory requirements. A careful scrutiny of that case indicates that the Court was relying upon the Idaho Constitution, art. 15, sec. 3 to establish and substantiate the diversion requirement.⁶

⁵ 94 Idaho 585, 587, 494 P.2d 1029, 1031 (1972).

⁶ Id. fn. 6. See also Sandpoint Water & Light Co. v. Panhandle Development Co., 11 Idaho 405, 413, 83 P. 347, 349 (1905); Neilson v. Parker, 19 Idaho 727, 730-31, 115 P. 488, 489 (1911); Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 493, 101 P. 1059, 1063 (1909); Cantlin v. Carter, 88 Idaho 179, 186, 397 P.2d 761, 765 (1964); Jones v. McIntire, 60 Idaho 338, 352-3, 91 P.2d 373, 379 (1939); Hutchins, The Idaho Law of Water Rights, 5 Idaho L.Rev. 1, 20-21 (1968).

McFADDEN, J., dissenting.

Article 15, section 3 of the Idaho Constitution in pertinent part provides that:

"The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes." (Emphasis added.)

In my view, the so-called "appropriation" authorized by I.C. § 67-4307 constitutes a denial of the constitutional right to appropriate the unappropriated waters of the Malad Canyon Springs.

I recognize that the state, acting in its proprietary capacity, may appropriate water without offending Article 15, section 3; but as in the case of private appropriators, the state's appropriative right depends upon the application of water to a "beneficial use." In this case, however, the state agency is directed to hold unappropriated waters "in trust for the people of the state" for "scenic beauty and recreational purposes." I.C. § 67-4307. If the state were to hold unappropriated waters in trust for these purposes, it certainly would not be acting in a proprietary capacity; it would be doing nothing more than it already had a duty to do in its sovereign capacity. Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61 (1960); Walbridge v. Robinson, 22 Idaho 236, 241-242, 125 P. 812 (1912); Idaho Power & Trans. Co. v. Stephenson, 16 Idaho 418, 429, 101 P. 821 (1909); Hutchins, The Idaho Law of Water Rights, 5 Idaho L. Rev. 1, 3 (1968). As the court stated in Walbridge:

"[T]he title to the public waters of the state is vested in the state for the use and benefit of all the citizens of the state * * *. This is not,

however, an interest or title in the proprietary sense, but rather in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity." 22 Idaho at 241-242 (emphasis added).

In water law, the verb "appropriate" means to acquire a right to use "public water." See Boise Irrigation & Land Co. v. Stewart, 10 Idaho 38, 49, 77 P. 25 (1904); Lake Shore Duck Club v. Lake View Duck Club, 166 P. 309, 310-311 (Utah 1917); Hutchens, The Idaho Law of Water Rights, 5 Idaho L. Rev. 1, 7 (1968); Hutchins, Selected Problems in the Law of Water Rights in the West, U.S. Dept. of Agriculture Misc. Pub. No. 418 (1942).

An appropriation may be made for "private" beneficial use or for "public" beneficial use. Boise Irrigation & Land Co., supra at 48-49. However, if the state in its sovereign capacity already has the right to use "public water" for a certain beneficial use, it obviously cannot "acquire" that right--in other words, the state cannot "appropriate" water in such a case, because it cannot "acquire" a right that it already has. See State ex rel. State Game Comm'n v. Red River Valley Co., 182 P.2d 421, 432(N.M. 1945). In my view, the in-stream use of a natural stream for recreational purposes and for scenic beauty is a public beneficial use which inheres in the state's sovereign ownership of such water. Therefore, since the state already has the right to so use the water, it cannot acquire the right to "appropriate" the water for these purposes.

Moreover, this purported "appropriation" is objectionable on grounds much more weighty than mere logical inconsistency. Under Article 15, section 3 of the Idaho Constitution, water held by the state in its sovereign capacity--even though being beneficially used by the general public--is subject to being appropriated for specific private (or proprietary) beneficial

uses. Thus, in-stream public use of unappropriated water for recreational purposes and for scenic beauty is subject to diminution by the exercise of the constitutional right to appropriate water for private (or proprietary) beneficial uses. State ex rel. State Game Comm'n v. Red River Valley Co., supra. The type of "appropriation" authorized here was recognized for what it really is by the author of the following excerpt:

"In Oregon * * * many streams that form beautiful falls or that are famous fishing waters have been reserved from appropriation. In Idaho the governor is authorized to appropriate the water of certain lakes in trust for the people, and the preservation of the lakes for scenic beauty, health, and recreation purposes is declared to be a beneficial use of the water [citing I.C. §§ 67-4301, 4304], although in reality this is not an appropriation, but like the Oregon laws a reservation of the water to prevent its being appropriated for more mundane purposes." Trelease, The Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L.J. 1, 12 (1956) [emphasis added].

Such a reservation by the state of unappropriated waters is completely unauthorized by our Constitution. Unlike the constitutions of some other western states, Idaho's Constitution does not provide that the right to appropriate "shall never be denied except when such denial is demanded by the public interest." ¹ Our Constitution provides that the right to appropriate unappropriated waters "shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Art. 15, sec. 3, Idaho Const. (emphasis added). The Idaho provision makes an exception only for power purposes--not for the demands of the public interest (and not for the purposes of recreation and scenic beauty): To allow the state to in effect reserve water from appropriation in furtherance of non-proprietary, non-power purposes--when the

¹ Neb. Const. art. XV, § 6; see also Wyo. Const. art. 8, § 3 ("No appropriation shall be denied except when such denial is demanded by the public interests").

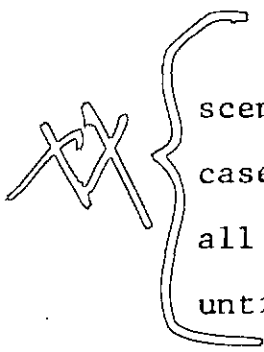
framers of the Constitution contemplated that private beneficial users could appropriate water being held by the state in its sovereign capacity--amounts to nothing less than a denial of the constitutional right to appropriate the "unappropriated waters" of any natural stream. "In other words, the state cannot by legislative act authorize its own agency to monopolize or withdraw the very rights that sec. 3 of art. 15 of the Constitution says 'shall never be denied' the people of the state." State Water Conservation Bd. v. Enking, 56 Idaho 722, 732, 58 P.2d 779 (1936). The proper means to authorize such a withdrawal (or "appropriation") is to amend the Constitution to so provide.

It is beyond dispute that scenic beauty and recreation are both of vital importance to modern day life in Idaho. But this does not ipso facto mean the state has the right to promote these beneficial ends by withdrawing waters from appropriation, given the guarantee contained in the Idaho Constitution. I note, however, that the effect of a proposed appropriation upon scenic beauty and recreation can and should be considered in determining whether the use contemplated is "beneficial" within the meaning of the Constitution. Comment, Water Appropriation for Recreation, 1 Land & Water L. Rev. 209, 221 (1966). In other words, where the benefits of a proposed use are outweighed by the attendant detriment to scenic beauty and recreation, the use is not a "beneficial use," and the application for a permit to appropriate public waters for that use should be denied. As always, the question of beneficial use must be determined on a case by case basis, since the benefits of a particular proposed appropriation may outweigh the detriment to recreation and scenic beauty. Whether a use of water is "beneficial" is a question of fact to be resolved

See next page

upon a consideration of the circumstances present in a particular case. City & County of Denver v. Sheriff, 96 P.2d 836, 842 (Colo. 1939). As stated in Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 45 P.2d 972, 1007 (Cal. 1935):

"What is beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."

 In conclusion, although I believe that recreation and scenic beauty can and should be taken into consideration on a case by case basis, they cannot be used as an excuse to deny all future appropriation of water for other purposes, at least until the Constitution is amended.

BAKES, J., concurring specially:

I concur in the result reached by Chief Justice Shepard in his plurality opinion, although not necessarily everything stated therein. Additionally, I wish to address in a different manner the question of whether or not the preservation of the waters of Malad Canyon in a natural state is a beneficial use that may be appropriated without the means of a diversion. (Parts II and III of that opinion).

The first question to be considered is whether any uses other than the uses referred to in Article 15, § 3, of the Idaho Constitution - domestic, mining, agricultural and manufacturing - can be beneficial uses of water under the Idaho Constitution. This section has remained unchanged since the adoption of the Idaho Constitution except for an amendment late in the 1920's which added language that granted the state the right to regulate water use for power purposes. This amendment was of narrow scope and did not affect the structure of the section. For that reason, I do not believe that the amendment was intended to change any restrictions there may have been in the original section regarding the beneficial uses mentioned therein. Given this, the question becomes, did the draftsmen of the Idaho Constitution intend the priority scheme for the use of water under Article 15, § 3, for domestic, mining, agricultural and manufacturing purposes to be an exclusive listing of all beneficial uses?

The Idaho Constitution does not explicitly answer this question. The debates preceding the adoption of Article 15, § 3, show that uses were listed so that definite priorities between uses would be elevated to constitutional status. Idaho Constitutional Convention, Proceedings and Debates, Vol. II, pp. 1115-48, 1154-66, 1330, 1331-33, 1340-43, 1350-65 (1889). The debates upon the section do not deal with the matter of whether or not these are the only possible beneficial uses; rather, they simply address themselves to the political question of which uses shall be preferred

over the others. Neither the language of the section nor the debates concerning adoption of the section show an intent to limit the uses which may be beneficial uses to those the priorities of which are listed in the section. If the question posed is to be answered, the answer must be based upon considerations not found expressly within the language of the Constitution itself or the constitutional debates.

Article 15 of the Idaho Constitution does not concern itself with abstract notions such as the relationship between the citizenry and their government, but instead concerns itself with the very practical question of water rights. I think we should look to very practical considerations in attempting to construe it. Prior to the time that the Constitution was adopted there were a number of common uses of water which were neither domestic, mining, agricultural nor manufacturing. A community would store water in a tank for use in fighting fires. The operator of a livery stable or a stockyard would water the stock kept there. Logging operations used water both to transport logs and for storage in mill ponds. Communities would use water wagons to settle dust on their dirt streets.¹ The railroad used water for its steam engines and other uses related to

1. Research has not uncovered a case in which the precise point has been presented of whether or not a use other than one explicitly mentioned in Article 15, § 3, may be a beneficial use, but there are cases in which it has apparently been assumed that such uses are beneficial. In *City of Pocatello v. Murray*, 206 F. 72 (D.C. Idaho 1913), affirmed 214 F. 214 (CA9, 1914), a case interpreting the contract between the City of Pocatello and the operators of its waterworks franchise, the question of the quantity of water which the franchisees were obligated to deliver was at issue. It was said in that case that the uses to which the water was to be put by the municipality included street sprinkling and protection against fire. The franchisees in the case were claiming that they were not obligated to deliver as much water as the City of Pocatello demanded. If it had been in the general contemplation of the law at that time that a city could not appropriate water for settling the dust on its streets or for storage for fighting fires, the franchisees probably would have argued that the city had no right to put the water to all the uses for which it was putting it, and thus the franchisees were under no obligation to deliver as much water as the city demanded. But the opinion reveals no challenge to the city's right to put water to these uses. Thus, it would seem that street sprinkling and firefighting were recognized as beneficial uses of water by the parties to that 1913 case, even though they were not mentioned in the Constitution.

the operation of the railroad.² All of these uses were undoubtedly considered beneficial, but none of them were domestic, mining, agricultural or manufacturing. I do not believe that by adopting Article 15, § 3, of the Idaho Constitution that it was intended that uses such as these could no longer be considered beneficial uses. On the contrary, the universal expectation must have been that such uses could continue and could be the subject of an appropriation. Many of those uses still continue today, and the

2. A review of the transcript in the case of Beus v. City of Soda Springs, 62 Idaho 1, 107 P.2d 151 (1940), reveals that as early as 1902 a district court in Idaho had adjudicated a water right, with a priority date of 1885 (before the adoption of the Idaho Constitution), which was in part to be used for purposes other than those listed in Article 15, § 3. In the Beus case a number of parties were litigating their rights to remove water from Ledge Creek, a small stream near Soda Springs. The Oregon Short Line Railroad Company was made a party to a suit, but all the parties to the suit agreed to the following stipulation with regard to the railroad's rights, as set out in the trial court's Finding of Fact IV:

"It is hereby stipulated [by all the parties] that no controversy exists between the parties with respect to the water right of the Oregon Short Line Railroad Company, and it may be decreed that said Oregon Short Line Railroad Company is the owner and entitled to the use of 1/5 of a cubic foot per second of waters of Ledge Creek . . . with priority date of April 1, 1885, as decreed to it by Decree of Fifth Judicial District Court in and for Bannock County, dated April 6, 1902, [in the case of Wetzel v. Nichols]' and which stipulation is hereby approved and adopted by the court; and which water is for use of said Oregon Short Line Railroad Company for the operation of its trains and for the supply of the depot and stockyards of said railroad company" (Clk.Tr. pp. 729-730).

All the parties stipulated to the validity of the railroad's appropriation for water for the operation of its trains, i.e., water for the steam engines' boilers, and for use in watering stock in transit in its stockyard. At least one, and perhaps both of these uses are non-Article 15, § 3, uses. It must have been assumed by the parties to the suit that these appropriations were unassailable, or such a stipulation would not have been entered into. This is further evidence that non-Article 15, § 3, uses were recognized from the territorial times in Idaho and in the early days of statehood and into the 1930's.

changing needs of our society are generating new uses for water which are neither domestic, agricultural, mining nor manufacturing. As an example, many privately owned public swimming pools or health facilities have applied for and received licenses to drill their own wells to supply their water needs. Natural hot water springs have been extensively developed into health resorts, e.g., Lava Hot Springs, upon the assumption that they have obtained a valid right to the use of the water in their facilities. Such uses could not be considered as domestic, mining, agricultural or manufacturing as used in Article 15, § 3, without unduly broadening the definitions of the terms, yet such uses are no doubt beneficial from a societal point of view in that they contribute to the general welfare of the citizenry; and unless a valid water right could be obtained for such a use, not only would society suffer by the loss of such uses, but a great deal of capital which has been invested in reliance upon the validity of a right to such a use for water would be in jeopardy. I therefore conclude that uses other than those enumerated in Article 15, § 3, can be beneficial uses.

② The next question is whether the use at issue in this case is beneficial. The uses enumerated by Article 15, § 3, have been raised to the status of beneficial uses by the Constitution, and they will remain beneficial uses so long as the Constitution is unchanged. But we have before us a use for scenic and recreational purposes. Even though the legislature has declared the use to be beneficial, this Court is the final arbiter of the construction of the Idaho Constitution, and therefore we must determine whether or not the scenic and recreational uses in this case are a "beneficial use" within the meaning of Article 15, § 3, of the Constitution. See Village of Moyie Springs, Idaho v. Aurora Manufacturing Co., 82 Idaho 337, 353 P.2d 767 (1960).

With the exception of those uses elevated to beneficial status by Article 15, § 3, of the Constitution, the concept of what is or is not a beneficial use must necessarily change with

changing conditions. For example, if we were now presented with a question of whether or not using water to operate a public swimming pool, a fountain, or to flood a tract to provide ice for a skating rink were beneficial uses, a good argument could be presented that such uses, although not domestic, mining, agricultural or manufacturing uses, were nevertheless beneficial. But we cannot say that such uses will always be beneficial because conditions might so change that these uses would be an unjustifiable use of water needed for other purposes. The notion of beneficiality of use must include a requirement of reasonableness. With the exception of the uses implicitly declared to be beneficial by Article 15, § 3, there is always a possibility that other uses beneficial in one era will not be in another and vice versa. As stated in Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 45 P.2d 972, 1007 (Cal. 1935):

"What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."

What we have decided in this case is that the use now before us, although not specifically listed in Article 15, § 3, of the Constitution, is beneficial because, considering today's circumstances, the legislative classification is reasonable based on the record.

XX { I would restrict today's holding to the narrow proposition that the use before us is beneficial so long as, and only so long as, the circumstances of water use in the state have not changed to the extent that it is no longer reasonable to continue this use at the expense of more desirable uses for more urgent needs. It should receive the same treatment as all other non-constitutional beneficial uses. The use before us is beneficial when considered in the abstract because a non-consumptive use of water at Malad Canyon to preserve a scenic attraction, both for aesthetic and recreational

purposes, is desirable and beneficial, and because the demands upon the water resources of this state are not so severe that this use, which is beneficial when considered alone, becomes unreasonable and not beneficial when considered in conjunction with all of the water resource development needs in the state. This supports the legislative determination that non-consumptive appropriations of water in natural waterways for scenic and recreational purposes, among others, can, under proper circumstances, be a beneficial use; this follows precedents such as similar appropriations by the legislature in 1927 of the waters of Big Payette Lake, I.C. §§ 67-4301-03, and of Priest, Pend Orielle and Coeur d'Alene Lakes, I.C. §§ 67-4304-06. Our sister states of Oregon, Texas and California have also provided by statute that water used for recreational purposes is beneficially applied, while New Mexico has reached this result under case law. ORS §§ 537.170(3)(a), 543.230(c)(a); Tex. Civ.Code Annot., art. 7471 (1970 Supp.); Cal.Water Code § 1243; State ex rel.State Game Commission v. Red River Valley Co., 182 P.2d 421 (N.Mex.1945). The Oregon statutes further provide that use of water to maintain scenic attractions is a beneficial purpose. On this issue I am in agreement with the plurality in this case and with the other states named.

③ However, in addition to determining whether this is a beneficial use, we must also decide whether or not the Constitution requires that all appropriations be made through the means of a diversion or whether the legislature may, as was done here, provide that an appropriation may be made without a diversion when the beneficial use provided for can be achieved without a diversion. As the plurality opinion points out, there has been no authoritative construction of Article 15, § 3, holding that that section requires a diversion for there to be a valid appropriation; neither does that section of the Constitution explicitly require a diversion for there to be an appropriation. We must again look to other sources for guidance in answering the question.

The common law doctrine of water rights was based upon the riparian system which limited the use of water to the stream, or to lands adjacent to the stream bed and required the water to be returned to the stream's natural drainage, thus preventing any use which effectively diminished or removed the water from the stream channel on a permanent basis. While the riparian system of water use had some support in the early history of the west,³ it was soon apparent that the most productive use of water in these arid areas could not be accomplished by limiting the use of water to lands adjoining the stream and in the stream's drainage, and requiring return of the water to the stream from which it was taken at a point on the riparian land upon which it was used, and thus a different system of water rights was necessary. Idaho was one of several western states which by adopting the common law of England in 1864 (1864 Idaho Session Laws, p. 527, § 1), had an early history of riparianism which, first by custom and later in 1881 by territorial legislation (1881 Idaho Session Laws, p. 267, §§ 1-20), was supplanted by the appropriation doctrine. See Drake v. Earhart, 2 Idaho 750, 23 P. 541 (1890), note particularly dissent of Berry, J.; Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909). However, riparian rights were not totally rejected (R.S. §§ 3180-90 (1887)), but only to the extent that the riparian doctrine conflicted with the doctrine of appropriation. Thus, as recently as 1963, this Court, in Weeks v. McKay, 85 Idaho 617, 382 P.2d 788 (1963), held that where both the riparian doctrine and the appropriation doctrine could co-exist, that the riparian doctrine was still in force in Idaho. In that case, a downstream appropriator sued to enjoin the maintenance of a dam by

3. 1 Hutchins, Water Rights Laws in the Nineteen Western States, pp. 130-225; see Union Mill & Mining Co. v. Dangberg, 81 F. 73 (C.C.D. Nev. 1897); Drake v. Earhart, 2 Idaho 750, 23 P. 541 (Berry J., dissenting) (1890); Smith v. Denniff, 60 P. 398 (Mont. 1900); Vansickle v. Haines, 7 Nev. 249 (1872).

an upstream riparian owner. The Court held that while the riparian upstream owner could not interfere with the natural flow of the stream to which the downstream appropriator was entitled under his appropriative water right, nevertheless the downstream appropriator could not require the riparian owner to release water impounded in his dam so long as the natural flow was not interfered with.

As I view Article 15, § 3, of the Constitution, which guarantees "the right to divert and appropriate the unappropriated waters of a natural stream to beneficial use . . ." the use of the word "divert" in that section by the Constitutional Convention in 1890 was a constitutional recognition of the supremacy of the prior appropriation doctrine with its concomitant right to remove waters from the stream bed and not return them, over the riparian system which would in effect require water to remain in the stream. In my view the use of the word "divert" was not used with the intention by the framers of the Constitution that no appropriative water right could be obtained without a diversion, but was inserted to guarantee the right of an appropriator to remove the water from the stream and consume it in a beneficial use and not return it. In summary, the word "divert" in Article 15, § 3, was used to mandate the supremacy of the prior appropriation doctrine over the riparian system and not to constitutionally limit the manner in which a prior appropriator could obtain his water right.

Where an appropriative water right does not require a diversion to make it effective and beneficial, in the absence of a statute requiring a diversion there appears to be no practical reason why a diversion should be required. As an example, in a case in which a scenic waterfall had produced a mist which caused unusual growth of attractive vegetation, it was said, "If nature accomplishes a result which is recognized and utilized, a change of process by man would seem unnecessary," and, "Undoubtedly, a landowner may rely upon an efficient application by nature, and need do no more than affirmatively avail himself of it; . . ."

Empire Power & Water Co. v. Cascade Town Co. 205 F. 123 (8 Cir. 1913). In Steptoe Livestock Co. v. Gulley, 295 P. 772 (Nev.1931), in a case in which cattle were watered in a natural stream, it was said that "we are not without authority to support the view that to constitute an appropriation where the statutes require no use of artificial means of diverting water, or where no diversion was required, that such appropriation might be made independent of both or either diversion or the use of artificial means in perfecting such appropriation. 295 P. at 775. See also Stevenson v. Steele, 93 Idaho 4, 453 P.2d 819 (1969). I find these decisions to be persuasive for the contention that a diversion is not constitutionally necessary for an appropriation. If a beneficial use can be made of the water in its natural channel, Article 15, § 3, should not require the superfluous effort of construction of a diversion as a pre-condition for obtaining an appropriation. However, in an appropriation without a diversion, the right acquired is not to the stream flow as was the case under the riparian system, but to the use of a specific amount of water which is the subject of the right.⁴ That amount must be a reasonable and efficient use of the water. Glavin v. Salmon River Canal Co., Ltd. , 44 Idaho 583, 258 P. 532 (1927); Union Grain & Elevator Co. v. McCammon Ditch Co., 41 Idaho 216, 240 P. 443 (1925).

Appellant Water Users argue that even if the constitution does not require a diversion, nevertheless the statutes relating to appropriations of water do. Regardless of the requirements of the general appropriations statutes, I concur with Chief Justice Shepard's conclusion that the clear import of I.C. § 67-407 is to dispense with any physical diversion requirement.

4. With regard to the Malad Canyon appropriation, I.C. § 67-4312 provides:

"67-4312. PERMITS FOR APPROPRIATION UNDER SECTIONS 67-4307--67-4311.--The permits for the waters described in this act shall be issued upon the determination by the director of water administration of the historical water flow and he shall issue a permit for only that amount. Any future appropriation of the waters specifically described in this act that are granted above the flow limits set by the director shall not involve any diversion that shall detract from or interfere with the geological interpretive value, historical significance, or the scenic attraction for public use under the administration of the state park board [park and (continued on next page . . .)]

The district court order granting a summary judgment reversing the decision of the Department of Water Administration in denying permit application # 37-7108, should be affirmed.

DONALDSON, J., concurs.

(footnote 4 continued from previous page):

recreation board] of the stream from the natural high water mark on one (1) bank to the natural high water mark on the opposite bank, or of the springs specifically described as they arise upon the lands listed in this act.

"The state park board [park and recreation board] shall apply first for those permits for water arising upon land which, at the time of enactment, the board administers, controls, or owns."

INTER-DEPARTMENT MEMO — 1

NATHAN W. HIGER

WAYNE HAAS

MALAD CANYON CASE

DATE 6/22/73
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JUN 22 1973

IDAHO WATER RESOURCE

Attached please find the information you requested on the
Malad Canyon Case.

NWH/sg

Attachments

<u>ROUTE</u>	<u>TO</u>	<u>DATE</u>	<u>INITIAL</u>
7	DIRECTOR		
7	DEPUTY DIRECTOR	WHA	60/25
3	Kennelbs	12-2	CDA
4	Alyceccle	Satt	Zolt
5	Robertson	e	e

FILE:

?
QWA

SIGNATURE

IDAHO WATER RESOURCE BOARD

PLANNING DIVISION

Date 12-2

From: WARREN D. REYNOLDS, Chief

To:

Planning.

- ☐ For your information
- ☐ For necessary action
- ☐ For reply
- ☐ As requested

37-7108

W. ANTHONY PARK
Attorney General
State of Idaho

MATTHEW J. MULLANEY, JR.
Deputy Attorney General
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JAMES G. REID
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DEC 18 1962
Department of Water Administration

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

IN THE MATTER OF PERMIT
APPLICATION NO. 37-7108
IN THE NAME OF THE STATE OF
IDAHO DEPARTMENT OF PARKS
(MALAD CANYON SPRINGS).

Case No. 15302

SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF MOTION OF APPELLANT, STATE OF
IDAHO DEPARTMENT OF PARKS, FOR
SUMMARY JUDGMENT ON APPEAL AND
CROSS-APPEAL

This Supplemental Memorandum is filed to further advise the
Court of the position of the State of Idaho Department of Parks,
Appellant herein, with respect to the pending Cross-Motions for
Summary Judgment filed by all parties.

ARGUMENT

I.

THE IDAHO CONSTITUTION DOES NOT FORBID A STATE
AGENCY FROM MAKING AN APPROPRIATION.

Idaho Waters Users Association, Twin Falls Canal Company,
and Northside Canal Company, Limited (hereinafter "Water Users")
forthrightly admit that State v. Enking, 56 Idaho 722, 58 P.2d
779 (1936) is dictum on the issue before the Court. The Enking
dictum is neutralized by the decision of the Idaho Supreme Court in
Beus v. Soda Springs, 62 Idaho 1, 107 P.2d 151 (1940). In the Beus
case, the court sustained the authority of a municipal corporation
to supply to persons outside the city limits excess water resulting
from the acquisition and holding of an additional supply to take
care of the future needs of the municipality, above and beyond

SUPPLEMENTAL MEMORANDUM

the present demands of its inhabitants. The Idaho court cited with approval Holt v. City of Cheyenne, 22 Wyoming 212, 137 Pac. 876, and quoted the holding of the Wyoming court that:

"A city's right to appropriate the waters of a stream is not limited to the needs of its citizens at the time of adjudication of its rights, but it is entitled to appropriate for the probable future demands of its population."

The holding of Beus court is contrary to the dictum in Enking and is later in time. It has also been held in the federal courts to be not against public policy for a city to appropriate more water than necessary to supply its immediate needs. Pocatello v. Murray, 206 Fed. 72 (D. Idaho 1913), aff'd Murray v. Pocatello, 214 Fed. 214 (C.C.A. 9th, 1914).

If Article XV of the Constitution says what Water Users contend, the appropriation of waters by a municipality beyond those which could be beneficially applied at the time of appropriation would be contrary to Article XV, by depriving the right of others to appropriate the unappropriated public waters of the State of Idaho. The Idaho Constitution applies no more or less to municipal corporations than to state agencies on the issue of the authority to appropriate.

We believe that Enking is more than outweighed by Beus. The Court is entitled to look at this issue afresh, without the confines of stare decisis. In light of the Public Trust Doctrine set out in our earlier Memorandum and the enabling legislation conditioning the appropriation "in trust for the People of the State of Idaho," Idaho Code, § 67-4307, the evils envisioned in Enking have been foreclosed. If the Court is still concerned about Enking, we would welcome a holding by the Court that all rights in these waters held by the Department of Parks are forfeited and that the waters revert to an unappropriated state, in the event the Department of Parks attempts to sell or grant an interest in the water contrary to the public trust.

II.

AESTHETIC OR RECREATIONAL VALUES CONSTITUTE "BENEFICIAL" USES WITHIN ARTICLE XV, SECTION 3, IDAHO CONSTITUTION AND SECTION 42-101, IDAHO CODE.

In his exhaustive article "The Idaho Law of Water Rights"

Mr. Hutchins summarizes,

"The water-rights statute provides that the appropriation must be for some useful or beneficial purpose, without placing any limitation upon purposes that would be considered useful or beneficial; and the so-called 'constitutional' or nonstatutory appropriations likewise may be made, apparently, for any useful or beneficial purpose." 5 Idaho L.R. 1, 42 (1968).

The holding of the so-called "Ice Cap Case", Blaine County Investment Company v. Mays, 49 Idaho 766, 291 Pac. 1055 (1930), relied upon by the Water Users is clouded. The court notes at page 773 of Mays that the beneficial use alleged was disputed and "the evidence being conflicting but sufficient, this conclusion of the referee and the (district) court is sustained" (Emphasis added). The court in Mays was not addressing the question of beneficial use in its legal aspect as we are, but in its factual aspect, of wasteful or nonwasteful use of the public waters. There is no issue of waste in the case at bar. The appropriation by the Department of Parks is a nonconsumptive use. The issue is a legal one which may be disposed of on Cross-Motions for Summary Judgment. The Mays case is inapposite here.

If, contrary to the position of the Department of Parks, the Court is disposed to hold that the litany of beneficial uses in Article XV, Section 3, Idaho Constitution, is exclusive, we would urge upon the Court that the appropriation of the waters of the Malad Canyon Springs for recreational and scenic purposes is an appropriation for domestic uses under the Idaho Constitution. Empire Water and Power Company v. Cascade Town Company, 205 Fed. 123 (8th Cir. 1913), reversing Cascade Town Company v. Empire

Water and Power Company, 181 Fed. 1011 (D-Colorado). In Empire, the court at page 128 said:

"It is urged that a use for a summer resort is not beneficial use for either domestic or agricultural purposes. Counsel say that the views and standards of the early settlers were reflected in the state Constitution, and that it should be construed accordingly; that they did not plan for rest and recreation and that to them 'domestic' had to do with sustenance for man and beast, and cleanliness; and that 'agricultural' related to the raising of crops. We think such a view is too narrow. * * * Places such as that described here, favored by climatic conditions, improved by the work of man, and designed to promote health by affording rest and relaxation are assuredly beneficial. They are relatively as important as sanitariums or hospitals, and should not be dismissed by calling them mere resorts for idleness. They are a recognized feature of the times, are important in their influence upon health, and multitudes of people avail themselves of them from necessity."

We hasten to add that the court in Empire ultimately denied the appropriation. The denial was not based on the fact that the uses to which the plaintiff sought to put the water were not beneficial, but that such uses were wasteful. The use to which the Department of Parks seeks to put the water in Malad Canyon are similar to the uses contemplated in the Empire case. In Malad Canyon, however, there is no waste involved, for the use is not a consumptive use.

Water Users are in error when they argue that the legislation authorizing the Malad Canyon appropriation is an extension of the riparian doctrine and not an appropriation pursuant to the doctrine of prior appropriation. The underlying theory of the riparian doctrine is that the owners of land bordering upon a stream have equal rights to the use of the water in the stream. Each riparian owner is entitled to the natural flow of the stream past his land, undiminished in quantity and unimpaired in quality. Thus, riparian ownership

of lands bordering waters is basic to the riparian doctrine of water rights. On the other hand, the doctrine of prior appropriation emerges from an entirely different set of principles. Its two cardinal principles are that "beneficial use" of water, not land ownership, is the basis of the right to water, and that priority of use, not equality of right, is the basis of the division of water between appropriators when there is not enough for all. The Department of Parks herein is seeking this "appropriation" of water not on the basis of land ownership, but on the basis that it wishes to appropriate water for its "beneficial use."

Water Users' concern that any fisherman or any sightseer may appropriate public waters by the statutory method to assure that his fishing hole is full and that his scenic view is preserved is rhetorical and not real. The legislature has clearly stated that:

"The preservation of waters in the area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state of Idaho is hereby declared to be a beneficial use of such water." Idaho Code, § 67-4307.

Malad Canyon

The beneficial use is qualified. No fisherman or sightseer can appropriate waters "for all the citizens of the state of Idaho." No fisherman or sightseer can act as trustee for the people of the state. The specter raised by Water Users is not before the Court, nor is it advanced in anyway by holding that the appropriation sought by the Department of Parks is for a beneficial use.

III.

IN ORDER TO MAKE A VALID APPROPRIATION, THERE NEED NOT BE AN ACTUAL DIVERSION.

At page 9 of the Administrator's Decision and page 8 of his Brief, the Administrator argues that an actual, physical diversion of public waters is necessary "to give an adequate

notice of the appropriation to all the world and to the Administrator." Water Users support the Administrator in this position. We disagree with the position. Actual diversion may or may not be necessary under the "constitutional" method of appropriation to give "actual notice to every intending appropriator of the waters of such a stream." Nielson v. Parker, 19 Idaho 727, 733, 115 Pac. 488 (1911). An actual diversion is not necessary to give public notice under the "statutory" method of appropriation, however. For a time in Idaho, beginning in 1881, the law required that notices of claims to public waters be posted at points of diversion and recorded the same as mining claims. In 1903, when the State of Idaho enacted a comprehensive, though not mandatory, permit system to appropriate public waters, the requirements of posting at the point of diversion and recording were repealed, it is submitted, as unnecessary. Hutchins, "The Idaho Law of Water Rights", 5 Idaho Law Review 1, 8. That an actual diversion is not necessary as public notice is more reasonable now than ever with the advent of a mandatory permit system. Idaho Code, § 42-201, as amended. Sandpoint Water and Light Company v. Panhandle Development Company, 11 Idaho 405, 83 Pac. 347 (1905), relied upon by Water Users arises under the early notice-and-recordation scheme. It is not applicable to the case at bar.

Numerous cases hold that a diversion of the waters from a natural channel is not a sine qua non when a diversion would be a needless act to apply the waters to a beneficial use.

"When no 'ditch, canal, or other structure' is necessary to divert the water from its natural channel, the law does not vainly require such works, prior to an appropriation." In Re Water Rights in Silvies River, 237 Pac. 322, 336 (Oregon, 1925).

"Has there been that actual application which the law requires? Undoubtedly a landowner may rely upon an efficient application by nature, and need do no more than affirmatively to avail himself of it (Thomas v. Guiraud, 6 Colo. 530; Larimer, etc., Co. v. People,

8 Colo. 614, 9 Pac. 794); but the use in that way should not be unnecessarily or wastefully excessive." Empire Water and Power Co. v. Cascade Town Company, supra, at 129.

See also, Humphreys Tunnel and Mining Co. v. Frank, 105 Pac. 1093 (Colo. 1909); Steptoe Livestock Co. v. Gulley, 295 Pac. 772 (Nev. 1931).

This teaching found mainly in the Colorado cases is brought up-to-date in the case of Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960), which is quoted in part in our earlier Memorandum at page 15. Genoa has been cited with approval in Stevenson v. Steele, 93 Idaho 4, 11, 453 P.2d 819, 826 (1969).

The Administrator argues in his Decision and Brief that he is unable to ascertain a clear intention on the part of the Idaho legislature to authorize an appropriation of public waters under the statutory method of appropriation without an actual diversion of the waters. He refers to the direction of the legislature to the Park Board "to appropriate in trust for the people of the state of Idaho the unappropriated natural spring flow arising upon the area described." Idaho Code, § 67-4307. This legislation was enacted at the same regular 1971 session as the mandatory permit system. Idaho Code, § 42-201, as amended. The former law appears at Chapter 177 of the Session Laws and the latter law at Chapter 207. Both laws were approved by the Governor on March 24, 1971. These two laws can be harmonized. The intent of the legislature is clear: to accomplish a legitimate appropriation. The nature of the appropriation, declared to be of beneficial use, does not require a diversion. The use of the word "appropriation" by the legislature is merely a shorthand term meaning "to acquire the right to the beneficial use of." Idaho Code, § 42-202. The same shorthand is used in this Supplemental Memorandum, and we believe by the bench, bar and public generally.

The decision of the Administrator is destructive of the clear intention of the legislature, and is not well founded. It makes the action of the legislature a useless act, a dead letter. When an actual diversion is necessary to apply the public waters to a beneficial use, the requirement of actual diversion should be met. When an actual diversion is not necessary, the law should be interpreted to conform to reality and not require a needless or counter-productive diversion.

Based upon the foregoing, it is respectfully submitted that Motion of the Department of Parks for Summary Judgment should be granted and the Motions of the Department of Water Administration and the Water Users should be denied.

Dated this 18th day of December, 1972.

Respectfully submitted,

W. ANTHONY PARK
Attorney General
State of Idaho

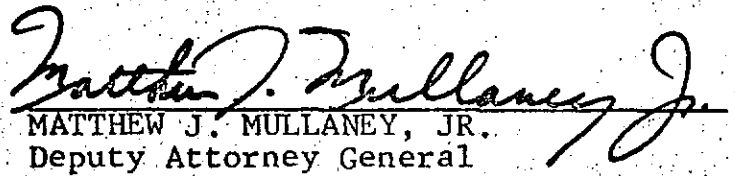
By: Matthew J. Mullaney, Jr.
MATTHEW J. MULLANEY, JR.
Deputy Attorney General
State of Idaho
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Boise, Idaho 83707

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of December, 1972, I served a true and correct copy of the foregoing Supplemental Memorandum in Support of Motion of Appellant, State of Idaho Department of Parks, for Summary Judgment on Appeal and Cross-Appeal upon: John O. Rosholt, Attorney at Law, of the firm of Parry Robertson, Daly & Larson, Fidelity Building, P. O. Box 525, Twin Falls, Idaho 83301, and Nathan W. Higer, Assistant Attorney General, Department of Water Administration, State of Idaho, Statehouse, Boise, Idaho, 83707, by depositing true and

SUPPLEMENTAL MEMORANDUM-P.8

correct copies thereof in the United States mail, postage prepaid in properly addressed envelopes to each of said attorneys, which addresses are the last addresses of the attorneys known to me.


MATTHEW J. MULLANEY, JR.
Deputy Attorney General

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RECEIVED
1972
Department of Water Administration

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

IN THE MATTER OF PERMIT
APPLICATION NO. 37-7108
IN THE NAME OF THE STATE
OF IDAHO DEPARTMENT OF
PARKS (MALAD CANYON
SPRINGS).

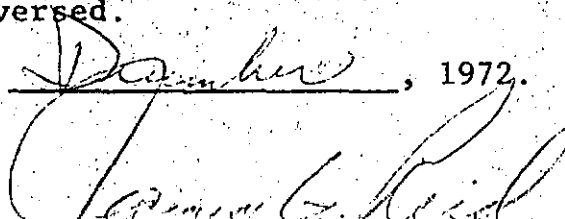
Case No. 15302

MOTION OF APPELLANT,
STATE OF IDAHO DEPARTMENT
OF PARKS, FOR SUMMARY
JUDGMENT ON APPEAL AND
CROSS-APPEAL

COMES NOW, The State of Idaho Department
of Parks, Appellant herein, and moves this court, pursuant
to Rule 56, Idaho Rules of Civil Procedure, for summary
judgment in its favor on both the appeal and cross-appeal
filed in this action, reversing the decision of the Depart-
ment of Water Administration in denying permit application
number 37-7108 in the name of the State of Idaho Depart-
ment of Parks.

This motion is made and based upon the fact that
there are no issues of fact whatsoever to be determined and
only questions of law are raised by this action. The decision
of the Department of Water Administration is incorrect as a
matter of law and should be reversed.

DATED This 5th day of December, 1972.


JAMES G. REID
Assistant Attorney General
State of Idaho

MOTION, P.1

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

IN THE MATTER OF PERMIT)
APPLICATION NO. 37-7108)
IN THE NAME OF THE STATE)
OF IDAHO, DEPARTMENT OF)
PARKS (MALAD CANYON SPRINGS).)

Case No. 15302

MEMORANDUM IN SUPPORT OF
MOTION OF APPELLANT, STATE
OF IDAHO, FOR SUMMARY JUDG-
MENT ON APPEAL AND CROSS
APPEAL.

This Memorandum is filed to advise the Court of the
position of the State of Idaho Department of Parks, Appellant
herein.

FACTS

The decision issued by the Department of Water Ad-
ministration on the 17th of July, 1972, and appealed from
herein puts forth all the facts of this case and will not be
restated here. Those facts are not disputed by either the
appeal or cross-appeal establishing the right of the State
of Idaho Department of Parks to summary judgment as a matter
of law because there are no issues of fact to be determined
(I.R.C.P. Rule 56).

ISSUES

There are three questions of law to be determined
by this Court in considering the Appellant's motion for sum-
mary judgment filed herein. (1) Is it constitutional in

MEMORANDUM, P. 1

Idaho for a state agency to appropriate, without explicit constitutional authorization, the waters of a natural stream and thereby to obtain a water right having a priority over water rights of private persons who have appropriations on such stream made subsequent in time to that of the state agency? (2) Are the uses described in Idaho Code, Section 67-4307, "beneficial uses" so as to support an appropriative water right under the Idaho Constitution? (3) Can there be created a valid appropriate water right in Idaho without an actual, physical reduction of the water claimed to possession through an actual diversion of the water from, or artificial control of the water in, the water's natural locus of condition?

ARGUMENT

I.

THE IDAHO CONSTITUTION DOES NOT FORBID A STATE AGENCY FROM MAKING AN APPROPRIATION

The first sentence of Art. 15, §3, Idaho Constitution, reads in part as follows:

" . . . The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes . . . "

The right to divert and appropriate waters applies only to those waters which are unappropriated, the question then being whether or not the state may lawfully restrict the place of appropriation of certain waters by the public by "appropriating" the waters in place in the name of the State or an agency thereof.

Idaho Code, §42-202, provides:

"42-202. APPLICATION TO APPROPRIATE
WATER--CONTENTS--FILING FEES--DIS-

POSITION OF FEES--RECORDS OF RECEIPTS.

--For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of reclamation for a permit to make such appropriation..."

The above section from the Idaho Code merely provides the method by which the above-enumerated classes may obtain an appropriation. It does not specifically prohibit the State of Idaho or an agency thereof from making an appropriation itself, nor is there any express provision in Art. 15, Idaho Constitution, forbidding the State of Idaho to make an appropriation.

In State v. Enking, 56 Idaho 722, 58 P.2d 779 (1936), the Idaho Supreme Court held that the Water Conservation Board of the State of Idaho could not withdraw from private appropriation the unappropriated waters of the State of Idaho. It is important at this point to understand the reasoning behind that decision. Page 732 of that decision reads in part as follows:

* * *

"Now it is clear that this attempt to authorize the Board to appropriate any or all the unappropriated public waters of the state, and thereby to withdraw them from private appropriation by any person who may desire to comply with the Constitution and statute in the diversion and appropriation of public waters. By this act the Board may rise superior to a settler or land owner in withdrawing waters from diversion and use and the settler be thereby forced to ultimately pay arbi-

trarily fixed water rates for the use of water he might otherwise have been able to personally divert and apply to a beneficial use.* In addition to authorizing the Board to withdraw unappropriated water from private appropriation, this act also authorizes the Board to condemn private water*rights for the purposes of carrying on the proposed enterprises the act contemplates. (Sec.4) We are not discussing what the Board is actually doing, but rather what the act authorizes it to do. (Boise-Payette Lumber Co. v. School Dist., 46 Ida. 403, 268 P. 26; Atkinson v. Board of Ada County Commrs., 18 Ida. 282, 108 P. 1046, 28 L.R.A., N.S., 412.) If the Board is merely an arm of the state performing 'governmental functions,' it cannot, in face of these constitutional provisions be authorized to withdraw from private appropriation the unappropriated waters of the state. In other words, the state cannot by legislative act authorize its own agency to monopolize or withdraw the very rights that sec. 3 of art. 15 of the Constitution says 'shall never be denied' the people of the state. (State v. Twin Falls etc., Water Co., 30 Ida. 41, 67, 166 P.220.) (Emphasis added)

"The people of Idaho adopting the Constitution thought it a matter of primary importance that they insert in the fundamental law of the state an express prohibition against the legislature ever, by any kind of legislation, taking away from the humblest settler the right 'to divert and appropriate' any of 'the unappropriated waters of any natural stream to beneficial uses.' (Sec. 3, art. 15, Const.) The legislature cannot circumvent or thwart that purpose by creating either a state agency or a special corporation and vesting it with power to appropriate and sell the unappropriated waters of the state (sec. 15 of the act) or condemn waters already appropriated (sec. 4) . . ." (Emphasis added)

Note that the Court's concern was directed not to what the Board had actually done, but to the potential abuse permissible under the statute. It is apparent that the Court was afraid of the situation which may arise in which the agency appropriating water may attempt to sell the appropriated water back to the public at a profit, which in the minds of the Court would circumvent the intent of Art. 15, §3, Idaho

Constitution. In short, the decision in Enking, supra, is not to be read as specifically prohibiting the State of Idaho or an agency thereof from making a valid appropriation, but rather as prohibiting the State from making mass appropriations and then in turn reselling the appropriated water to the public. At the time of Enking, had there been a doctrine prohibiting the State from appropriating, the decision would have turned on that doctrine rather than on the potential for the State's appropriating and then selling the waters so appropriated. Under the "Public Trust Doctrine", it would be impossible for the State, after having once appropriated the water in trust for the public at large to resell it back to the public at a profit.

In Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", 68 Michigan Law Review, No. 3, Jan. '70, beginning at p. 484, an outline of the Public Trust Doctrine is set forth as follows:

"Other than the rather dubious notion that the general public should be viewed as a property holder, there is no well conceived doctrinal basis that supports a theory under which some interests are entitled to special judicial attention and protection. Rather, there is a mixture of ideas which have floated rather freely in and out of American public trust law. The ideas are of several kinds, and they have received inconsistent treatment in the law.

"The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark society as one of citizens rather than of serfs. It is thought that, to protect those rights, it is necessary to be especially wary, lest any particular individual or group acquire the power to control them. The historic public rights of fishing and navigation reflect this feeling; and while the particular English experience which gave rise to the controversy over those interests

was not duplicated in America, the underlying concept was readily adopted. Thus, American law courts held it 'inconceivable' that any person should claim a private property interest in the navigable waters of the United States. It was from the same concept that some of the language of the Northwest Ordinance was taken:

'The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States . . . without any tax, impost, or duty therefor. (Citing an Act of July 13, 1787, Art. 4 1 Statute 51) . . .'

* * *

"Finally, there is often a recognition, albeit one that has been irregularly perceived in a legal doctrine, that certain uses have a peculiar public nature that makes their adaption to private use inappropriate. The best known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only a usufruct--an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies.

* * *

"Of all existing legal doctrines, none comes as close as does the public trust concept to providing the point of intersection for the three important interests noted above. Certainly the phrase 'public trust' does not contain any magic such that special obligations can be said to arise merely from its incantation; and only the most manipulative of historical readers could extract much binding precedent from what happened a few centuries ago in England. But that the doctrine contains the seeds of ideas whose importance is only beginning to be perceived, and that the doctrine might easily promote needed legal development can hardly be doubted . . .

One who searches through the reported cases will find many general statements which seem to imply that a government may never alienate trust property by conveying it to a private owner and that it may not affect changes in the use to which that property has been devoted . . . but a careful examination of the cases will show that the excerpts just quoted and almost all other statements are dicta and do not determine the limits of the state's legitimate authority in dealing with trust lands. Unfortunately, the case law has not developed in any way that permits certainty about the outer limits of state power. Nonetheless, by examining the diverse and often loosely written opinions dealing with public lands, one may obtain a reasonably good picture of judicial attitudes . . .

"The first point that must be clearly understood is that there is no general prohibition against the disposition of trust properties, even on a large scale. A state may, for example, recognize private ownership in tidelands and submerged lands below the high water mark; indeed, some states have done so and have received judicial approval. Still, courts do not look kindly upon such grants and usually interpret them quite restrictively, and apply a more rigorous standard than is used to analyze conveyances by private parties. In this connection, courts have held that since the state has an obligation as trustee which it may not lawfully divest, whatever title the grantee has taken is impressed with the public trust and must be read in conformity with it. (Emphasis added)

* * *

"These judicial cases suggest the extremes of the legal constraints upon the States: no grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern it, but a grant is not illegal solely because it diminishes in some degree the quantum of judicial uses.

* * *

"The most celebrated public trust case in American law is the decision of the United States Supreme Court in Illinois Central Railroad Co. v. Illinois (Citing

146 U.S. 387, 1892. In 1869 the Illinois legislature made an extensive grant of submerged lands, in fee simple, to the Illinois Central Railroad. That grant included all the land underlying Lake Michigan for one mile out from the shore line and extending one mile in length along the central business district of Chicago--more than one thousand acres of incalculable value, comprising virtually the whole commercial waterfront of the city. By 1873 the legislature had repented its excessive generosity, and it repealed the 1869 grant, it then brought an action to have the original grant declared invalid.

"The supreme court upheld the state's claim and wrote one of the very few opinions in which an express conveyance of trust lands has been held beyond the power of the state legislature . . . The court stated that the title under which Illinois held navigable waters of Lake Michigan is 'different in character from that which the state holds in lands intended for sale.' . . . It is a title held in trust for the people of the state and that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interferences of private parties. (Citing 146 U.S. at 452)

"With this language, the court articulated a principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public a court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to a more restricted use or to subject public uses to the self interest of private parties." Sax, "The Public Trust Doctrine of Natural Resource Law: Effective Judicial Intervention", 68 Michigan Law Review No. 3, pp. 484-490.

By virtue of the Public Trust Doctrine outlined above, it is apparent that the precise fear of the court in determining the Enking, supra, case has been dispelled. Under the Public Trust Doctrine, it would be impossible for the State of Idaho, having once appropriated water in trust for the public to sell the water back to the public or dispose of it in any manner which would in a substantial way, defeat the

primary objective of the original appropriation.

Having disposed of the main problem contemplated by Enking, supra, there is no other authority that would support the position that the State cannot appropriate water for neither the Constitution nor the Idaho Code specifically prohibit appropriations by the State.

II.

AESTHETIC OR RECREATIONAL VALUES CONSTITUTE
"BENEFICIAL" USES WITHIN ARTICLE 15,
SECTION 3, IDAHO CONSTITUTION
AND SECTION 42-101, IDAHO CODE.

Section 42-101, Idaho Code, in declaring the waters of the state to be public waters, provides in part:

"All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed;..."
(Emphasis added)

In Section 67-4307, Idaho Code, the legislature stated:

"The preservation of water in the area described for its scenic beauty and recreational purposes is necessary and desirable for all citizens of the state of Idaho and is hereby declared to be a beneficial use of such water." (Emphasis added)

As was stated in the case of United States v. Gettysberg Electric Railway Co., 160 U.S. 668, 680 (1869):

"(W)hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."

The legislature in the State of Idaho in enacting Sections 67-4307, Idaho Code, has clearly declared that scenic beauty of water is a "beneficial use". That declaration is entitled to very great weight and if not patently unreasonable, should be conclusive.

The declaration is a reasonable one. Hutchins, in his work on the Idaho Law of Water Rights, states as follows:

"The water rights statute provides that the appropriation must be for some useful or beneficial purpose, without placing any limitation upon purposes that would be considered useful or beneficial; and the so-called 'constitutional' or non-statutory appropriations likewise may be made, apparently for any useful or beneficial purpose." Hutchins, The Idaho Law of Water Rights, p. 38 (1956)

Kinney, in his work on irrigation and water rights, makes the following statement:

"... and, in general, we will say that any purpose which is useful, or beneficial may be the object of such appropriation. In some states, however, certain uses are given preference right by statute, but where this is not the case as a general thing, any use which is beneficial may claim its right in the order of its priority with the other rights claimed from the same strain. As we stated in the first addition of this book, the purpose contemplated for the use of water may be irrigation for agricultural or horticultural purposes, mining, milling, manufacturing, domestic or any other purpose for which water is needed to supply the natural and artificial wants of man, provided it be for a beneficial use." (Emphasis added)
...and as was said in a recent federal case: "The courts have not defined, because as yet they are unable to define, the exact boudaries of the territory known as 'beneficial use'. Therefore, as to what is a beneficial use must depend upon the facts and circumstances surrounding any particular use, until that use has been defined by the courts as being beneficial." (Emphasis added) Kinney, Irrigation and Water Rights, 2d Ed., §690 (1912)

In Yellin, Visual Pollution and Aesthetic Regulation, 46 Los Angeles Bar Bulletin, No. 11, Sept. '71, at p. 425, the history of aesthetic regulation is briefly traced as follows:

"The legal basis for aesthetic regulation has evolved greatly since the beginning of this century. Excerpts from several leading opinions provide an illustration of this change in judicial, and community, thinking:

"In 1909: 'Aesthetic considerations are a matter of luxury and indulgence rather than of necessity and it is necessity alone which justifies the exercise of the police power to take private property without compensation.' (Citing People ex rel M. Wineburgh, ADV v. Murphy, 195 N.Y. 126, 188 N.E. 17, 20 (1909))

"And in 1925: 'It is commendable and desirable, but not essential to the public need that our aesthetic desires be gratified . . . Certain legislation might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, for limericks than for Keats . . . the world would be a continual seesaw if aesthetic considerations were permitted to govern the use of the police power.' (Citing City of Youngstown v. Kahn Bros. Building Co., 112 Ohio Statutes 654, 148 N.E. 842, 844 (1925)).

"By 1954, however: 'The concept of public welfare is broad and inclusive... the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community shall be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled . . . If those who govern the District of Columbia decide that the nation's capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.' (Citing Berman v. Parker, 348 U.S. 26, 32-33 (1954)).

"And six years ago: 'There is growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings. This change in attitude is a reflection of the refinement of our tastes and growing appreciation of cultural values in a maturing society. The change may be ascribed more directly to the judicial expansion of the police power to include within the concept of the 'general welfare' the enhancement of the citizen's cultural life.' (Emphasis added) (Citing Oregon City v. Hartke, 240 Ore. 109, 400 P.2d 255 (1965), at p. 426.)

In Wes Outdoor v. Goldberg, 1 Environmental Reporter, 1172, (N. J. 1970), a New Jersey statute authorized the transportation commissioner to condemn property for landscaping and a roadside development appropriate for the restoration, preservation and enhancement of scenic beauty adjacent to federal

aid highways. Plaintiffs owned lands sought to be condemned under the statute and brought the action, contesting the commissioner's power to condemn on the ground that the statute was unconstitutional for lack of an adequate standard to guide him in the selection of lands to be taken for the designated purpose. Plaintiffs argued that the words "scenic beauty" were too vague to be employable as an objective guide. In effect, they argued that the "restoration, preservation and enhancement of scenic beauty" did not adequately define a public purpose and the legislature therefore failed to articulate an intelligible guiding principle. Holding the statute valid, the court said:

"To paraphrase the language of the statute, what the legislature here sought, was the restoration, preservation and enhancement of the natural condition of land adjacent to the federal highway system. The act contemplates that there is a certain basic beauty and natural terrain and vegetation unspoiled by the hands of man, which it proposes to recapture or maintain. Although the extent to which each individual finds a specific landscape beautiful must be determined by a subjective test, this does not denote that there is no catholic criterion for the ascertainment of whether any scenic beauty exists in a given panorama. 'Scenic Beauty' is concerned with such manifold possible situations that it does not lend itself to a more specifically detailed descriptive statement. A tabulation of the various possible elements constituting scenic beauty is well nigh impossible. The present interest in ecology and conservation demonstrates the necessity and public purpose of preserving land, as nearly as possible, in its native state. We have no hesitancy in stating that the restoration, preservation and enhancement of scenic beauty adjacent to public highways is a public use for the public welfare, filling a social need of our times. Hence, the power to acquire lands for that purpose is beyond judicial interference." (Citations omitted), 1 Environmental Reporter 1172, 1174.

Having established that scenic beauty is a "beneficial use" under the Idaho Code, it remains to be determined whether or not scenic beauty is a permissible beneficial use under the Idaho Constitution.

Art. 15, §3, Idaho Constitution, establishes the right to appropriate the unappropriated waters of the State of Idaho and reads as follows:

"§3. WATER OF NATURAL STREAM--RIGHT TO APPROPRIATE--STATE'S REGULATORY POWER--PRIORITIES.--The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution."

Under the Constitution, in order to obtain a valid appropriation, the water so appropriated must be put to a beneficial use. The Constitution does not define or limit beneficial uses. The itemization of certain beneficial uses is not meant to be exclusive but to state the relative preferences among certain beneficial uses:

"... but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes." Art. 15, §3, Idaho Constitution (1949) (Emphasis added)

Uses other than those specified in Art. 15, §3, should be recognized as "beneficial uses" for which appropriations may be made.

"The fact that a particular purpose of use of water is omitted from a list of purposes for which water may be appropriated under any general state statute does not necessarily stigmatize it legislatively as non-beneficial --unless of course the statute should declare the stated list to be exclusive, and none of the present statutes do. Hence, if actually beneficial in a particular instance, an unlisted purpose of use should be acceptable for inclusion in an application to appropriate water." Waters and Water Rights, Vol. 1, §19.3C, P. 89 (1967)

To summarize, the Constitution of the State of Idaho does not preclude scenic beauty as being a "beneficial use" so as to permit an appropriation for that purpose. Idaho Code, Section 42-101 provides that any beneficial use may be the subject of an appropriation. Section 67-4307 is a specific declaration by the State Legislature that scenic beauty is a beneficial use. Bearing the above citations in mind, along with the recent trend toward recognizing aesthetic value as being beneficial, there is now no question but that the aesthetic value of water is a beneficial use within Art. 15, §3, Idaho Constitution, and Section 42-101, Idaho Code, so as to permit an appropriation of water for its scenic use.

III.

IN ORDER TO MAKE A VALID APPROPRIATION,
THERE NEED NOT BE AN ACTUAL DIVERSION.

In order to apply the waters of Malad Canyon to the beneficial use contemplated by §67-4307, Idaho Code, it is not necessary that there be an actual diversion on the part of the appropriator. Appropriation of water for its "aesthetic value" is not a consumptive appropriation as are appropriations made for domestic, agricultural, mining, or manufacturing purposes. Because aesthetic or recreational uses are not "consumptive", it is unrealistic to require that one must divert the water from the natural flow of the stream. The appropriation contemplated by §67-4307, Idaho Code, in no sense diminishes the quantity of water available for private appropriation, but merely limits the place of appropriation.

The act of diverting water from its natural stream provides a means of measuring quantitative appropriation. With respect to consumptive uses, the requirement of a diversion is necessary in order to ascertain the amount of water in any given water course that has been appropriated (taking into account return flow, etc.); after which further appropriation is impossible. However, where aesthetic or recreational appropriations are involved, there is no need to determine the quantitative flow "appropriated", as the actual stream flow remains undiminished. Therefore, the reason requiring a diversion for consumptive uses ceases to exist.

In the case of Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960) the Court stated at page 378:

"It is not necessary in every case for an appropriator of water to construct ditches or artificial ways to which the water might be taken from the stream in order that a valid appropriation might be made. The only indispensable requirements are that the appropriator intends to use the water for a beneficial purpose and actually applies them to that use."

From the above quote it becomes evident that the Colorado Court was not so concerned about applying mechanically a diversion requirement but that the beneficial use contemplated be in fact achieved whether by use of a physical diversion or otherwise.

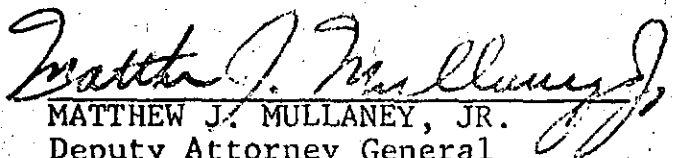
In cases involving consumptive uses, accomplishment of the use itself requires a diversion, but to require diversion to the scenic or recreational uses set out in §67-4307, Idaho Code, would defeat the purpose of the appropriation. If recreational and aesthetic uses be deemed "beneficial" uses within Art. 15, §3, Idaho Constitution, it is inconceivable to require a diversion to such uses, thereby thwarting the benefit contemplated.

The applicants are cognizant of the fact that there are cases in other jurisdictions which purportedly require an actual diversion in order to obtain a valid appropriation. However, these cases, in requiring an actual diversion, deal with consumptive uses of water. As is pointed out herein, the use contemplated by §67-4307, Idaho Code, is not a consumptive use. Further, those cases long precede the trend toward judicial recognition of the importance and validity of laws conserving and enhancing scenic and recreational values.

It is respectfully submitted that the motion of the State of Idaho Department of Parks for summary judgment should be granted and the motion of the Department of Water Administration for summary judgment should be denied.

Respectfully submitted,

W. ANTHONY PARK
Attorney General


MATTHEW J. MULLANEY, JR.
Deputy Attorney General
State of Idaho

MEMORANDUM, P. 16

JAMES G. REID
Assistant Attorney General
State of Idaho

W. ANTHONY PARK
Attorney General
State of Idaho

JAMES G. REID
Assistant Attorney General
State of Idaho
Statehouse, Boise, Idaho 83707
Telephone: [208] 384-2400

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

IN THE MATTER OF PERMIT
APPLICATION NO. 37-7108
IN THE NAME OF THE STATE
OF IDAHO DEPARTMENT OF
PARKS (MALAD CANYON
SPRINGS).

Case No. 15302

CERTIFICATE OF SERVICE

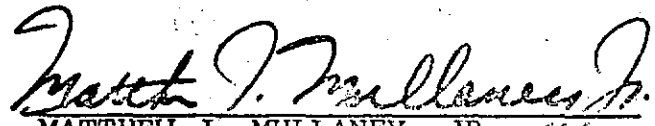
I HEREBY CERTIFY on this 5th day of December,
1972, I served the attached Motion of Appellant, State of
Idaho Department of Parks for Summary Judgment On Appeal
and Cross-Appeal; Memorandum and Support of State of Idaho
Department of Parks for Summary Judgment on Appeal and Cross
Appeal by placing true and correct copies thereof in post
paid envelopes addressed to the persons hereinafter named,
at the places and addresses stated below, which are their
last known addresses, by depositing said envelopes with the
contents in regular United States mail at Boise, Idaho.

JOHN A. ROSHOLT
Attorney at Law
P.O. Box 525
Twin Falls, Idaho 83301

MAURICE H. GREENE
Attorney at Law
2619 Camas Street
P.O. Box 5402
Boise, Idaho 83705

RAYMOND D. GIVENS
Attorney at Law
GIVENS & GIVENS
500 Washington Street
Boise, Idaho 83702

NATHAN HIGER
Assistant Attorney General
Idaho Department of Water Administration
Statehouse Annex No. 2
Boise, Idaho 83707


MATTHEW J. MULLANEY, JR.
Deputy Attorney General
State of Idaho

WATER RIGHT NUMBER 37-7108

WATER RIGHTS EDIT REPORT

01/09/80

PAGE 23

ACT
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L

PROOF MADE - P

ACT
ION

1 N OWNER LAST NAME - STATE OF IDAHO
2 N ADDRESS LINE 1 - DEPT. OF PARKS
3 N CITY - BOISE STATE - ID 83701
4 N SOURCE - SPRINGS TRIBUTARY OF - SNAKE RIVER
5 N STAGE - PERMIT PRIORITY - 07-12-1971 COUNTY - GOODING TOTAL DIV. RATE - 1260.0000CFS
6 N DIVERSION POINT - NWNE 36 06S 13E
7 N FROM - 01-01 TO - 12-31 USE - RECREATION USE DIV. RATE - 1260.0000CFS
8 N REMARKS - P/D IN S1/2SW, S25; N1/2NW, S36, T6S, R13E & S1/2SE, S25; T6S, R1
9 N S1/2SE, S25, T6S, R13E. P/U INCOMPLETE. SEE FILE.
10 N PROOF DUE - 01-01-1980 PERMIT/DENIED - 07-06-1972

IDENT. NO. 37-7108

IDENT. NO. 37-7108

I D A H O D E P A R T M E N T O F W A T E R R E S O U R C E S

WATER RIGHT
DATA ENTRY LOG

[illegible]

WATER RIGHT ANALYSIS FORM

- DATA ENTRY -

Identification No. _____

Old No. _____

New No. _____

1 37-7108

Record

1. Original Owner: State of Idaho
Dept. of Parks

Present Owner: _____

2. Address: _____

3. City: Bowle State: ID Zip: _____4. A. Source of Water: SpringsB. Tributary of: Snake River5. A. Stage (A,P,L,D,S,J): P

B. Status (D,L,R,C,A,I,F - leave blank if valid): _____

C. Priority Date: 7-12-1971D. County: 47E. Total Diversion Rate: 1260

F. Total Diversion Volume: _____

G. Transfer/Amendment (P,T of A or blank): _____

H. Water District: _____

I. DLE/Carey Act (D,C or blank): _____

J. Right Basis (for adjudication claims A,B,C only): _____

	Tract	Sec.	Twp.	Rge.	Gov't Lot	Rediv.
6. A. Point of Diversion	<u>NWNE</u>	<u>36</u>	<u>6S</u>	<u>13E</u>	_____	_____
	_____	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____	_____

7. Period of Use, Use, Diversion Rate/Volume:

from 1-1 to 12-31 for R purposes. Amount 1260
(cfs or AC-FT/yr)

from _____ to _____ for _____ purposes. Amount _____

from _____ to _____ for _____ purposes. Amount _____

from _____ to _____ for _____ purposes. Amount _____

from _____ to _____ for _____ purposes. Amount _____

from _____ to _____ for _____ purposes. Amount _____

from _____ to _____ for _____ purposes. Amount _____

8. Use Code:

[illegible]

9. A. Decree Name:

B. Decree Date:

10. Remarks: A. $5\frac{1}{2}$ SE, 525;
B. P/O's in $5\frac{1}{2}$ SW, 828; $N\frac{1}{2}$ NW, 534, T6S, R13E.
C. P/U incomplete. See file.
D.
E.

11. Other Uses (Non-irrigation, explanatory information):

12. Other Rights for Same Use:

13. A. Proof Due Date: 1-1-1980

B. Date Permit Approved or Denied: 7-6-1972

C. Protested Date:

D. Hearing Date:

E. Old Number:

F. Proof Made (P or blank):

G. Field Exam Made (P,R,F or blank):

H. Conditions of Approval:

14. Diversion Means (brief narrative):

AKO 5-2-79



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
SOUTHERN REGION

John V. Evans
Governor

C. Stephen Allred
Director

1041 Blue Lakes Blvd. North
Twin Falls, Idaho 83301
(208) 734-3578

Idaho Dept. of Parks & Recreation
Statehouse
Boise, Idaho
83720

December 27, 1979

RE: Water Permit 37-7108

Dear Sir;

We acknowledge receipt of the affidavit submitted as proof of beneficial use for the above referenced permit.

Before a license can be issued, a field examination must be made by a representative of this Department. We cannot tell just when this examination will be made, but our examiner will try to contact you at the time he makes the examination so that you may show him the system.

Field examinations must be done while the system is in operation. For this reason we concentrate on irrigation permits during the summer months and do examinations on permits for other uses during the non-irrigating months.

If you have any questions regarding the field examination, please contact our office.

Sincerely,

Gary L. Funderburg
Senior Water Resource Agent

RECEIVED
DEC 28 1979

DEPARTMENT OF WATER RESOURCES

The Idaho Department of Water Resources will consider this card as a statement that the permit holder(s) has completed development to the extent shown below of Permit No. 37-7108.

Name(s) of Permit Holder: Idaho Dept. of Parks and Re.

Post Office Address: State House

83720 Tel. No. 384-3870

Source of Water: SPRINGS

Extent of Use: ☐ Domestic (number of households)
☐ Stockwater (number and type of stock)
☐ Irrigation (acres)
☒ Other Recreation and Scenic beauty

Measuring Device: Required? ☐ Yes ☒ No Installed? ☐ Yes ☒ No

Access Port: Required? ☐ Yes ☒ No Installed? ☐ Yes ☒ No

The above information is a true statement of the extent to which the above numbered permit has been developed.

11/12/79
Date

M. Mous
Signature of Permit Holder

Idaho State Parks & Rec.

State House Mail

Boise, Idaho 83720

RECEIVED

NOV 15 1979



PLACE
TEN CENT
STAMP
HERE

~~Department of Water Resources~~

IDAHO DEPARTMENT OF WATER RESOURCES
STATEHOUSE
BOISE, IDAHO 83720

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

STATEHOUSE
BOISE, IDAHO 83720
(208) 384-2215

STATE OF IDAHO
DEPT. OF PARKS
BOISE, ID

1G1449

OCTOBER 31, 1979

DEAR PERMIT HOLDER:

ONE OF THE CONDITIONS OF APPROVAL OF YOUR WATER PERMIT NO. 37-7108 WAS THAT EVIDENCE OF THE EXTENT OF DEVELOPMENT MUST BE SUBMITTED TO THIS OFFICE ON OR BEFORE JANUARY 01, 1980. (SEE LAST PAGE OF YOUR APPROVED PERMIT). ENCLOSED IS A POST CARD WHICH MAY 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 POST CARD 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 WITHIN 60 DAYS.

SINCERELY,

RITA FLECK
SR. SECRETARY

ENC: 1

RECEIVED
OCT 31 1979

January 17, 1975

State of Idaho, Dept. of Parks
Statehouse
Boise, Idaho 83720

Gentlemen:

Action on your Applications for Permit No.'s 36-7198 from Box Canyon Creek, 36-7199 from Big Springs, and 36-7200 from Niagra Springs has been withheld pending the decision of the Idaho Supreme Court with regard to your Malad Canyon Application No. 37-7108.

That decision has been rendered by the Court and your application was remanded to us for approval. A copy of the Order approving your application is enclosed.

We are now prepared to proceed with hearings on the other three applications that have been protested.

You will be notified of the date of the hearing when it is set.

Sincerely,

BOBBY D. FLEENOR
Chief, Water Rights

BDF:jg
Enclosure

MICROFILMED

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION

Cecil D. Andrus
Governor
R. Keith Higginson
Director

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



Water Rights Administration
Water Resource Investigations
Dam and Reservoir Safety
Water Well Drilling
Waste Disposal Wells
Stream Channel Protection

November 10, 1972

The Honorable Charles O.S. Scoggin
District Judge
Fifth Judicial District
Courthouse
Gooding, Idaho 83330

RE: IN THE MATTER OF PERMIT APPLICATION
NO. 37-7108, IN THE NAME OF THE STATE
OF IDAHO, DEPARTMENT OF PARKS (MALAD
CANYON SPRINGS).

Case No. 15302

Dear Judge Scoggin:

Enclosed herewith for your information please find an
ANOTHER AMENDED NOTICE OF HEARING in the above-entitled action.

Very truly yours,

NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration

NWH/sc

Enclosure

37 7108

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION

Cecil D. Andrus
Governor
R. Keith Higginson
Director

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



Water Rights Administration
Water Resource Investigations
Dam and Reservoir Safety
Water Well Drilling
Waste Disposal Wells
Stream Channel Protection

November 10, 1972

Ms. Vivian M. Burden
Clerk of the District Court
Fifth Judicial District
Courthouse
Gooding, Idaho 83330

RE: IN THE MATTER OF PERMIT APPLICATION
NO. 37-7108, IN THE NAME OF THE STATE
OF IDAHO, DEPARTMENT OF PARKS (MALAD
CANYON SPRINGS).

Case No. 15302

Dear Ms. Burden:

Enclosed herewith please find an ANOTHER AMENDED NOTICE OF
HEARING in the above-entitled action for filing with the District
Court.

Thank you for your assistance and cooperation in this matter.

Very truly yours,

Nathan W. Higer
NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration

NWH/sc

Enclosure

37 7108

NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707
TELEPHONE: 384-2215

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

IN THE MATTER OF PERMIT)
APPLICATION NO. 37-7108,)
IN THE NAME OF THE STATE)
OF IDAHO, DEPARTMENT OF)
PARKS (MALAD CANYON SPRINGS).)

CASE NO. 15302
ANOTHER
A M E N D E D
NOTICE OF HEARING

TO: State of Idaho, Department of Parks, Appellant;
Idaho State Reclamation Association; North Side
Canal Co., Ltd.; Twin Falls Canal Company, Cross-
Appellants:

YOU AND EACH OF YOU, ARE HEREBY NOTIFIED That Respondent,
Idaho Department of Water Administration's, Motion For Summary
Judgment will be heard before the above-named Court on Friday,
the 8th day of December, 1972, at the District Courtroom in the
Courthouse in Gooding, Gooding County, Idaho, at the hour of
9:00 a.m.

DATED This 10th day of November, 1972.


NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration

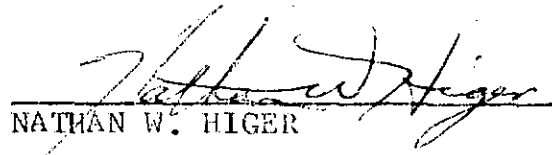
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 10th day of November, 1972,
a true and correct copy of the foregoing AMENDED NOTICE OF HEARING
was mailed, postage prepaid to:

JOHN A. ROSHOLT
PARRY, ROBERTSON, DALY & LARSON
P.O. Box 525
Twin Falls, Idaho 83301

JAMES G. REID
Assistant Attorney General
State of Idaho
Office of the Attorney General
Statehouse
Boise, Idaho 83707

37 7108


NATHAN W. HIGER

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION

Cecil D. Andrus
Governor
R. Keith Higginson
Director

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



Water Rights Administration
Water Resource Investigations
Dam and Reservoir Safety
Water Well Drilling
Waste Disposal Wells
Stream Channel Protection

November 7, 1972

The Honorable Charles O.S. Scoggin
District Judge
Fifth Judicial District
Courthouse
Gooding, Idaho 83330

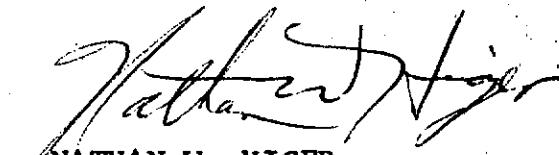
RE: IN THE MATTER OF PERMIT APPLICATION
NO. 37-7108, IN THE NAME OF THE STATE
OF IDAHO, DEPARTMENT OF PARKS (MALAD
CANYON SPRINGS).

Case No. 15302

Dear Judge Scoggin:

Enclosed herewith for your information please find an
AMENDED NOTICE OF HEARING in the above-entitled action.

Very truly yours,


NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration

NWH/sc

Enclosure

37 7108

NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707
TELEPHONE: 384-2215

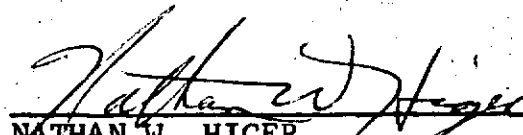
IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF GOODING

IN THE MATTER OF PERMIT	)	CASE NO. 15302
APPLICATION NO. 37-7108,	)	
IN THE NAME OF THE STATE OF IDAHO,	)	<u>A M E N D E D</u>
DEPARTMENT OF PARKS (MALAD CANYON	)	NOTICE OF HEARING
SPRINGS).	)	

TO: State of Idaho, Department of Parks, Appellant;
Idaho State Reclamation Association; North Side
Canal Co., Ltd.; Twin Falls Canal Company, Cross-
Appellants:

YOU AND EACH OF YOU, ARE HEREBY NOTIFIED That Respondent,
Idaho Department of Water Administration's, Motion For Summary
Judgment will be heard before the above-named Court on the
1st day of December, 1972, at the hour of 9 o'clock a.m.

DATED this 7th day of November, 1972.


NATHAN W. HIGER
Counsel, Idaho Department of
Water Administration

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 7th day of November, 1972,
a true and correct copy of the foregoing AMENDED NOTICE OF HEARING
was mailed, postage prepaid to:

JOHN A. ROSHOLT, Esq.
PARRY, ROBERTSON, DALY & LARSON
P.O. Box 525
Twin Falls, Idaho 83301

JAMES G. REID, Esq.
Assistant Attorney General
State of Idaho
Office of the Attorney General
Statehouse
Boise, Idaho 83707


NATHAN W. HIGER
37-7108

November 1, 1972

C
O
P
Y

The Honorable Charles O.S. Scoggin
District Judge
Fifth Judicial District
Courthouse
Gooding, Idaho 83330

RE: IN THE MATTER OF PERMIT APPLICATION
NO. 37-7108, IN THE NAME OF THE STATE
OF IDAHO, DEPARTMENT OF PARKS (MALAD
CANYON SPRINGS).
Case No. 15302

Dear Judge Scoggin:

Enclosed herewith for your information, please find
a MOTION OF RESPONDENT, DEPARTMENT OF WATER ADMINISTRA-
TION, FOR SUMMARY JUDGMENT ON APPEAL AND CROSS-APPEAL;
MEMORANDUM IN SUPPORT OF MOTION OF RESPONDENT, DEPART-
MENT OF WATER ADMINISTRATION, FOR SUMMARY JUDGMENT ON
APPEAL AND CROSS-APPEAL; and NOTICE OF HEARING in
the above-entitled action.

Very truly yours,

NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration

NWH/sc

Enclosures

37 7108

November 1, 1972

C
O
P
Y

Ms. Vivian M. Burden
Clerk of the District Court
Fifth Judicial District
Courthouse
Gooding, Idaho 83330

RE: IN THE MATTER OF PERMIT APPLICATION
NO. 37-7108, IN THE NAME OF THE STATE
OF IDAHO, DEPARTMENT OF PARKS (MALAD
CANYON SPRINGS).
Case No. 15302

Dear Ms. Burden:

Enclosed herewith please find a MOTION OF RESPONDENT,
DEPARTMENT OF WATER ADMINISTRATION, FOR SUMMARY JUDGMENT
ON APPEAL AND CROSS-APPEAL; MEMORANDUM IN SUPPORT OF
MOTION OF RESPONDENT, DEPARTMENT OF WATER ADMINISTRATION,
FOR SUMMARY JUDGMENT ON APPEAL AND CROSS-APPEAL; and
NOTICE OF HEARING in the above-entitled action for
filing with the District Court.

Thank you for your assistance and cooperation
in this matter.

Very truly yours,

NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration

37 7108

NWH/sc

Enclosures

NATHAN W. HIGER
Counsel, Idaho Department of
Water Administration
Statehouse - Annex 2
Boise, Idaho 83707
TELEPHONE: 384-2215

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

IN THE MATTER OF PERMIT	)	CASE NO. 15302
APPLICATION NO. 37-7108,	)	MOTION OF RESPONDENT, DEPARTMENT OF
IN THE NAME OF THE STATE	)	WATER ADMINISTRATION, FOR SUMMARY
OF IDAHO, DEPARTMENT OF	)	JUDGMENT ON APPEAL AND CROSS-APPEAL
PARKS (MALAD CANYON SPRINGS).	)	

COMES NOW, the Idaho Department of Water Administration,
Respondent herein, and moves this Court, pursuant to Rule 56,
I.R.C.P. for Summary Judgment in its favor on both the appeal
and cross-appeal filed in this action, affirming the decision
of the Department of Water Administration on all points.

This Motion is made and based upon the fact that there
are no issues of fact whatsoever to be determined and only questions
of law are raised by this action. The decision of the Department
of Water Administration is correct as a matter of law and should
be affirmed.

DATED this 1st day of November, 1972.


NATHAN W. HIGER

Counsel, Idaho Department of
Water Administration

37 7208

be presumed to have done an unconstitutional act and, therefore, that the power to make an appropriation was evidence that the Board was in fact a corporation.

This conclusion, indeed treatment of this entire issue, was unnecessary for the decision in the Enking case. There were many other substantial reasons for the Court to hold that the Board was in fact a corporation. It need not have discussed the Article 15, Section 3 issue at all. Following the usual precepts of constitutional interpretation, it should not have even considered them. The discussion at 56 Idaho 731-33 is, therefore, only dictum and not a binding interpretation of the Constitution.

The evils which concerned the Enking Court are not present in this instance. Upon reading the Enking opinion, one has to be struck by the Court's fear that the Board was empowered to obtain, by appropriation or condemnation, rights to all or most of the State's unappropriated water, which it could then sell to water users. The Court correctly understood that the purpose of Section 3 of Article 15 was to insure that water would always be a commodity free to users. It was, therefore, the Court's position that the loosely drawn Statute in Enking, because it permitted the State to obtain a monopoly on and to sell water as if a utility, was opposed to the intendment of the constitutional provisions.

While the Enking case speaks to monopoly, the application before us raises none of those problems. The Parks Board is not seeking to tie up undefined, unlimited quantities of water. It is nowhere authorized to do so. All it seeks is to appropriate a discreet amount of water for a non-consumptive use on and in relation to its own land. The threat foreseen by the Enking Court and which led to the expansive Enking dictum are simply not present here. The reasoning of that case is not,

therefore, available to cross-appellant.

A formal distinction exists between the Enking situation and this one. In the Enking case the Board was authorized to act to regulate water resource management generally. Its supposed power was, thus, related to the police power and represented state action in a sovereign capacity. The Parks Board seeks this appropriation in order to benefit its lands. It is not seeking any regulatory end. It is, therefore, acting in a proprietary capacity only. Article 15, Section 3 appears to preclude state sovereign action. It prohibits "denials" of the right to appropriate. A denial connotes an exercise of authority and not an act of property management. As long as the Parks Board is seeking an appropriation in the same way as any other water user, as long as it is acting in a proprietary and not a sovereign capacity, it is not in conflict with Article 15, Section 3.

It should also be noted that the Enking case is an erratic in our law. It is alone in its interpretation of our Constitution or of any of the constitutions of the other western states which have provisions analogous to Article 15, Section 3. Not only were no cases cited in Enking on this question, no cases have followed the Enking dictum despite the fact that §§ 67-4301-4306 have raised the issue since 1925. No similar cases have been found in other states.

It should be noted here, that it certainly could not have been the intent of the framers of the Constitution, nor the Court in Enking to deprive State agencies of the right to appropriate and use water in the same manner as private individuals. If it is decided that State agencies cannot appropriate water, the result would be unrealistic and chaotic. For example, how would the Parks and Highway Departments obtain the water necessary to maintain our State Parks and roadside rest areas where it is

necessary to provide water for the use of the general public. The Fish and Game Department would be unable to continue the beneficial job of planting fish in our streams because the water necessary at the fish hatcheries would be unavailable. The State's institutions of higher learning would not be able to appropriate the water necessary for the obvious consumption required for their existence. These are only a few examples, but they amply illustrate the necessity that various State agencies have for appropriation of water, and indicate the practical needs of State agencies for appropriation of water. A need which cannot be overlooked.

Therefore, it is submitted, that as a matter of law, a State agency can appropriate water for a limited purpose when it is done in the same manner and under the same limitations applicable to all water users of those who desire to appropriate.

The second issue of law raised is whether the preservation of the water in the spring flow of the Malad Canyon Springs for recreational and aesthetic purposes is a beneficial use of water under the Constitution of the State of Idaho. It should be noted at the outset that there is no problem of statutory construction, because Idaho Code, §67-4307 specifically provides that is is a beneficial use of the water.

Article 15, Section 3 of our Constitution describes five catagories of beneficial uses of water. It subjects water use for power generation to regulation and limitation and specifies that, for purposes of condemnation, priorities exist between domestic, mining, agricultural, and manufacturing purposes. It may be urged that these five catagories exhaust the classes of beneficial uses which will support an appropriative water right in Idaho.

An examination of the history of Article 15, Section 3

(1970). The legislature has made such a finding.

No clause in the Constitution or in the Idaho Code specifically limits, defines, or otherwise treats as a term of art the expression "beneficial use of water" or its equivalent. The word "beneficial" in its usual sense has the following meaning:

"Conferring benefits; useful; profitable; helpful; advantageous; serviceable; contributing to a valuable end. . . ." WEB-
STERS INTERNATIONAL DICTIONARY OF THE ENGLISH
LANGUAGE 137 (1890) (This older edition has
been used to preclude any suggestion that
"beneficial" had a more restricted meaning
in the last one-fifth of the Nineteenth
Century, when our Constitution was drafted
and adopted.)

It is therefore submitted that the use request is a beneficial use by general law. Even if it were not so found in the general law, the Legislature has stated that use of water for scenic and recreational purposes is a beneficial use. This declaration is within the power of the Legislature and is not prohibited by our Constitution. The decision of the Department of Water Administration should be affirmed on this issue as a matter of law.

The third and final issue is whether the application before us can begin the process of obtaining an appropriative water right if it lacks a proposed physical diversion or reduction of water to possession.

It has long been held or assumed that there can be created no water right in the arid states without an "appropriation", and that there cannot be an appropriation without some act, some diversion, physically reducing the claimed water to possession and control. Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P.144 (Cal. App. 1920); Colorado River Water Conserv. Dist. v. Rocky Mt. Power Co., 406 P.2d 798 (Colo. 1965); City & County of Denver v. Northern Colo. W.C. Dist., 276 P.2d 992 (Colo. 1954);

see Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909); cf. Cantlin v. Carter, 88 Idaho 179, 397 P.2d 761 (1964). The fundamental requirement of a reduction of the water used to possession is recognized in our Statutes governing permits and licenses. E.g. Idaho Code, §§ 42-202, 42-217, and 42-225.

The reasons underlying this essential feature of the law of prior appropriation are many, but the single most important purpose when related to appropriations for purposes of the sort with which we are concerned here is to give an adequate notice of the appropriation to all the world and to the administrator. Without such notice on the ground there would be few safeguards against abuse of non-consumptive use appropriations not evidenced by some actual physical control of measurable extent. Much of the remaining stream water in Idaho could be claimed to be tied up in "appropriations" for recreation purposes, and each of these claims would have to be litigated before any further water development could take place. Thus, instead of providing an orderly and neutral legal environment -- one rewarding diligence -- for the management of our water resources, the appropriative water rights regime could become an invitation to speculation and obstruction if appropriation could be obtained without diversion or control. We believe, therefore, that the requirement of physical control -- a "diversion" -- is a fundamental and necessary requirement of an appropriation.

It may be possible for the Legislature to provide for specific appropriative water rights to be created without creation of a physical diversion, but so substantial a departure from normal water law doctrine would have to be effected by a clear and unambiguous statement. Idaho Code, §§ 67-4307 and 67-4312 are not so unambiguous as to support a conclusion that the Legislature intended to depart from normal water law procedure. At no point in either of those Sections is there an explicit statement that

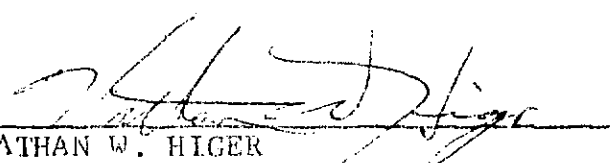
the Statute was meant to create a water right without the usual requisites of an appropriation. In fact the Legislature specifically directed the Park Board "to appropriate" the water in question, and, as is noted above the verb "to appropriate" has always included the act of diversion and control as it has been used in western water law. Furthermore the Legislature has specifically keyed the appropriation process to the normal statutory permit and license procedure, which, as we have stated, specifically recognizes the requirement of the construction of non-natural diversion or control structures.

It is submitted that as a matter of law an actual physical diversion is necessary to appropriate the waters of this State. The decision of the Department of Water Administration should be affirmed.

It is the contention of the Department of Water Administration that Summary Judgment should be granted to the Department of Water Administration on both the appeal and cross-appeal.

DATED this 13th day of November, 1972.

Respectfully submitted,


NATHAN W. HIGER
Counsel, Idaho Department of
Water Administration

37 7108

NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707
TELEPHONE: 384-2215

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

IN THE MATTER OF PERMIT	)	
APPLICATION NO. 37-7108,	)	CASE NO. 15302
IN THE NAME OF THE STATE	)	
OF IDAHO, DEPARTMENT OF PARKS	)	NOTICE OF HEARING
(MALAD CANYON SPRINGS).	)	

TO: State of Idaho, Department of Parks, Appellant;
Idaho State Reclamation Association; North Side
Canal Co., Ltd.; Twin Falls Canal Company, Cross-
Appellants:

YOU AND EACH OF YOU, ARE HEREBY NOTIFIED That Respondent,
Idaho Department of Water Administration's, Motion For Summary
Judgment will be heard before the above-named Court on the
1st day of December, 1972, at the hour of 10 o'clock a.m.

DATED THIS 1st day of November, 1972.


NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration

37 7108

NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707
TELEPHONE: 384-2215

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

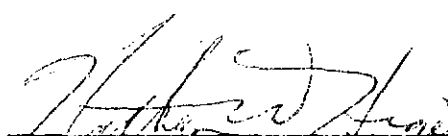
IN THE MATTER OF PERMIT)
APPLICATION NO. 37-7108,)
IN THE NAME OF THE STATE) CASE NO. 15302
OF IDAHO, DEPARTMENT OF)
PARKS (MALAD CANYON SPRINGS).)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November,
1972, I served the attached MOTION OF RESPONDENT, DEPARTMENT OF
WATER ADMINISTRATION, FOR SUMMARY JUDGMENT ON APPEAL AND CROSS-
APPEAL; MEMORANDUM IN SUPPORT OF MOTION OF RESPONDENT, DEPARTMENT
OF WATER ADMINISTRATION, FOR SUMMARY JUDGMENT ON APPEAL AND CROSS-
APPEAL; and NOTICE OF HEARING by placing true and correct copies
thereof in postpaid envelopes addressed to the persons hereinafter
named, at the places and addresses stated below, which are their
last known addresses, and by depositing said envelopes with
contents in the regular United States Mail at Boise, Idaho.

John A. Rosholt, Esq.
PARRY, ROBERTSON, DALY & LARSON
P.O. Box 525
Twin Falls, Idaho 83301

James G. Reid, Esq.
Assistant Attorney General
State of Idaho
Statehouse
Boise, Idaho 83707


NATHAN W. HIGER
Counsel, Idaho Department
of Water Administration

37 7108

RECEIVED

Department of Water Administration

1 PARRY, ROBERTSON, DALY & LARSON
2 P. O. Box 525
3 Twin Falls, Idaho 83301
4 Telephone: 733-3722
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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 Permit) Case No. 15302
13 Application No. 37-7108)
14 in the name of the State of) CROSS-APPEAL
15 Idaho Department of Parks)
16 (Malad Canyon Springs))
17

18 Comes now the Idaho Water Users Association, the Twin Falls
19 Canal Company, and the North Side Canal Company, by and through
20 their attorneys, Parry, Robertson, Daly & Larson, and pursuant to
21 Idaho Code Section 42-203, appeals from the decision of the
22 Department of Water Administration of the State of Idaho dated the
23 17th day of July, 1972, attached hereto and marked Exhibit "A", for
24 the following reasons:

25 I

26 THAT the Department of Water Administration of the State
27 of Idaho erred in holding that it is constitutional for a state
28 agency to appropriate, without explicit constitutional authoriza-
29 tion, the waters of a natural stream and thereby to obtain a water
30 right having a priority over water rights of private persons who
31 have appropriations on said stream made subsequent in time to that
32 of the state agency.

33 II

34 THAT the Department of Water Administration of the State

37 7108

1 of Idaho erred in holding that the uses described in Idaho Code
2 Section 67-4307 are "beneficial uses" so as to support an appro-
3 priative water right under the Idaho Constitution.

4 Dated: October 19, 1972.

5
6 PARRY, ROBERTSON, DALY & LARSON
Twin Falls, Idaho

7
8 By: John A. Rosholt
9 John A. Rosholt
10 Attorneys for Cross-Appellants
Idaho Water Users Association,
11 Twin Falls Canal Company, and
North Side Canal Company, Ltd.

12 SUBSCRIBED AND SWORN to before me this 19th day of October, 1972.

13
14 Lillian M. Pugh
15 Notary Public for Idaho
16 Residing in Twin Falls, Idaho
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have on this 19th day of October, 1972, served the foregoing CROSS-APPEAL by placing a true and correct copy thereof in the United States mail, postage prepaid, addressed to:

Maurice H. Greene
Attorney at Law
P. O. Box 4402
Boise, Idaho 83705

Raymond D. Givens
Givens and Givens
500 Washington Street
Boise, Idaho 83702

W. Anthony Park
Attorney General
State of Idaho
Statehouse,
Boise, Idaho 83707

Nathan Higer
Deputy Attorney General
Department of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707

James G. Reid
Assistant Attorney General
State of Idaho
Statehouse
Boise, Idaho 83707


JOHN A. ROSHOLT

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State of)
Idaho, Department of Parks)
(Malad Canyon Springs).)
_____)

DECISION

Idaho Code, Section 67-4307 was enacted as Section 1 of Chapter
207 of the 1971 Idaho Session Laws. That Section provides as follows:

"The state park board is hereby authorized
and directed to appropriate in trust for the
people of the state of Idaho the unappropriated
natural spring flow arising upon the area
described as follows, to-wit:

The south half of the southwest quarter,
and the south half of the southeast
quarter, of section twenty-five, township
six south, range thirteen east of the
Boise Meridian; and

The north half of the northwest quarter,
and the northwest quarter of the northeast
quarter, of section thirty-six, township
six south, range thirteen east of the
Boise Meridian.

The preservation of water in the area described
for its scenic beauty and recreational purposes
necessary and desirable for all citizens of
the state of Idaho is hereby declared to be
a beneficial use of such water.

No fee shall be required in connection with
said appropriation by the state park board
or the permit issued in connection therewith,
but license shall issue at any time upon
proof of beneficial use to which said waters
are now dedicated.

37 7108

The park board, or its successor, shall be deemed to be the holder of such permit, in trust for the people of the state, and the public use of the unappropriated water in the specific area herein described is declared to be of greater priority than any other use except that of domestic consumption.

The unappropriated lands belonging to the state of Idaho between the high water mark on one bank to the high water mark on the opposite bank, of the area described, are hereby declared to be devoted to a public use in connection with the preservation of the area in its present condition as a place of recreation for the citizens of the state of Idaho."

Pursuant to the direction contained in that Statute, the Idaho Parks Department filed an Application for a Permit to appropriate the public waters of the State, more particularly, to appropriate the unappropriated waters of the springs in Malad Canyon. This application was protested by the Twin Falls Canal Co., the North Side Canal Co., the Idaho State Reclamation Association, the Boise Project Board of Control, the Owyhee Project South Board of Control, and the Gem Irrigation District. A meeting was had between representatives of the Applicant, the Protestants, the Attorney General's office and this Department, at which all participants agreed that there were no issues of fact which would require determination at a hearing. The parties further agreed that the Protestants had standing to protest, that the subject waters are waters of a natural stream, that the unaugmented, natural spring flow of the Malad Canyon Springs was nine hundred forty (940) cubic feet per second, and that a large map of the area, now marked as "Exhibit B", accurately portrays the land and its ownership in the area of the proposed appropriation and a preliminary plan for a park through which the waters are to be used pursuant to Section 67-4307.

All parties further agreed that there were only three (3) substantial issues of law which constituted the entire basis of the protests herein. These are:

Court discussed the relationship between Section 3 of Article 15 of the Idaho Constitution and the powers which had been accorded the Board. It undertook this discussion only in an effort to illustrate a legislative intention to create a special corporation and not a mere branch of government. That Court reasoned that, if an agency of the State could appropriate any or all of the waters of the State, it could preclude private parties from gaining a better priority. The agency could, therefore, effectively deny the right to appropriate water to the citizens of the State. That, the Court concluded, would probably be unconstitutional under Article 15, Section 3. Having reached that conclusion, the Court held that the Legislature would not be presumed to have done an unconstitutional act and, therefore, that the power to make an appropriation was evidence that the Board was in fact a corporation.

This conclusion, indeed treatment of this entire issue, was unnecessary for the decision in the Enking case. There were many other substantial reasons for the Court to hold that the Board was in fact a corporation. It need not have discussed the Article 15, Section 3 issue at all. Following the usual precepts of constitutional interpretation, it should not have even considered them. The discussion at 56 Idaho 731-33 is, therefore, only dictum and not a binding interpretation of the Constitution.

The evils which concerned the Enking Court are not present in this instance. Upon reading the Enking opinion, one has to be struck by the Court's fear that the Board was empowered to obtain, by appropriation or condemnation, rights to all or most of the State's unappropriated water, which it could then sell to water users. The Court correctly understood that the purpose of Section 3 of Article 15 was to insure that water would always be a commodity free to users. It was, therefore, the Court's position that the loosely drawn Statute in Enking, because it permitted the State to obtain a monopoly on and to sell water

as if a utility, was opposed to the intendment of the constitutional provisions.

While the Enking case speaks to monopoly, the application before us raises none of those problems. The Parks Board is not seeking to tie up undefined, unlimited quantities of water. It is nowhere authorized to do so. All it seeks is to appropriate a discreet amount of water for a non-consumptive use on and in relation to its own land. The threat foreseen by the Enking Court and which led to the expansive Enking dictum are simply not present here. The reasoning of that case is not, therefore, available to ~~Protestants here.~~ ^{over-ruled}

A formal distinction exists between the Enking situation and this one. In the Enking case the Board was authorized to act to regulate water resource management generally. Its supposed power was, thus, related to the police power and represented state action in a sovereign capacity. The Parks Board seeks this appropriation in order to benefit its lands. It is not seeking any regulatory end. It is, therefore, acting in a proprietary capacity only. Article 15, Section 3 appears to preclude state sovereign action. It prohibits "denials" of the right to appropriate. A denial connotes an exercise of authority and not an act of property management. As long as the Parks Board is seeking an appropriation in the same way as any other water user, as long as it is acting in a proprietary and not a sovereign capacity, it is not in conflict with Article 15, Section 3.

It should also be noted that the Enking case is an erratic in our law. It is alone in its interpretation of our Constitution or of any of the constitutions of the other western states which have provisions analogous to Article 15, Section 3. Not only were no cases cited in Enking on this question, no cases have followed the Enking dictum despite the fact that Sections 67-4301 -- 4306 have

because Idaho Code, Section 67-4307 specifically provides that it is a beneficial use of the water.

Article 15, Section 3 of our Constitution describes five (5) categories of beneficial uses of water. It subjects water use for power generation to regulation and limitation and specifies that, for purposes of condemnation, priorities exist between domestic, mining, agricultural, and manufacturing purposes. It ^{may be} (is) urged that these five (5) categories exhaust the classes of beneficial uses which will support an appropriative water right in Idaho.

An examination of the history of Article 15, Section 3 reveals that no such exhaustive list was intended in that Section. The draftsmen of the Constitution apparently feared that important consumptive uses of water might be precluded by prior but less important water consuming enterprise. Thus they felt compelled to provide for condemnation of water rights having less importance. At the same time, they expressed fear that by establishing these priorities they might destroy the entire concept of rewarding diligence which underlies the entire appropriative water rights system. The history of the Constitution reveals that the drafters compromised their concerns by establishing priorities among some of the possibly competing consumptive uses. At the same time there was a strong negative reaction to too many priorities and too much specificity. See 2 IDAHO CONST. CONV., PROCEEDINGS AND DEBATES, 1115-48, 1154-64, 1330-33, 1140-42 (1912). Thus the listing in Article 15, Section 3 was probably meant to be not exhaustive and clearly only relates to consumptive uses ^{for consumptive purposes}.

This conclusion is buttressed by the fact that the mention of water used for power, a non-consumptive use, is unrelated to the list of priorities. If this list was understood to have been exhaustive, then surely power generation would have been given a priority when its mention was inserted in Section 3.

III.

The final question is whether the application before us can begin the process of obtaining an appropriative water right if it lacks a proposed physical diversion or reduction of water to possession.

It has long been held or assumed that there can be created no water right in the arid states without an "appropriation", and that there cannot be an appropriation without some act, some diversion, physically reducing the claimed water to possession and control. Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P.144 (Cal. App. 1920); Colorado River Water Conserv. Dist. V. Rocky Mt. Power Co., 406 P.2d 798 (Colo. 1965); City & County of Denver v. Northern Colo. W.C. Dist., 276 P.2d 992 (Colo. 1954); see Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909); cf. Cantlin v. Carter, 88 Idaho 179, 397 P.2d 761 (1964). The fundamental requirement of a reduction of the water used to possession is recognized in our Statutes governing permits and licenses. E.g. Idaho Code, Sections 42-202, 42-217, and 42-225.

The reasons underlying this essential feature of the law of prior appropriation are many, but the single most important purpose when related to appropriations for purposes of the sort with which we are concerned here is to give an adequate notice of the appropriation to all the world and to the administrator. Without such notice on the ground there would be few safeguards against abuse of non-consumptive use appropriations not evidenced by some actual physical control of measurable extent. Much of the remaining stream water in Idaho could be claimed to be tied up in "appropriations" for recreation purposes, and each of these claims would have to be litigated before any further water development could take place. Thus, instead of providing an orderly and neutral legal environment -- one rewarding

diligence -- for the management of our water resources, the appropriative water rights regime could become an invitation to speculation and obstruction if appropriation could be obtained without diversion or control. We believe, therefore, that the requirement of physical control -- a "diversion" -- is a fundamental and necessary requirement of an appropriation.

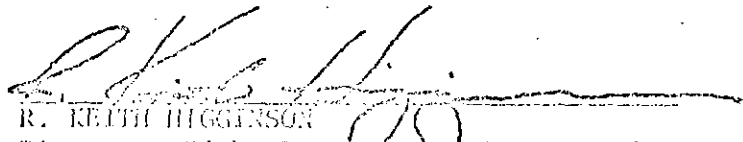
It may be possible for the Legislature to provide for specific appropriative water rights to be created without creation of a physical diversion, but so substantial a departure from normal water law doctrine would have to be effected by a clear and unambiguous statement. Idaho Code, Sections 67-4307 and 67-4312 are not so unambiguous as to support a conclusion that the Legislature intended to depart from normal water law procedure. At no point in either of those Sections is there an explicit statement that the Statute was meant to create a water right without the usual requisites of an appropriation. In fact the Legislature specifically directed the Park Board "to appropriate" the water in question, and, as is noted above the verb "to appropriate" has always included the act of diversion and control as it has been used in western water law. Furthermore the Legislature has specifically keyed the appropriation process to the normal statutory permit and license procedure, which, as we have stated, specifically recognizes the requirement of the construction of non-natural diversion or control structures.

For these reasons we must conclude that Idaho Code, Sections 67-4307 and 67-4312 are not so explicit, clear, or unambiguous as to permit us to conclude that the Legislature intended to depart significantly from normal concepts of western water law by creating an appropriation without a physical diversion. Accord Colorado River Water Conserv. Dist. v. Rocky Mt. Power Co., 406 P.2d 798 (Colo. 1965). We are, therefore, compelled to reject this application and to refuse to issue a permit for it.

It should be here noted that our Decision in this regard will not affect the lake water appropriations provided in other Sections of Chapter 43 of Title 67. In the case of each of those lakes there is an outlet control structure which diverts the lake water from its normal flow and which reduces it to physical possession.

NOW THEREFORE IT IS ORDERED that Application For Permit Number 37-7108 be and hereby is rejected and a permit therefor is refused.

DATED this 6th day of July, 1972.


R. KEITH HIGGINSON
Director, Idaho Department of Water Administration

37 7108

CERTIFICATE OF SERVICE

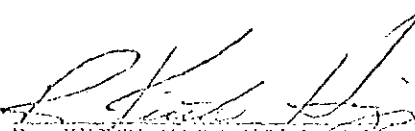
I HEREBY CERTIFY that on the 7th day of July, 1972,
I served the attached DECISION by placing true and correct copies
thereof in postpaid envelopes addressed to the persons hereinafter
named, at the places and addresses stated below, which are their last
known addresses, and by depositing said envelopes with contents in
the regular United States Mail at Boise, Idaho.

Raymond D. Givens, Esq.
GIVENS & GIVENS
P.O. Box 964
Boise, Idaho 83701

Maurice H. Greene, Esq.
P.O. Box 4402
Boise, Idaho 83705

John A. Rosholt, Esq.
PARRY, ROBERTSON, DALY, & LARSON
P.O. Box 525
Twin Falls, Idaho 83301

State of Idaho
Office of the Attorney General
STATEHOUSE MAIL


R. KEITH HUGGELSON, Director
Department of Water Administration

37 7108

EXHIBIT A

W. ANTHONY PARK
Attorney General
State of Idaho

JAMES G. REID
Assistant Attorney General
State of Idaho
Statehouse, Boise, Idaho 83707
Telephone: 208-384-2400

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State of)
Idaho, Department of Parks)
(Malad Canyon Springs).)

Case No. _____
PETITION FOR APPEAL

C O M E S N O W The Idaho Department of Parks,
State of Idaho, by and through their Attorney James G. Reid,
pursuant to Section 42-202, Idaho Code, and appeals from the
decision of the Department of Water Administration of the
State of Idaho dated the 17th day of July, 1972, attached
hereto and marked exhibit "A", denying permit application no.
37-7108 for the following reason:

I.

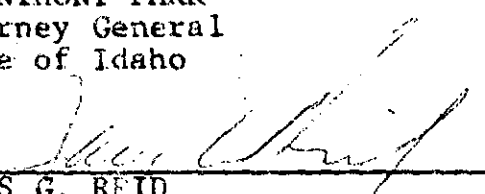
THAT the Department of Water Administration of the
State of Idaho erred in holding that there cannot be created
a valid appropriative water right in Idaho without an actual,
physical reduction of the water claimed to possession through
an actual diversion of the water from, or artificial control
of the water in, the waters' natural locus or condition.

DATED This ____/____ day of September, 1972.

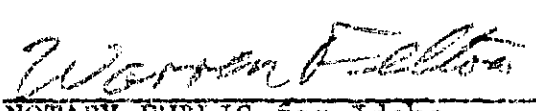
PETITION FOR APPEAL, P. 1

37 7108

W. ANTHONY PARK
Attorney General
State of Idaho


JAMES G. REID
Assistant Attorney General
State of Idaho
Statehouse, Boise, Idaho 83707

SUBSCRIBED AND SWORN To before me this 1st day of
September, 1972.


NOTARY PUBLIC for Idaho
Residing in Boise, Idaho

CERTIFICATE OF MAILING

I HEREBY CERTIFY That I have on this 1 day of
September, 1972, served the foregoing PETITION FOR APPEAL by
placing a true and correct copy thereof in the United States
mail, postage pre-paid, addressed to the Department of Water
Administration, State of Idaho, 614 State Street, Boise, Idaho,
83707.


JAMES G. REID
Assistant Attorney General
State of Idaho

37 7108

September 8, 1972

C
O
P
Y
Clerk of the District Court
Fifth Judicial District
Gooding County Courthouse
Gooding, Idaho 83330

RE: IN THE MATTER OF PERMIT APPLICATION
NO. 37-7108, IN THE NAME OF THE STATE
OF IDAHO, DEPARTMENT OF PARKS (MALAD
CANYON SPRINGS).
Case No. 15302

Dear Sir:

P Enclosed please find an ANSWER OF RESPONDENT, DEPARTMENT OF
WATER ADMINISTRATION, TO PETITION FOR APPEAL OF IDAHO DEPARTMENT
OF PARKS in the above-entitled action for filing with the District
Court.

Thank you for your assistance and cooperation in this matter.

Very truly yours,

NATHAN W. HIGER
Counsel, Idaho Department of
Water Administration

NWH/sc

Enclosure

37 7108

NATHAN W. HIGER
Counsel, Idaho Department of
Water Administration
Statehouse - Annex #2
Boise, Idaho 83707
TELEPHONE: 384-2215

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

IN THE MATTER OF PERMIT	)	
APPLICATION NO. 37-7108,	)	CASE NO. 15302
IN THE NAME OF THE STATE	)	
OF IDAHO, DEPARTMENT OF	)	ANSWER OF RESPONDENT,
PARKS (MALAD CANYON SPRINGS).	)	DEPARTMENT OF WATER ADMINISTRATION,
	)	TO PETITION FOR APPEAL OF IDAHO
	)	DEPARTMENT OF PARKS

COMES NOW, the DEPARTMENT OF WATER ADMINISTRATION, STATE
OF IDAHO, and by way of Answer to the Petition for Appeal of the
Idaho Department of Parks, states, alleges, and denies as follows:

I.

Denies each and every allegation contained in said
Petition for Appeal not specifically admitted herein.

II.

Admits that the Department of Water Administration
issued an Order and Decision denying the application for permit
#37-7108, but states that said Order was issued on July 6th,
1972, rather than July 17th, 1972, as alleged in the Petition
and that this Appeal is brought pursuant to §42-203, Idaho Code
rather than §42-202 as alleged in the Petition.

III.

The Department of Water Administration denies that it

erred in denying the permit, and asserts that said Decision was based upon and in conformity with the laws of this State on appropriative water rights.

WHEREFORE, the DEPARTMENT OF WATER ADMINISTRATION prays that the Petition of the Idaho Department of Parks be denied and that the Court affirm the Decision of the Department of Water Administration in all respects.

DATED this 8th day of September, 1972.


NATHAN W. HIGER
Counsel, Idaho Department of
Water Administration

I HEREBY CERTIFY that on the 8th day of September, 1972, I served the attached ANSWER OF RESPONDENT, DEPARTMENT OF WATER ADMINISTRATION, TO PETITION FOR APPEAL OF IDAHO DEPARTMENT OF PARKS, by placing a true and correct copy thereof in a post-paid envelope addressed to the person hereinafter named, at the place and address stated below, which is his last known address, and by depositing said envelope with contents in the regular United States Mail at Boise, Idaho.

JAMES G. REID
Assistant Attorney General
State of Idaho
Statehouse
Boise, Idaho 83707


NATHAN W. HIGER
Counsel, Idaho Department of
Water Administration

File 37-7108

July 10, 1972

The Honorable Earl C. Greenawalt
House of Representatives
District No. 22B
206 E. Ave. A.
Jerome, Idaho 83338

Dear Mr. Greenawalt:

Enclosed is a copy of the decision of this office which was issued last Friday in connection with the application of the Parks Board to appropriate the waters of Galad Canyon Springs. Since you co-sponsored the original legislation in 1971 which brought about this filing, I'm certain that you would be interested in our reason for rejecting the application. We are hopeful that this matter can now be quickly brought into court and a decision on the three constitutional law questions issued before the 1973 legislature convenes.

If you have any questions concerning this, I would be happy to discuss it with you.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

Enclosure

37 7108

File 37-7108

July 10, 1972

C
Mr. Jack A. Barnett
Consulting Engineer
Room 201, Idaho Building
Boise, Idaho

O
Dear Jack:

Enclosed is a copy of the decision of this office which was issued last Friday in connection with the application of the Parks Board to appropriate the waters of Malad Canyon Springs.

P
If you have any questions concerning this, I would be happy to discuss it with you.

Very truly yours,

Y
R. KEITH HIGGINSON
Director

RKH:mjl

Enclosure

37 7108

File 37-7108

July 10, 1972

C
The Honorable J. Vard Chatburn
House of Representatives
District No. 25
Ranch
Albion, Idaho 83311

O
Dear Mr. Chatburn:

P
I thought you would be interested in receiving a copy of the decision which was issued last week rejecting the application of the Parks Board for a permit to appropriate the waters of Malad Canyon Springs. This application was filed under the provisions of House Bill 69 of the 1971 legislature. You will recall that that bill raised several constitutional water law questions. The decision gives our opinion concerning each of those questions, and we are now hopeful that the court will quickly review this matter so that we will finally have an answer.

If you have any questions concerning this decision or future action needed, I will be happy to discuss it with you.

Y
Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

Enclosure

37-7108

File 327108

July 10, 1972

The Honorable J. Marsden Williams
Senator, State of Idaho
District No. 29
1776 Camrose
Idaho Falls, Idaho 83401

Dear Senator:

I thought you would be interested in receiving a copy of the decision which was issued last week rejecting the application of the Parks Board for a permit to appropriate the waters of Malad Canyon Springs. This application was filed under the provisions of House Bill 69 of the 1971 legislature. You will recall that that bill raised several constitutional water law questions. The decision gives our opinion concerning each of those questions, and we are now hopeful that the court will quickly review this matter so that we will finally have an answer.

If you have any questions concerning this decision or future action needed, I will be happy to discuss it with you.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

Enclosure

37 7108

File 37-7108

July 10, 1972

The Honorable Vernon F. Ravenscroft
House of Representatives
District No. 22A
P. O. Box 5
Tuttle, Idaho 83354

Dear Vern:

Enclosed is a copy of the decision of this office which was issued last Friday in connection with the application of the Parks Board to appropriate the waters of Malad Canyon Springs. Since you co-sponsored the original legislation in 1971 which brought about this filing, I'm certain that you would be interested in our reason for rejecting the application. We are hopeful that this matter can now be quickly brought into court and a decision on the three constitutional questions issued before the 1973 legislature convenes.

If you have any questions concerning this, I would be happy to discuss it with you.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mj1

Enclosure

37 7108

SENDER: Be sure to follow instructions on other side

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37 7108

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Ruth Kassens

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Divens & Divens by Vickie Vasquez

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②

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DATE DELIVERED

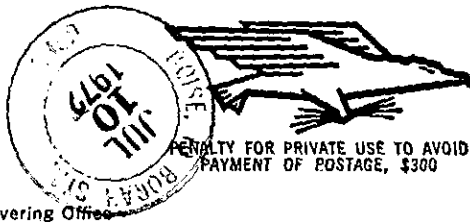
JUL 10 1972

③

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STATEHOUSE - ANNEX #2

BOISE, IDAHO 83707

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23793

1

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TO**

DEPARTMENT OF WATER ADMINISTRATION

STATEHOUSE - ANNEX #2

BOISE, IDAHO 83707

37 7108

NAME AND
ADDRESS
OF SENDER

Dept of Water Admin

Indicate type of mail:

☐ REGISTERED ☐ REGISTERED
C.O.D.

☒ CERTIFIED

Affix stamp here if issued as certificate of mailing or for additional
copies of this bill.

POSTMARK AND DATE OF RECEIPT

NUMBER OF ARTICLE	NAME OF ADDRESSEE, STREET, AND POST OFFICE ADDRESS	POSTAGE	FEB	R. R. FEE	REG. DEL. FEE	ACTUAL VALUE	SURCHARGE	REMARKS*
1	<i>23790 State of Idaho, Dept of Parks</i>							<i>37-7108</i>
2	<i>Statehouse, Boise</i>							
3								
4	<i>23791 Raymond D. Shivers, Shivers & Shivers</i>							
5	<i>PO Box 964, Boise</i>							
6								
7	<i>23792 John A. Resbert, Pamy, Rahutan,</i>							
8	<i>Idaho, Laramie, PO Box 525</i>							
9	<i>Laramie Falls</i>							
10								
11	<i>23793 Maurice H. Greene PO Box 1402</i>							
12	<i>Boise</i>							
13								
14	<i>23794 State of Idaho, Office of the</i>							
15	<i>Attorney General, Statehouse</i>							
16								
17								
18								
19								
20								

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APPLICATION FOR REGISTRATION OR CERTIFICATION

(Surcharges are not required on international registered mail)

c46-16-8792-15 U.S. GOVERNMENT PRINTING OFFICE

37 7108

July 7, 1972 CERTIFIED MAIL

Re: Application for Permit No. 37-7108 (Malad Canyon Springs)

State of Idaho, Dept. of Parks
Statehouse
Boise, Idaho 83707

Gentlemen:

Enclosed herewith is a copy of the above referenced application for permit which has been DENIED by this office. Also enclosed is a copy of the Decision.

If you have any questions regarding this matter, please contact us.

Sincerely,

BOBBY D. FLEENOR
Assistant Director

BDF:DR
Enclosures

bc: Southern District Office

37 7108

--MEMORANDUM--

TO: NATHAN HIGER

FROM: PHIL BARBER

DATE: May 31, 1972

**RE: FILES -- MALAD CANYON SPRINGS -- MALAD SPRINGS
37-7108**

COPY
This is the first of the Thousand Springs filings, and the one which is likely to go to Court. I will soon have finished the draft of a decision in this matter. Once our decision is rendered, and an appeal is taken to the District Court, the Attorney General's office will be involved directly as a contending party representing the Department of Parks. The Department of Water Administration, therefore, if it desires to be represented in Court, will be compelled to seek outside counsel if the Department of Parks has not already done so.

Y
The Thousand Springs filings are a result of an effort by the Legislature to preserve the remaining springs at the Thousand Springs, and/or test some nagging issues of water law by directing the Department of Parks to obtain water rights appropriations, permits, and licenses for those springs. The questions presented involve whether it is possible to "appropriate" water without actually diverting it or otherwise rendering it subject to control, whether the State can appropriate water and whether scenic and recreational purposes constitute beneficial uses of water so as to support an appropriative water right in Idaho.

P.M.B.

PMB/sc

CC: R. Keith Higginson

37 7108

37-7108 - Idaho Dept. of Parks

Statehouse, Room No. 420, Boise, Idaho

October 27, 1971 - 10:00 a.m.

ROSTER OF ATTENDANCE

Name	Address	Representing
Ned Thillard	State House, Boise	Idaho Dept. of Parks
Tom Cotton	Box 67 Homedale, Idaho	So. Bd. of Control
Maurice S. Greene	Box 5402 Boise	owning Project & Gum Irrig. Dist
Loyce Van Curen	214 Broadway, Boise	and Idaho State Department of Boise Project & Land Control
John Mage	Atty General's Off.	Atty General
JOHN ROSHOLT	P.O. 525 Twin Falls	Ida St. Rel. Assoc. N.S. Canal
Robert E. Baker	P.O. Box 2832 Boise	T.F. Canal Ruin View Trmt. Co, Inc
JACK A. BARNETT	Room 520 Idaho	Idaho State Rec. Assn.

Phil BARBER	A.G. of Water Admin. Office	Counsel Dept. of Water Admin
-------------	--------------------------------	---------------------------------

R. KEITH HIGGINSON WATER ADMINISTRATION

Bob Fleenor	Water Administration	
Gayle Johnson	1601 E. Boise Ave	Board of Control Boise.
Ed Diehl	921 N. Lincoln	North Side Canal Co.

37 7108

Determine

- Procedure
- Are there issues of fact
- or are the issues points of law

Protest Points

- No point of diversion Can water be appropriated without diversion?
- Uses not in accordance with law
- Can water be appropriated by the State
- ~~Financial Responsibility~~

Question of Fact

- What has the historical flow?
- Is a stream involved?

→ Provide USGS letter to the parties.

Will Parks Board stipulate that the protests have standing.

What is the priority?

→ Provide copies of map to protestants

Include additional information noting point of diversion of other users.

PMB
PMB

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State of) STIPULATION
Idaho, Department of Parks)
(Malad Canyon Springs).)
_____)

COMES NOW, the Department of Parks of the State of Idaho, Applicant in the above-entitled matter and stipulates, by and through counsel, that the Department of Water Administration may proceed to render its decision on its protest in the above-entitled matter without hearing oral arguments thereon; provided however, that, if any other party to this matter, whether Applicant or Protestant, demands leave to appear before the Department for oral argument, the Department of Parks of the State of Idaho hereby reserves the right to appear by and through counsel and to argue the issues of law presented in this matter.

DATED this 24th day of April, 1972.

W. ANTHONY PARK
ATTORNEY GENERAL, STATE OF IDAHO

by John Magel
JOHN MAGEL
Deputy Attorney General
Attorney for Applicant
Department of Parks of the
State of Idaho

CONVERSATION MEMORANDUM

DATE

4/14/72

FILE

MALIBU CANYON

NAME OF PARTY

JOHN MABEL

EMPLOYEE

R. K. H.

RE:

ASKED JOHN WHY HE WANTED TO
ORALLY ARGUE CASE. HE SAID IT WAS
PARTIALLY POLITICAL TO SATISFY PARKS BOARD
AND SPONSORS OF LEGISLATION. MIGHT BE
WILLING TO SUBMIT INSTEAD AN ADDITIONAL
MEMO ON AUTHORITY OF DEPARTMENT TO
DENY APPLICATION - CLAIMS SUCH ACTION WOULD
BE CONTRARY TO LEGISLATIVE DIRECTION.



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83707

W. ANTHONY PARK
ATTORNEY GENERAL

PMB
RECEIVED
APR 13 1972
Department of Water Administration

April 13, 1972

Mr. Phillip M. Barber
Counsel
Department of Water Administration
BUILDING

Re: Water Permit Application
No. 37-7108 (Malad Canyon
Springs)

Dear Phil:

This is in response to your letter of April 6, 1972.

At the present time, we feel that oral argument should be heard in the above matter. Thus, we are not in a position to execute the stipulation enclosed with your letter.

Yours very truly,

FOR THE ATTORNEY GENERAL

John Magel By *R.C.*

JOHN MAGEL
Deputy Attorney General

JM:rc

cc: Mr. Steven W. Bly

37 7108

RAYMOND L. GIVENS
RAYMOND D. GIVENS

GIVENS AND GIVENS
ATTORNEYS AT LAW
COLUMBIA BUILDING, 500 WASHINGTON STREET
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April 12, 1972

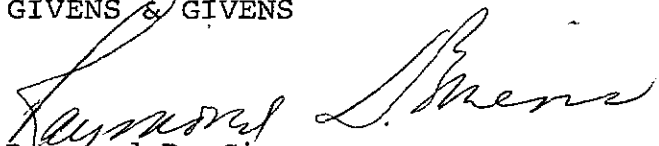
Mr. Phillip Barber
Counsel
Department Water Administration
614 West State
Boise, Idaho

Dear Mr. Barber;

I can find no immediate need for an oral argument.
I have signed and return herewith the Stipulation for
argument.

Yours Very Truly,

GIVENS & GIVENS


Raymond D. Givens

RDG:sd
Encl/

37 7118

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APR 11 1972

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State)
of Idaho, Department of)
Parks (Malad Canyon)
Springs).)
_____)

STIPULATION

COMES NOW, Boise Project Board of Control,
Protestant in the above-entitled matter and stipulates,
by and through counsel, that the Department of Water
Administration may proceed to render its decision
on its protest in the above-entitled matter without
hearing oral arguments thereon; provided however,
that, if any other party to this matter, whether
Applicant or Protestant, demands leave to appear be-
fore the Department for oral argument, Boise Project
Board of Control hereby reserves the right to appear
by and through counsel and to argue the issues of
law presented in this matter.

DATED this 11th day of April, 1972.

GIVENS & GIVENS
Attorneys for Protestant
Boise Project Board of Control;

by Raymond D. Givens
RAYMOND D. GIVENS

37 7108

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State)
of Idaho, Department of)
Parks (Malad Canyon)
Springs).)
_____)

STIPULATION

COMES NOW, Idaho State Reclamation Association,
North Side Canal Co., Ltd., and Twin Falls Canal Com-
pany, Protestants in the above-entitled matter and
stipulates, by and through counsel, that the Depart-
ment of Water Administration may proceed to render
its decision on its protest in the above-entitled
matter without hearing oral arguments thereon; pro-
vided however, that, if any other party to this mat-
ter, whether Applicant or Protestant, demands leave
to appear before the Department for oral argument,
Idaho State Reclamation Association, North Side Canal
Co., Ltd., and Twin Falls Canal Company hereby reserves
the right to appear by and through counsel and to argue
the issues of law presented in this matter.

DATED this 10th day of April, 1972.

PARRY, ROBERTSON, DALY, & LARSON
Attorneys for Protestants
Idaho State Reclamation Association,
North Side Canal Co., Ltd.
Twin Falls Canal Company;

by John A. Rosholt
JOHN A. ROSHOLT

37-7108

RECEIVED
APR 11 1972
Department of Water Administration

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State) STIPULATION
of Idaho, Department of)
Parks (Malad Canyon)
Springs).)
_____)

COMES NOW, Owyhee Project South Board of Control and Gem Irrigation District, Protestants in the above-entitled matter and stipulates, by and through counsel, that the Department of Water Administration may proceed to render its decision on its protest in the above-entitled matter without hearing oral arguments thereon; provided however, that, if any other party to this matter, whether Applicant or Protestant, demands leave to appear before the Department for oral argument, Owyhee Project South Board of Control and Gem Irrigation District hereby reserves the right to appear by and through counsel and to argue the issues of law presented in this matter.

DATED this 10th day of April, 1972.

MAURICE H. GREENE
Attorney for Protestants
Owyhee Project South Board of Control
Gem Irrigation District;

Maurice H. Greene

37 7108

April 6, 1972

Raymond D. Givens, Esq.
GIVENS & GIVENS
P.O. Box 964
Boise, Idaho 83701

RE: Water Permit Application No. 37-7108
(Malad Canyon Springs)

Dear Mr. Givens:

All briefs are now on file with the Department of Water Administration. The Department is prepared to undertake consideration of these briefs.

It has remained unclear in my mind, following our pre-hearing conference, as to whether or not we had agreed that the Department would render its decision in this matter solely on the briefs or would hear oral arguments first. This question was not covered in the original Stipulation which only provided that there were no factual issues to be determined at a hearing. If you feel that oral arguments on the questions of law are not necessary, I would greatly appreciate your signing and returning to me the enclosed Stipulation to that effect. Your prompt response in this matter will hasten the Department's decision.

Sincerely,

PHILLIP M. BARBER
Counsel, Department of Water
Administration

PMB/sc

Enclosure

37 7108

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State)
of Idaho, Department of)
Parks (Malad Canyon)
Springs).)
_____)

STIPULATION

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fore the Department for oral argument, Boise Project
Board of Control hereby reserves the right to appear
by and through counsel and to argue the issues of
law presented in this matter.

DATED this _____ day of _____, 1972.

GIVENS & GIVENS
Attorneys for Protestant
Boise Project Board of Control;

by _____
RAYMOND D. GIVENS

37 7108

April 6, 1972

C
Maurice H. Green, Esq.
P.O. Box 4402
Boise, Idaho 83705

O
RE: Water Permit Application No. 37-7108
(Malad Canyon Springs)

Dear Mr. Green:

P
All briefs are now on file with the Department of Water Administration. The Department is prepared to undertake consideration of these briefs.

P
Y
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Sincerely,

PHILLIP M. BARBER
Counsel, Department of Water
Administration

PMB/sc

Enclosure

37 7108

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State) STIPULATION
of Idaho, Department of)
Parks (Malad Canyon)
Springs).)
_____)

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DATED this _____ day of _____, 1972.

MAURICE H. GREEN
Attorney for Protestants
Owyhee Project South Board of Control
Gem Irrigation District;

37 7108

April 6, 1972

John A. Rosholt, Esq.
FARRY, ROBERTSON, DALY, & LARSON
P.O. Box 525
Twin Falls, Idaho 83301

RE: Water Permit Application No. 37-7108
(Malad Canyon Springs)

Dear Mr. Rosholt:

All briefs are now on file with the Department of Water Administration. The Department is prepared to undertake consideration of these briefs.

It has remained unclear in my mind, following our pre-hearing conference, as to whether or not we had agreed that the Department would render its decision in this matter solely on the briefs or would hear oral arguments first. This question was not covered in the original Stipulation which only provided that there were no factual issues to be determined at a hearing. If you feel that oral arguments on the questions of law are not necessary, I would greatly appreciate your signing and returning to me the enclosed Stipulation to that effect. Your prompt response in this matter will hasten the Department's decision.

Sincerely,

PHILLIP M. BARBER
Counsel, Department of Water
Administration

PMB/sc

Enclosure

37 7108

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State)
of Idaho, Department of)
Parks (Malad Canyon)
Springs).)

STIPULATION

COMES NOW, Idaho State Reclamation Association,
North Side Canal Co., Ltd., and Twin Falls Canal Com-
pany, Protestants in the above-entitled matter and
stipulates, by and through counsel, that the Depart-
ment of Water Administration may proceed to render
its decision on its protest in the above-entitled
matter without hearing oral arguments thereon; pro-
vided however, that, if any other party to this mat-
ter, whether Applicant or Protestant, demands leave
to appear before the Department for oral argument,
Idaho State Reclamation Association, North Side Canal
Co., Ltd., and Twin Falls Canal Company hereby reserves
the right to appear by and through counsel and to argue
the issues of law presented in this matter.

DATED this _____ day of _____, 1972.

PARRY, ROBERTSON, DALY, & LARSON
Attorneys for Protestants
Idaho State Reclamation Association,
North Side Canal Co., Ltd.
Twin Falls Canal Company;

by _____
JOHN A. ROSHOLT

37 7108

April 6, 1972

Mr. John Magel
Deputy Attorney General
STATEHOUSE MAIL

RE: Water Permit Application No. 37-7108
(Malad Canyon Springs)

Dear Mr. Magel:

All briefs are now on file with the Department of Water Administration. The Department is prepared to undertake consideration of these briefs.

It has remained unclear in my mind, following our pre-hearing conference, as to whether or not we had agreed that the Department would render its decision in this matter solely on the briefs or would hear oral arguments first. This question was not covered in the original Stipulation which only provided that there were no factual issues to be determined at a hearing. If you feel that oral arguments on the questions of law are not necessary, I would greatly appreciate your signing and returning to me the enclosed Stipulation to that effect. Your prompt response in this matter will hasten the Department's decision.

Sincerely,

PHILLIP M. BARBER
Counsel, Department of Water
Administration

PMB/sc

Enclosure

37 7108

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State of) STIPULATION
Idaho, Department of Parks)
(Malad Canyon Springs).)
_____)

COMES NOW, the Department of Parks of the State of Idaho, Applicant in the above-entitled matter and stipulates, by and through counsel, that the Department of Water Administration may proceed to render its decision on its protest in the above-entitled matter without hearing oral arguments thereon; provided however, that, if any other party to this matter, whether Applicant or Protestant, demands leave to appear before the Department for oral argument, the Department of Parks of the State of Idaho hereby reserves the right to appear by and through counsel and to argue the issues of law presented in this matter.

DATED this _____ day of _____, 1972.

W. ANTHONY PARK
ATTORNEY GENERAL, STATE OF IDAHO

by _____
JOHN MAGEL
Deputy Attorney General
Attorney for Applicant
Department of Parks of the
State of Idaho

37 7108

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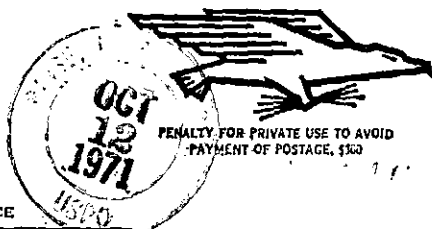
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J. A. Carrel

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Martha Titmus

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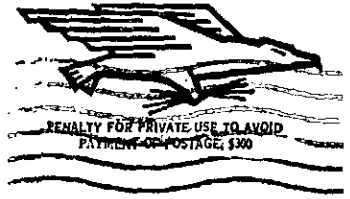
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1

Mahoe State Reclamation Ass'n

2

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3

Christine W. Nootan

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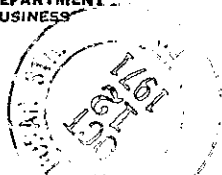
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3	23104 Boise Project Board of Control							
4	Gayle Johnson Chairman 214 Broadway							
5	Boise							
6	23105 Gen Linn West + South Board of							
7	Central Owyhee Project Fern Cotton							
8	See - mgs Box 69 Homedale							
9	23106 Idaho State Reclamation Board							
10	Jack A Barnett 520 Idaho Bldg							
11	Boise							
12	23107 North Side Canal Co Ltd							
13	921 No Lincoln Grove							
14	23108 Twin Falls Canal Company							
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37 7108

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PARRY, ROBERTSON, DALY & LARSON

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February 25, 1972

R. P. PARRY
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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

Department of Water Administration

TELEPHONE
(208) 733-3722

Mr. R. Keith Higginson, Director
Idaho Department of Water Administration
State House - Annex 2
Boise, Idaho 83707

Re: Application for Permit No. 37-7108 Malad Canyon

Dear Keith:

Enclosed is my Brief together with the Certificate of Mailing. I apologize for being two days late in getting the Brief to you.

If you feel that additional facts are needed and I can be of assistance, don't hesitate to contact me.

Sincerely,


JOHN A. ROSHOLT

JAR:php

Enclosure

37 7108

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JUN 12 1942

Department of Water Administration

PARRY, ROBERTSON, DALY & LARSON
P. O. Box 525
Twin Falls, Idaho 83301
Telephone: 733-3722

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

In the Matter of Application	)	
for Permit No. 37-7108, in	)	PROTESTANTS' BRIEF
the Name of the State of	)	IN OPPOSITION TO
Idaho, Department of Parks	)	ISSUANCE OF PERMIT
(Malad Canyon Springs)	)	

In this matter, the parties have stipulated to three questions of law for determination by the Director of the Department of Water Administration. In brief form (other than the stipulated language), those questions are as follows:

1. May a state agency appropriate water?
2. Are scenic beauty and recreational purposes beneficial uses under the constitution?
3. Can you acquire a water right in Idaho without a diversion?

I.

APPROPRIATION OF WATER BY A STATE AGENCY.

The crux of this argument centers around the much-cited case of State Water Conservation Board of the State of Idaho v. Enking, 56 Idaho 722, 58 Pac. 2d 779 (1936). The case was an outgrowth of the efforts of the Legislature to establish the equivalent of the now Idaho Water Resource Board without a

37 7108

1 constitutional amendment. In this decision, the State Water
2 Conservation Board was emasculated on many constitutional grounds
3 by the Idaho Supreme Court. At page 731 of the Idaho Reporter,
4 the Court determined that the Board could not be given authority
5 by statute to appropriate water. Such an attempt was violative
6 of Article 15, Section 3, of the Constitution. The reasoning of
7 the Court was that the Legislature could not give this power to
8 a state agency who might take away from the "humblest settler"
9 the right to divert and appropriate the waters of the State
10 specifically given in the Constitution.

11 There is a dearth of authority from other jurisdictions
12 on this point. A run through Shepherd's Citations indicates to
13 a legal researcher that this particular case has never been cited
14 for this particular point. Consequently, a unique rule may
15 prevail in Idaho.

16 In addition to the instant case and the Enking case, the
17 Legislature has only followed a similar course of action on one
18 other occasion. The 1925 Legislature authorized the governor
19 of the State to appropriate in trust for the people of Idaho
20 the waters of Payette Lake, Priest Lake, Pend d'Oreille Lake, and
21 Coeur d'Alene Lake for "scenic beauty, health and recreation
22 purposes". This action has never been judicially questioned.
23 Perhaps Chapter 43, Title 67, of the Idaho Code will be affected
24 by the outcome of the instant dispute.

25 The State Department of Parks is not a constitutional agency.
26 The attempted appropriation in the instant matter flies directly
27 in the face of the Enking decision. Whether we like it or not,
28 or whether we think Idaho Code Section 67-4307 is progressive
29 legislation or not, the Idaho Department of Parks is in the exact
30 situation today as was the State Water Conservation Board according
31 to the Enking decision. Under the rule of Enking, the State
32 Department of Parks has no authority to acquire a water right in

1 the Malad Canyon Springs. The proper way to accomplish the intent
2 of former House Bill 69, now Idaho Code Section 67-4307, is to
3 properly amend the Constitution so as to authorize some state
4 agency to make reasoned withdrawals of waters necessary for the
5 public good. In such an amendment, Point II of the instant
6 dispute could also be rectified. Without question, the delegation
7 of authority to the State Department of Parks as set out in
8 Idaho Code Section 67-4307 is unconstitutional. The application
9 must be denied.

10
11 II.

12 RECREATIONAL AND SCENIC BEAUTY AS BENEFICIAL USES.

13 There are many possible ramifications of Idaho Code Section
14 67-4307 and a water right issued pursuant thereto. Without
15 question, the modern and well-reasoned approach to the beneficial
16 use problem would dictate that such uses of water, for the public
17 good, are desirable. The real question is whether or not water
18 rights can be acquired for scenic beauty and recreation in Idaho
19 within our present constitutional and statutory framework. Our
20 Constitution at Article 15, Section 3, specifically mentions
21 power, domestic, agriculture, mining, and manufacturing. This
22 list sets forth the base for our state water rights system insofar
23 as beneficial uses are concerned. Deviations have been made but
24 basically to only expand the definition of one or more of the
25 five categories. For example, agricultural includes the many
26 methods of irrigation, watering stock, and perhaps fish propaga-
27 tion. A current list of uses as defined and compiled by one of
28 today's noted water authorities would include:

29 "Domestic, municipal, irrigation, stock watering,
30 power generation, mining, milling, manufacturing,
31 general railroad use, refrigeration, preservation
32 and propagation of fish and wildlife, fire protec-
tion, public parks, recreation, scenic attraction,
navigation, recovery of minerals from navigable

1 waters, and recharging ground water reservoirs."
2 (Volume 1, Water and Water Rights, Robert Emmet
Clark, 1967, at page 89.)

3 Clark also indicates that the fact that a particular use of
4 water is omitted from his list, does not "stigmatize" it legis-
5 latively as non-beneficial. No doubt any reasonable and proper
6 use of water would fall under Professor Clark's definition. Idaho
7 Code Section 42-104 would indicate no legislative restriction as
8 to beneficial uses in Idaho.

9 Perhaps tradition and interpretation have led Idaho to an
10 inflexible position. However, a complete understanding of the
11 appropriation doctrine as historically developed in Idaho leads
12 to the ultimate conclusion that beneficial uses of minimum stream
13 flows, recreation, æsthetic purposes, and those other supposed
14 "public" uses do not fit into the current constitutional network.
15 Volume 5 of the Idaho Law Review, 1968, No. 1, at pages 42 through
16 45, basically discusses the purposes for which water may be bene-
17 ficially used as judicially determined in Idaho. Let us also look
18 at what other jurisdictions have done on the matter.

19 The Constitution and statutes of the State of Colorado are
20 probably more analogous to the Idaho situation than any other
21 western appropriation doctrine state. In the case of Colorado
22 River Water Conservation District v. The Rocky Mountain Power
23 Company, found at 406 Pac. 2d 798 (1965), the issue was minimum
24 stream flows and more specifically, whether flowing water in a
25 stream constituted a beneficial use. Although the Court required
26 that an actual diversion also be made, the following quote is
27 found at page 800 of the decision:

28 "There is no support in the law of this state
29 for the proposition that a minimum flow of water
30 may be 'appropriated' in a natural stream for
31 piscatorial purposes without diversion of any
32 portion of the water 'appropriated' from the
natural course of the stream. By the enactment
of C.R.S. 1963, 150-7-5 (10), the Legislature did
not intend to bring about such an extreme departure

1 from well-established doctrine, and we hold that no
2 such departure was brought about by such statute."

3 The above cited section of the Colorado statutes is found
4 at page 799 of the decision and reads as follows:

5 "To file upon and hold for the use of the public
6 sufficient water of any natural stream to maintain
7 a constant stream flow in the amount necessary to
8 preserve fish, and to use such water in connection
9 with retaining ponds for the propagation of fish
10 for the benefit of the public."

11 This Colorado case further cites the famous case which
12 originated in Idaho, Shodde v. Twin Falls Land and Water Company,
13 224 US 107, 32 Supreme Court 470, 56 L.Ed. 686. The quote is
14 found at page 800 of the Colorado Supreme Court opinion:

15 "'We say this because it may not be doubted that
16 the application here sought to be made of the doc-
17 trine of riparian right would be absolutely destruc-
18 tive of the fundamental conceptions upon the theory
19 of appropriation for beneficial use proceeds, since
20 it would allow the owner of a riparian right to appro-
21 priate the entire volume of water of the river, with-
22 out regard to the extent of his beneficial use.'"

23 At Volume 5, Powell on Real Property, pages 457 and 458, para-
24 graph 735, the author indicates that seventeen states have general
25 statutes similar to the Idaho Code Section 42-104 which do not
26 define beneficial uses. The author determines that under such
27 statutes, basically only irrigation, manufacturing, industrial
28 purposes, municipal needs, domestic consumption, and stock watering
29 have been judicially approved. Mr. Powell also cross-references
30 Hutchins, Selected Problems in the Law of Water Rights in the West,
31 Miscellaneous Publications No. 418, 1942, United States Govern-
32 ment Printing Office, at pages 314-325. Mr. Hutchins discusses at
page 315, the Texas statute which specifically includes "recreation
and pleasure" as beneficial uses of water.

33 In Volume 1, No. 1, of the Land and Water Law Review,
34 University of Wyoming, 1966, at page 209, the authors specifically
35 discuss water appropriations for recreation. They indicate that
36 two problems exist, both of which are the subject of the instant

1 protests. Those questions are, (1) whether recreation is a bene-
2 ficial use, and (2) whether a diversion is necessary in order to
3 perfect a valid appropriation. A discussion is had of all the
4 jurisdictions which either enumerate recreation and scenic beauty
5 as beneficial uses of water or where they have been allowed. The
6 Law Review "Comment" further covers the Utah case of Lake Shore
7 Duck Club v. Lake View Duck Club, 50 Utah 76, 166 Pac. 300 (1917),
8 a quote from which case appears at page 212 of the Law Review:

9 "We are not disposed to hold that any use of water
10 tending to supply man or domestic animals with food
11 is not beneficial but for the purpose of effecting a
12 valid appropriation of water under the statutes of
13 this state, we are decidedly of the opinion that the
14 beneficial use contemplated in making the appropri-
15 ation must be one that enures to the exclusive benefit
16 of the appropriator and subject to his complete domin-
17 ion and control."

18 The conclusion of the authors is somewhat untenable. They
19 indicate that no statutory or constitutional changes are necessary
20 to promote recreational uses of water and that the state engineer
21 should have the complete discretion within existing legal frame-
22 work to allow or deny recreation water rights. I would submit
23 that no administrator of the state's water right system would like
24 to be put in this position. The Law Review "Comment" authors
25 further suggest that an economic cost-benefit approach be applied
26 in determining whether or not the recreational use should be
27 allowed. They suggest that this would be a possible manner of
28 determining which of two recreational uses is most beneficial. The
29 authors cite from the Dean of Wyoming Law School in their conclu-
30 sion with the following quote found at page 222 of the Law Review:

31 "Perhaps the best approach is that no dogmatic
32 rule should be adopted allowing or forbidding the
33 taking of water for...recreation, but each such
34 attempted appropriation should be scrutinized and the
35 effect of its allowance upon foreseeable demands for
36 water for other purposes should be considered."

37 The above venture into some of the interesting theories on
38 other beneficial uses of water, leads this writer to again

1 conclude that each state must operate within the appropriate
2 framework as provided. If the Director can get by the argument
3 of the Enking case in the instant discussion, to then get by
4 Question II. of the stipulated questions of law, he must determine
5 that the water usages mentioned in Article 15, Section 3, is
6 merely a statement of preferences among those particular enumerated
7 uses. He must also find scenic beauty and recreation are bene-
8 ficial within the perview of Idaho Code Section 42-104 and the
9 existing case law. It seems to me that a more reasoned approach
10 is to amend Article 15, Section 3, so as to remove all doubt that
11 other beneficial uses are within its perview. For example, a
12 sentence could be added to this section by constitutional amend-
13 ment stating, "The Legislature may provide for additional bene-
14 ficial uses of water and set a priority of use as among those uses
15 and may by statute withdraw from appropriation those waters
16 determined necessary for public enjoyment." If such an amendment
17 were to be enacted, the Director and the Supreme Court would be
18 relieved of the problem of evaluating each particular application
19 for any purpose beyond those in Article 15, Section 3, of the
20 Constitution. The most common uses of water would be covered in the
21 statute thus presenting a beneficial use question under only the
22 most unusual circumstances. The legislation which might be adopted
23 pursuant to such an amendment should also make a distinction
24 between recreation and æsthetic uses which might be acquired on
25 a private basis. Such a procedure would for practical purposes
26 set up a variation of the riparian doctrine but, if change and
27 public need dictate such a position, let's do it right.

28 The thought keeps arising that a mass appropriation of the
29 presently unappropriated waters of the State of Idaho could possibly
30 foreclose any future out-of-stream consumptive uses as a result of
31 a decision favorable to the Parks Department in the instant matter
32 since the next logical step is to allow private persons to establish

1 similar rights. It might mean that a city, in need of additional
2 drinking water, would have to condemn a portion of the free-
3 flowing water to meet its demands. If a private owner had an
4 available right, presumably effective condemnation action could
5 be brought. If there were no such private rights, the municipality
6 would be forced to look to the state. Although there could well
7 be an excess of free-flowing water designated as recreational
8 under a right acquired by the state for the general public, this
9 water would be unavailable to a municipality since they could not
10 condemn as against the state. Consequently, all uses acquired by
11 the state, for whatever purpose, are automatically given the
12 highest priority as among uses. Recreation could replace domestic,
13 power, and those other uses set forth in the Constitution because
14 they would never be relinquished except by the voluntary act of the
15 state.

16 The ramifications of the constitutional method of appro-
17 priation also must be considered. How many so-called additional
18 beneficial uses have been acquired to date by the constitutional
19 method? How many could be acquired if the recent mandatory permit
20 legislation is declared unconstitutional? These are questions that
21 arise from a possible recognition in this case of scenic beauty and
22 recreation as beneficial uses, without some type of reasoned and
23 prudent statutory framework.

24 Many factors must be considered before changing the para-
25 meters of our current water rights administration by the expansion
26 of beneficial uses to include those in which no diversion is
27 required. This leads us to the last question of law.

28 III.

29 CAN AN APPROPRIATION BE MADE WITHOUT A DIVERSION.

30 The question which may well be the most important of the three
31 legal issues herein framed is the third -- the diversion question.

32

1 the whole foundation of the appropriation doctrine of water law is
2 based upon a diversion. As pointed out in the University of
3 Wyoming's Land and Water Law Review article, supra, at page 215:

4 "...in practice the vast majority of appropriations
5 consist of an actual diversion of water from its natural
6 course, or, of a reservoir on a stream used to store the
7 water before it is diverted as needed; however, the require-
8 ment that there be an actual diversion was laid down by the
9 early courts to cope with the situations that existed at
10 that time. Only exceptional cases in early western America
11 such as stock watering and irrigation by natural overflow
12 justified an appropriation of water without a diversion."

13 The authors cite the Utah case of Adams v. Portage Irrigation,
14 Reservoir and Power Company, 95 Utah 1, 72 Pac. 2d 648 (1937),
15 wherein the Utah Court re-affirmed that there were three principal
16 elements necessary to constitute a valid appropriation of water.
17 The Court said that they were (1) an intent to apply the water to
18 a beneficial use, (2) a diversion from the natural channel, and
19 (3) an application to a beneficial use within a reasonable time.

20 The Colorado Court in the case of City and County of Denver v.
21 Northern Colorado Water Conservancy District, 130 Colorado 375,
22 276 Pac. 2d 992, sets forth the following language:

23 "Further, the rule is elementary that the first
24 essential of an appropriation is the actual diversion
25 of the water within intent to apply to a beneficial
26 use....Water can be actually diverted only by taking
27 it from the stream."

28 In the later case of Colorado River Conservation District v.
29 Rocky Mountain Power Company, 406 Pac. 2d 798 (1965), the Court
30 cited a previous Colorado case at page 800:

31 "It should be observed further that as the act of
32 diversion and the act of applying the water diverted
33 to a beneficial use, whether performed by the same or
34 different persons, are both necessary to constitute an
35 appropriation, so the continued existence of the appro-
36 priation depends on the continuance of both, diversion
37 and beneficial application."

38 The Supreme Court of Wyoming in the case of McPhail v. Forney,
39 4 Wyoming 556, 35 Pacific 773 (1894), held:

40 "it is just as necessary to the creation and
41 preservation of a water right to provide means for
42 the continual diversion of the water from its channel..."

1 as it is to apply it to a beneficial purpose."

2 The Idaho Constitution, Article 15, Section 3, sets forth
3 the diversion requirement. It says:

4 "The right to divert and appropriate the unappro-
5 priated waters of any natural stream to beneficial
6 uses, shall never be denied."

7 This constitutional provision definitely sets out a require-
8 ment for two individual and distinct acts--a "diversion" and "an
9 appropriation to beneficial purposes."

10 The Idaho Code has a complex network of statutes requiring
11 the location of points of diversion when acquiring a right as well
12 as certain procedures that must be followed when the point of
13 diversion is sought to be changed. The Idaho rule is set forth
14 in the case of Hutchison v. Watson Slough Ditch Company, 16 Idaho
15 484, 101 Pac. 1059 (1909), at page 491:

16 "A riparian proprietor in the State of Idaho has
17 no right in or claim to the waters of a stream flowing
18 by or through his lands that he can successfully assert
19 as being prior or superior to the rights and claims of
20 one who has appropriated or diverted the water of the
21 stream and is applying it to a beneficial use. To this
22 extent therefore, the common-law doctrine or riparian
23 rights is in conflict with the constitution and statutes
24 of this state and has been abrogated thereby."

25 In this case, the Court determined the riparian doctrine did
26 not prevail in Idaho. In other words, a riparian owner had the
27 right to have the stream flow past his property for æsthetic or
28 other purposes only so long as no one "diverted" and "appropriated
29 the water to beneficial uses".

30 In the case of Sandpoint Water & Light Company v. Panhandle
31 Development Company, 11 Idaho 405, 83 Pac. 347 (1905), one of the
32 early court recitations was made concerning a comparison between
the constitutional method of appropriation and the permit system.
At pages 413 and 414 of the opinion, the Court discusses the neces-
sary elements of an appropriation with the following language:

31 "A person desiring to appropriate the waters of
32 a stream may do so either by actually diverting the
water and applying it to a beneficial use, or he may

1 pursue the statutory method by posting and recording
2 his notice and commencing and prosecuting his work
within the statutory time."

3 At page 414:

4 "In such case the appropriation is initiated by
5 the posting of the notice, and an inchoate right
6 thereby arises which may ripen into a legal and
7 complete appropriation upon the final delivery of
8 the waters to the place of intended use. In other
words, by pursuing the successive steps prescribed
in the statute and completing his diverting works
and applying the water to a beneficial purpose,
the appropriation is completed."

9 At Volume 5, No. 1, of the Idaho Law Review (1968), pages 20
10 and 21, there is also a discussion of the diversions and appropria-
11 tions to beneficial use as developed in Idaho.

12 The primary element of the appropriation doctrine is posses-
13 sion of the water. The doctrine actually grew from the law of
14 "capture" originated in Colorado. Colorado also has similar con-
15 stitutional provisions "that the right to appropriate water can
16 never be denied."

17 Robert Emmet Clark discusses the basis of the appropriative
18 right at Volume 1, Water and Water Rights (1967), at page 295 and
19 296. The following quote is included in the discussion:

20 "...In states that do not have an administrative
21 system or do not hold that system to be the exclu-
22 sive method for acquiring a water right, priority is
determined by the first substantial act that leads
to diversion and use."

23 Dr. Clark also discusses the measure of the appropriative
24 right at pages 296 and 297, but in the discussion acknowledges that
25 diversion is an essential element of the appropriation.

26 The authors of the Land and Water Law Review "Comment on
27 Recreational Use of Water" take the position that a diversion is not
28 a necessity. On page 218 of Volume 1 (1966), these writers suggest
29 that the criteria has been met when an application for permit is
30 filed defining the amount of water which the recreational appro-
31 priator desires to obtain. However, they do point out problems
32 that could occur in states which have not strictly adhered to the

1 mandatory permit system. For example, in Idaho (if the constitu-
2 tional method is still alive in spite of the recent mandatory
3 permit system amendments), who is to know what recreational and
4 scenic beauty rights have been acquired. These authors point out
5 that it is a pretty simple matter to determine when an actual
6 physical diversion has been made, but that fishing a particular
7 stream on Monday, Wednesday and Friday, and constitutionally
8 acquiring a water right by such conduct, leads to additional
9 administrative chaos.

10 Some California cases have good language on the requirement
11 that a technical diversion must exist. In the California decision
12 of Simons v. Inyo Cerro Gordo Mining & Power Company, 192 Pac. 144
13 (1920), at page 150 of that decision, the Court discussed the rules
14 and a previous California case:

15 "The right is the right to the 'use', and it can
16 be acquired only by 'priority of possession'; i.e.,
17 by actual diversion with a bona fide intent to use
the water for a beneficial purpose. In Kelly v.
Natoma Water Co., 6 Cal. 105, it was that--

18 "'Possession or actual appropriation, must
19 be the test of priority in all claims to
the use of water, whenever such claims are
20 not dependent upon the ownership of the
land through which the water flows.'

21 "To constitute a valid appropriation of water,
22 three elements must always exist: (1) An intent to
apply it to some existing or contemplated beneficial
23 use; (2) an actual diversion from the natural channel
by some mode sufficient for the purpose; and (3) an
24 application of the water within a reasonable time to
some beneficial use. ..."

25 "As to the second element of a valid appropriation,
26 namely, that there must be an actual diversion, it
is the fact of diversion, and not its mode, that is
27 material. Ordinarily a diversion is accomplished by
a ditch, canal, pipe line, and the like, but any mode
28 may be resorted to which, under the circumstances,
proves effective."

29 30 CONCLUSION

31 To approve Application No. 37-7108, the Director must be able
32 to satisfy the three tests as required by the three points of law

1 certified in the stipulation. An adverse finding to the Depart-
2 ment of Parks on any one of the three questions is fatal to the
3 application. To otherwise hold would be to establish a semi-
4 riparian doctrine of water law in a state where the courts have
5 consistently abrogated the riparian doctrine. To allow an appro-
6 priation of water without a diversion could open Pandora's box so
7 far as Idaho water law is concerned. If the present law is not
8 what the people of Idaho desire, then proper constitutional and
9 statutory changes should be made. To allow everyone walking down
10 the street to declare to himself that he has a water right is to
11 undermine the basic element of Idaho's property law and economy,
12 its water. Let us think most seriously before rendering a decision
13 which could possibly lead our state into a position where every
14 existing water right is placed in jeopardy and future development
15 is a near impossibility.

16 Respectfully submitted,

17 
18

19 Parry, Robertson, Daly & Larson
20 P. O. Box 525
21 Twin Falls, Idaho 83301
22 Attorneys for Protestants
23 Idaho Water Users Association
24 (formerly Idaho State Reclamation
25 Association),
26 Twin Falls Canal Company, and
27 North Side Canal Company
28
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CERTIFICATE OF MAILING

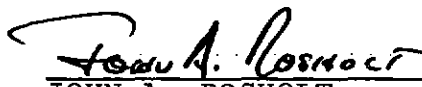
I HEREBY CERTIFY that a true and correct copy of the above
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Dated this 25th day of February, 1972.



JOHN A. ROSHOLT

RECEIVED

FEB 24 1972

BEFORE THE DIRECTOR OF THE DEPARTMENT OF ^{Department of Water Administration}
WATER ADMINISTRATION OF THE STATE OF IDAHO

In the Matter of Permit)
Application No. 27-7108,)
in the Name of the State of Idaho,)
Department of Parks)
(Malad Canyon Springs))
_____)

BRIEF OF PROTESTANT

BOISE PROJECT BOARD OF CONTROL

RAYMOND D. GIVENS, Attorney for
Protestant Boise Project Board of
Control

500 Washington Street, P.O. Box 964,
Boise, Idaho 83701

DATED: February 23, 1972

DUE DATE: February 23, 1972

37 7108

In the Matter of Permit)
Application No. 27-7108,)
in the Name of the State of Idaho,)
Department of Parks)
(Malad Canyon Springs))
)

37 7108

"In order, therefore, to constitute a valid appropriation of water, within the meaning of that term as understood by the decisions of this court and the laws of the state, and, as we believe, by the decisions of the courts and laws of other states in the arid region, there must be an actual diversion of the same, with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time. McDonald v. Mining Co., 13 Cal. 220; Larimer Co. R. Co. v. People, 8 Colo. 614, 9 Pac. 794; Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Col. 1, 30 Pac. 1032, 36 Am. St. Rep. 259; Lowe v. Rizor, 25 Or. 551, 37 Pac. 82; Ditch Co. v. Bennett; 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777; Offield v. Ish, 21 Wash. 277, 57 Pac. 809; Reservoir Co. v Southworth (Colo.) 21 Pac. 1030, 4 L. R. A. 767; Simmons v. Winters (Or.) 27 Pac. 7, 28 Am. St. Rep. 727; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195.

While this court has never been required in its decisions to thus formally state the rule, yet an examination of the various cases which have been before it, and the large number of legislative diversions of water to be one of the essential elements of an appropriation, within the meaning of that term. Under the rule announced above, the rights of the respondents to the use of the waters of Reese river did not have their inception on the 15th day of March, 1863. Their rights were not initiated by settlement upon the land, by having the same surveyed, or by making the boundaries thereof. No actual diversion was made on that date, and for a period of several years after, as appears from the facts stated. Cutting wild grass produced by the overflow of the river, or, as expressed by the witnesses, by the water of Reese river coming down and spreading over the land, was not an appropriation of that water, within the meaning of that term.

The doctrine of riparian rights has been thoroughly rejected by the state of Idaho:

Jones v McIntire
60 Idaho 338

Albion-Idaho Land Company v Naf Irrigation Company
97 Fed. 2d 439

Hitchinson v Watson Slough Ditch Co,
16 Idaho 484.

but regardless of whether the use described is truly a riparian right, it is not an appropriation. The historic

placement of waters within the stream bed is either an Act of God or an act of nature, as the viewer perceives it. Man had nothing to do with it. Man has everything to do with appropriation.

(c) Article XV, Section 3 of the Constitution clearly and explicitly requires a diversion of the water in order to establish an appropriation. The use of the conjunctive in joining the required action "to divert and appropriate" permits no separation. The two go hand in hand.

See
Low v Rizer
Walsh v Wallace
Hutchinson v Watson, etc. supra

See also
Cantlon v Carter
88 Idaho 179, 397 P 2d 761

CONCLUSION

The clear provision of the Constitution answers each of the posed questions in the negative. Until the constitutional bar is removed as is indicated by the brief filed on behalf of the Gem Irrigation District and Owyhee Project South, Board of Contract, the result sought by Section 67-403 Idaho Code, regardless of how beneficial it may otherwise be, cannot be attained.

Respectfully submitted,

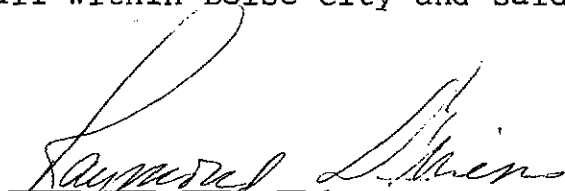
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CERTIFICATE OF MAILING

I hereby certify that I served a true and correct copy of the foregoing Brief of Protestant, Boise Project Board of Control upon Mr. Maurice H. Greene, Attorney at Law, P.O. Box 5402, Boise, Idaho, 83705; Mr. John A. Rosholt of the firm of Parry, Pobertson, Daly & Larson, P.O. Box 525, Twin Falls, Idaho 83301; and Mr. John Magel, Deputy Attorney General, Department of Parks, State House, Boise, Idaho, by mailing them a copy of the 23rd day of February, 1972, enclosed in a sealed envelope with postage prepaid at the above addresses. I further certify that there is a regular communication by mail within Boise City and said addresses.


Raymond D. Givens

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FEB 23 1972

Department of Water Administration

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

In the Matter of Permit)
Application No. 27-7108,)
in the Name of the State)
of Idaho, Department of)
Parks)
(Malad Canyon Springs))

BRIEF OF APPLICANTS
DEPARTMENT OF PARKS
STATE OF IDAHO

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STATE OF IDAHO

DATED: FEBRUARY 22, 1972 ATTORNEYS FOR APPLICANTS

DUE DATE: FEBRUARY 23, 1972 Statehouse
Boise, Idaho 83707

37 7108

In the Matter of Permit
Application No. 27-7108,
in the Name of the State
of Idaho, Department of Parks
(Malad Canyon Springs)

- A. Are the uses described in Idaho Code, §67-4307, "beneficial uses" so as to support an appropriative water right under the Idaho Constitution?
- B. Is it constitutional in Idaho for a state agency to appropriate, without explicit constitutional authorization, the waters of a natural stream and thereby to obtain a water right having a priority over water rights of private persons who have appropriations on said stream made subsequent in time to that of the state agency?
- C. Can there be created a valid appropriative water right in Idaho without an actual, physical reduction of the water claimed to possession through an actual diversion of the water from, or artificial control of the water in, the water's natural locus or condition?

37 7108

"§3. WATER OF NATURAL STREAM--RIGHT TO APPROPRIATE--STATE'S REGULATORY POWER--PRIORITIES.--The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution."

Under the Constitution, in order to obtain a valid appropriation, the water so appropriated must be put to a beneficial use. However, while the Constitution does not define beneficial uses, it does state the relative preferences of certain beneficial uses:

"... but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes." Art. 15, §3, Idaho Constitution (1949)

Art. 15, §3, Idaho Constitution, however, does not provide an exclusive list of all possible beneficial uses. Uses other than those specified in Art. 15, §3, are recognized as "beneficial uses" for which appropriations may be made. Section 42-101, Idaho Code, in declaring the waters of the State to be public waters, provides that they may be appropriated for "any beneficial purpose". Hutchins, in his work on The Idaho Law of Water Rights, states as follows:

"The water rights statute provides that the appropriation must be for some useful or beneficial purpose, without placing any limitation upon purposes that would be considered useful or beneficial; and the so called "constitutional" or non-statutory appropriations likewise may be made, apparently for any useful or beneficial purpose." Hutchins, The Idaho Law of Water Rights, p. 38 (1956)

Kinney, in his work on irrigation and water rights, makes the following statement:

". . . and, in general, we will say that any purpose which is useful, or beneficial may be the object of such appropriation. In some states, however, certain uses are given preference right by statute, but where this is not the case as a general thing, any use which is beneficial may claim its right in the order of its priority with the other rights claimed from the same strain. As we stated in the first addition of this book, the purpose contemplated for the use of water may be irrigation for agricultural or horticultural purposes, mining, milling, manufacturing, domestic or any other purpose for which water is needed to supply the natural and artificial wants of man, provided it be for a beneficial use." (Emphasis added)

and as was said in a recent federal case:

"The courts have not defined, because as yet they are unable to define, the exact boundaries of the territory known as 'beneficial use'. Therefore, as to what is a beneficial use must depend upon the facts and circumstances surrounding any particular use, until that use has been defined by the courts as beneficial." (Emphasis added) Kinney, Irrigation and Water Rights, 2d. Ed., §690 (1912)

In order to determine whether the use of water for its aesthetic value is a "beneficial use", one must look to case decisions for an analysis of the term "beneficial use". Also, one should attempt to determine the "value" of the aesthetic use of water and then decide whether or not it is of such "benefit" as to be considered "beneficial" within the meaning of Art. 15, §3, Idaho Constitution, and §42-101, Idaho Code.

In considering the importance of aesthetic values, it is worthwhile to note that in recent years courts have held that protection and preservation of aesthetic and scenic values are proper objects of legislation.

In Yellin, Visual Pollution and Aesthetic Regulation, 46 Los Angeles Bar Bulletin, No. 11, Sept. '71, at p. 425, the history of aesthetic regulation is briefly traced as follows:

"The legal basis for aesthetic regulation has evolved greatly since the beginning of this century. Excerpts from several leading opinions provide an illustration of this change in judicial, and community, thinking:

"In 1909: 'Aesthetic considerations are a matter of luxury and indulgence rather than of necessity and it is necessity alone which justifies the exercise of the police power to take private property without compensation.' (Citing People ex rel M. Wineburgh, ADV v. Murphy, 195 N.Y. 126, 188 N.E. 17, 20 (1909))

"And in 1925: 'It is commendable and desirable, but not essential to the public need that our aesthetic desires be gratified . . . Certain legislation might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, for limericks than for Keats . . . the world would be a continual seesaw if aesthetic considerations were permitted to govern the use of the police power.' (Citing City of Youngstown v. Kahn Bros. Building Co., 112 Ohio Statutes 654, 148 N.E. 842, 844 (1925)).

"By 1954, however: 'The concept of public welfare is broad and inclusive . . . the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community shall be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled . . . if those who govern the District of Columbia decide that the nation's capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.' (Emphasis added) (Citing Berman v. Parker, 348 U.S. 26, 32-33 (1954))

"And six years ago: 'There is growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings. This change in attitude is a reflection of the refinement of our tastes and growing appreciation of cultural values in a maturing society. The change may be ascribed more directly to the judicial expansion of the police power to include within the concept of the "general welfare" the enhancement of the citizen's cultural life.' (Emphasis added) (Citing Oregon City v. Hartke, 240 Ore. 109, 400 P.2d 255 (1965), at p. 426.)

In Wes Outdoor v. Goldberg, 1 Environmental Reporter, 1172, (N. J. 1970), a New Jersey statute authorized the transportation commissioner to condemn property for landscaping and a roadside development appropriate for the restoration, preservation and enhancement of scenic beauty adjacent to federal aid highways. Plaintiffs owned lands sought to be condemned under the statute and brought the action, contesting the commissioner's power to condemn on the ground that the statute was unconstitutional for lack of an adequate standard to guide him in the selection of lands to be taken for the designated purpose. Plaintiffs argued that the words "scenic beauty"

were too vague to be employable as an objective guide. In effect, they argued that the "restoration, preservation and enhancement of scenic beauty" did not adequately define a public purpose and the legislature therefore failed to articulate an intelligible guiding principle. Holding the statute valid, the court said:

"To paraphrase the language of the statute, what the legislature here sought, was the restoration, preservation and enhancement of the natural condition of land adjacent to the federal highway system. The act contemplates that there is a certain basic beauty and natural terrain and vegetation unspoiled by the hands of man, which it proposes to recapture or maintain. Although the extent to which each individual finds a specific landscape beautiful must be determined by a subjective test, this does not denote that there is no catholic criterion for the ascertainment of whether any scenic beauty exists in a given panorama. 'Scenic beauty' is concerned with such manifold possible situations that it does not lend itself to a more specifically detailed descriptive statement. A tabulation of the various possible elements constituting scenic beauty is well nigh impossible. The present interest in ecology and conservation demonstrates the necessity and public purpose of preserving land, as nearly as possible, in its native state. We have no hesitancy in stating that the restoration, preservation and enhancement of scenic beauty adjacent to public highways is a public use for the public welfare, filling a social need of our times. Hence, the power to acquire lands for that purpose is beyond judicial interference." (Citations omitted), 1 Environmental Rptr. 1172, 1174.

The above citations clearly establish that aesthetic or scenic values are of such importance to be the subject of valid police power regulation devised to preserve and enhance such values. Thus, aesthetic or scenic uses of water should constitute a "beneficial use" under Art. 15, §3, Idaho Constitution, and §42-101, Idaho Code, so as to permit an appropriation of water for its "aesthetic" or "scenic" value.

In view of the fact that there has never been an exact definition of beneficial use the legislature, as well as the courts, may determine what constitutes a "beneficial use". In §67-4307, Idaho Code, the legislature stated:

"The preservation of water in the area described for its scenic beauty and recreational purposes is necessary and desirable for all citizens of the State of Idaho and is hereby declared to be a beneficial use of such water."

As the legislature has clearly stated that the scenic beauty of water is a beneficial use, there is now no question but that the aesthetic value of water is a beneficial use within Art. 15, §3, Idaho Constitution, and §42-101, Idaho Code, so as to permit an appropriation of water for its scenic or aesthetic use.

II,

THE IDAHO CONSTITUTION DOES NOT FORBID A STATE AGENCY FROM MAKING AN APPROPRIATION

The first sentence of Art. 15, §3, Idaho Constitution, reads in part as follows:

". . . . The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes . . . "

The right to divert and appropriate waters applies only to those waters which are unappropriated, the question then being whether or not the state may lawfully restrict the place of appropriation of certain waters by the public by "appropriating" the waters in place in the name of the State or an agency thereof.

Idaho Code, §42-202, provides:

"42-202. APPLICATION TO APPROPRIATE
WATER--CONTENTS--FILING FEES--DIS-
POSITION OF FEES--RECORD OF RECEIPTS.
--For the purpose of regulating the
use of the public waters and of estab-
lishing by direct means the priority
right to such use, any person, assoc-
iation or corporation hereafter in-
tending to acquire the right to the
beneficial use of the waters of any
natural streams, springs or seepage
waters, lakes or ground water, or
other public waters in the state of
Idaho, shall, before commencing of
the construction, enlargement or ex-
tension of the ditch, canal, well, or
other distributing works, or perform-
ing any work in connection with said
construction or proposed appropriation
or the diversion of any waters into a
natural channel, make an application
to the department of reclamation for
a permit to make such appropriation
. . . . "

The above section from the Idaho Code merely provides the method by which the above-enumerated classes may obtain an appropriation. It does not specifically prohibit the State of Idaho or an agency thereof from making an appropriation itself, nor is there any express provision in Art. 15, Idaho Constitution, forbidding the State of Idaho to make an ap-
propriation.

In State v. Enking, 56 Idaho 722, 58 P.2d 779 (1936), The Idaho Supreme Court held that the Water Conservation Board of the State of Idaho could not withdraw from private appropriation the unappropriated waters of the State of Idaho. It is important at this point to understand the reasoning behind that decision. Page 732 of that decision reads in part as follows:

* * *

"Now it is clear that this attempts to authorize the Board to appropriate any or all the unappropriated public waters of the state, and thereby to withdraw

them from private appropriation by any person who may desire to comply with the Constitution and statute in the diversion and appropriation of public waters. By this act the Board may rise superior to a settler or land owner in withdrawing waters from diversion and use and the settler be thereby forced to ultimately pay arbitrarily fixed water rates for the use of water he might otherwise have been able to personally divert and apply to a beneficial use.* In addition to authorizing the Board to withdraw unappropriated water from private appropriation, this act also authorizes the Board to condemn private water*rights for the purposes of carrying on the proposed enterprises the act contemplates. (Sec. 4.) We are not discussing what the Board is actually doing, but rather what the act authorizes it to do. (Boise-Payette Lumber Co. v. School Dist., 46 Ida. 403, 268 P. 26; Atkinson v. Board of Ada County Commrs., 18 Ida. 282, 108 P. 1046, 28 L.R.A., N.S., 412.) If the Board is merely an arm of the state performing 'governmental functions,' it cannot, in fact of these constitutional provisions be authorized to withdraw from private appropriation the unappropriated waters of the state. In other words, the state cannot by legislative act authorize its own agency to monopolize or withdraw the very rights that sec. 3 of art. 15 of the Constitution says 'shall never be denied' the people of the state. (State v. Twin Falls etc., Water Co., 30 Ida. 41, 67, 166 P. 220.) (Emphasis added)

"The people of Idaho adopting the Constitution thought it a matter of primary importance that they insert in the fundamental law of the state an express prohibition against the legislature ever, by any kind of legislation, taking away from the humblest settler the right 'to divert and appropriate' any of 'the unappropriated waters of any natural stream to beneficial users.' (Sec. 3, art. 15, Const.) The legislature cannot circumvent or thwart that purpose by creating either a state agency or a special corporation and vesting it with power to appropriate and sell the unappropriated waters of the state (sec. 15 of the act) or condemn waters already appropriated (sec. 4)" (Emphasis added)

Note that the Court's concern was directed not to what the Board had actually done, but to the potential abuse permissible under the statute. It is apparent that the Court was

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afraid of the situation which may arise in which the agency appropriating water may attempt to sell the appropriated water back to the public at a profit, which in the minds of the court would circumvent the intent of Art. 15, §3, Idaho Constitution. In short, the decision in Enking, supra, is not to be read as specifically prohibiting the State of Idaho or an agency thereof from making a valid appropriation, but rather as prohibiting the State from making mass appropriations and then in turn reselling the appropriated water to the public. At the time of Enking, had there been a doctrine prohibiting the State from appropriating, the decision would have turned on that doctrine rather than on the potential for the State's appropriating and then selling the waters so appropriated. Under the "Public Trust Doctrine", it would be impossible for the State, after having once appropriated the water in trust for the public at large to resell it back to the public at a profit.

In Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", 68 Michigan Law Review, No. 3, Jan. '70, beginning at p. 484, an outline of the Public Trust Doctrine is set forth as follows:

"Other than the rather dubious notion that the general public should be viewed as a property holder, there is no well conceived doctrinal basis that supports a theory under which some interests are entitled to special judicial attention and protection. Rather, there is a mixture of ideas which have floated rather freely in and out of American public trust law. The ideas are of several kinds, and they have received inconsistent treatment in the law.

"The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark society as one of

citizens rather than of serfs. It is thought that, to protect those rights, it is necessary to be especially wary, lest any particular individual or a group acquire the power to control them. The historic public rights of fishing and navigation reflect this feeling; and while the particular English experience which gave rise to the controversy over those interests was not duplicated in America, the underlying concept was readily adopted. Thus, American law courts held it 'inconceivable' that any person should claim a private property interest in the navigable waters of the United States. It was from the same concept that some of the language of the Northwest Ordinance was taken:

'The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States . . . without any tax, impost, or duty therefor. (Citing an Act of July 13, 1787, Art. 4, 1 Statute 51) . . .

* * *

"Finally, there is often a recognition, albeit one that has been irregularly perceived in a legal doctrine, that certain uses have a peculiar public nature that makes their adaption to private use inappropriate. The best known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only a usufruct--an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies.

* * *

"Of all existing legal doctrines, none comes as close as does the public trust concept to providing the point of intersection for the three important interests noted above. Certainly the phrase 'public trust' does not contain any magic such that special obligations can be said to arise merely from its incantation; and only the most manipulative of historical readers could extract much binding precedent from what happened a few centuries ago in England. But that the doctrine contains the seeds of ideas whose importance is only beginning to be perceived, and that the doctrine might easily promote needed legal development can hardly be doubted . . . One who searches through the reporting cases will find many general statements which seem to imply that a government may never alienate trust property by conveying it to a private owner and that it may not affect changes in the use to which that property has been devoted. . . . but a careful examination of the cases will show that the excerpts just quoted and almost all other statements are dicta and do not determine the limits of the state's legitimate authority in dealing with trust lands. Unfortunately, the case law has not developed in any way that permits certainty about the outer limits of state power. Nonetheless, by examining the diverse and often loosely written opinions dealing with public lands, one may obtain a reasonably good picture of judicial attitudes . . .

"The first point that must be clearly understood is that there is no general prohibition against the disposition of trust properties, even on a large scale. A state may, for example, recognize private ownership in tidelands and submerged lands below the high water mark; indeed, some states have done so and have received judicial approval. Still, courts do not look kindly upon such grants and usually interpret them quite restrictively, and apply a more rigorous standard than is used to analyze conveyances by private parties. In this connection, courts have held that since the state has an obligation as trustee which it may not lawfully divest, whatever title the grantee has taken is impressed with the public trust and must be read in conformity with it. (Emphasis added)

* * *

"These judicial cases suggest the extremes of the legal constraints upon the States: no grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern it, but a grant is not illegal solely because it diminishes in some degree the quantum of judicial uses.

* * *

"The most celebrated public trust case in American law is the decision of the United States Supreme Court in Illinois Central Railroad Company v. Illinois (Citing 146 U.S. 387, 1892). In 1869, the Illinois legislature made an extensive grant of submerged lands, in fee simple, to the Illinois Central Railroad. That grant included all the land underlying Lake Michigan for one mile out from the shore line and extending one mile in length along the central business district of Chicago--more than one thousand acres of incalculable value, comprising virtually the whole commercial waterfront of the city. By 1873 the legislature had repented its excessive generosity, and it repealed the 1869 grant; it then brought an action to have the original grant declared invalid.

"The supreme court upheld the state's claim and wrote one of the very few opinions in which an express conveyance of trust lands has been held beyond the power of the state legislature . . . The court stated that the title under which Illinois held navigable waters of Lake Michigan is 'different in character from that which the state holds in lands intended for sale.' . . . is a title held in trust for the people of the state and that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interferences of private parties. (Citing 146 U.S. at 452.)

"With this language, the court articulated a principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public a court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to a more restricted use or to subject public uses to the self interest of private parties." Sax, "The Public Trust Doctrine of Natural Resource Law: Effective Judicial Intervention", 68 Michigan Law Review No. 3, pp. 484-490.

By virtue of the Public Trust Doctrine outlined above, it is apparent that the precise fear of the court in determining the Enking, supra, case has been dispelled. Under the Public Trust Doctrine, it would be impossible for the State of Idaho, having once appropriated water in trust for the public to sell the water back to the public or dispose of it in any manner which would in a substantial way, defeat the primary objective of the original appropriation.

Having disposed of the main problem contemplated by Enking, supra, there is no other authority that would support the position that the State cannot appropriate water for ~~neither~~ the Constitution nor the Idaho Code specifically prohibit appropriations by the State.

III.

IN ORDER TO MAKE A VALID APPROPRIATION,
THERE NEED NOT BE AN ACTUAL DIVERSION

In order to apply the waters of Malad Canyon to the beneficial use contemplated by §67-4307, Idaho Code, it is not necessary that there be an actual diversion on the part of the appropriator. Appropriation of water for its "aesthetic value" is not a consumptive appropriation as are appropriations made for domestic, agricultural, mining, or

manufacturing purposes. Because aesthetic or recreational uses are not "consumptive", it is inconceivable that in order to apply water to those uses, one must first divert the water from the natural flow of the stream. The appropriation contemplated by §67-4307, Idaho Code, in no sense diminishes the quantity of water available for private appropriation, but merely limits the place of appropriation.

The act of diverting water from its natural stream provides a means of measuring quantitative appropriation. With respect to consumptive uses, the requirement of a diversion is necessary in order to ascertain the amount of water in any given stream that may become subject to future appropriation; for once the entire quantity of water in any given water course has been appropriated, (taking under account return flow, etc.) further appropriation is impossible. However, where aesthetic or recreational appropriations are involved, there is no need to determine the quantitative flow "appropriated", as the actual stream flow remains undiminished. Therefore, the reason requiring a diversion for consumptive uses ceases to exist.

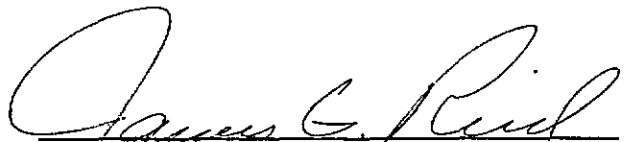
In cases involving consumptive uses, accomplishment of the use itself requires a diversion, but to require diversion to the scenic or recreational uses set out in §67-4307, Idaho Code, would defeat the purpose of the appropriation. If recreational and aesthetic uses be deemed "beneficial" uses within Art. 15, §3, Idaho Constitution, it is inconceivable to require a diversion to such uses, thereby thwarting the benefit contemplated.

The applicants are cognizant of the fact that there are cases in other jurisdictions which purportedly require an actual diversion in order to obtain a valid appropriation. However, these cases, in requiring an actual diversion, deal with consumptive uses of water. As is pointed out herein, the use contemplated by §67-4307, Idaho Code, is not a consumptive use. Further, those cases long precede the trend toward judicial recognition of the importance and validity of laws conserving and enhancing scenic and recreational values. For these reasons, we submit that such cases cannot control the outcome hereof.

Respectfully submitted,

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Attorney General

JOHN MAGEL
Deputy Attorney General


JAMES G. REID
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CERTIFICATE OF MAILING

I HEREBY CERTIFY That a true and correct copy of
the above and foregoing Brief was this day mailed to:

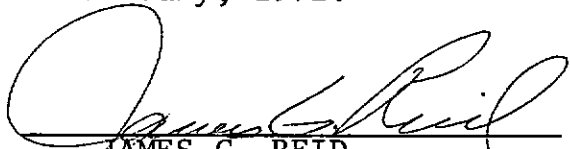
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DATED This 23 day of February, 1972.


JAMES G. REID
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STATE OF IDAHO

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MAR 7 1972

Department of Water Administration

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

In the Matter of Application)
for Permit No. 27-7108, in)
the Name of the State of Idaho,) R E P L Y B R I E F
Department of Parks)
(Malad Canyon Springs))
_____)

In the briefs submitted by the various protestants, a point was raised which was not in the applicant's brief dated February 23, 1971. The protestants contended that to permit the appropriation contemplated by §67-4307, Idaho Code, is to impose the "riparian" doctrine on the Idaho law of water rights.

At page 5 in the brief of protestant submitted by Maurice H. Greene, it is stated:

"In other words, it is contemplated that the appropriation is for the sole purpose of freezing the natural stream flow in the natural stream channel. Nothing is contemplated in connection with the use of water, except that it remain in the natural stream channel.

"Protestants parties to this brief have attempted to analyze this so-called 'appropriation' of water. Notwithstanding that the legislature has, by statute, termed the use of the water to constitute an appropriation, protestants cannot help but believe that there is no 'appropriation'. In fact, what the legislature has attempted to do, under the guise of an 'appropriation', is to create a riparian right in the water, a right that does not exist in the public water of the State of Idaho;"

and at page 10 in the brief submitted by John A. Rosholt, there is an implication that the appropriation sought by the Department of Parks in the Malad Canyon case may be

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considered to be an extension of the riparian doctrine and not an appropriation pursuant to the doctrine of prior appropriation.

The underlying theory of the riparian doctrine is that the owners of land bordering upon a stream have equal rights to the use of the water in the stream. Each riparian owner is entitled to the natural flow of the stream past his land, undiminished in quantity and unimpaired in quality. Thus, riparian ownership of lands bordering waters is basic to the riparian doctrine of water rights. On the other hand, the doctrine of prior appropriation emerges from an entirely different set of principles. Its two cardinal principles are that "beneficial use" of water, not land ownership, is the basis of the right to water, and that priority of use, not equality of right, is the basis of the division of water between appropriators when there is not enough for all. The applicant herein is seeking this "appropriation" of water not on the basis of land ownership, but on the basis that it wishes to appropriate water for its "beneficial use".

The applicant has previously discussed the nature of beneficial use and it would serve no purpose to reiterate the arguments made by the State in regard to this question. Although protestants rely on decisions from the State of Colorado in support of their position regarding beneficial uses, the applicants make reference to the case of Empire Water and Power Company v. Cascade Town Company, 205 F. 123, (8th Cir. 1913), which concerned itself with the problem of whether or not recreational or aesthetic uses should be considered beneficial uses. While the Empire, supra, case

was decided in the Federal District Court, the case arose out of the State of Colorado. In that case, the plaintiff owned a tract of land which had been improved as a summer resort and the spray of a waterfall on the property watered surrounding vegetation. The court held that places devoted to public health, rest and recreation constitute a beneficial use and stated:

"Places such as that described here, favored by climate conditions, improved by the work of man, and designed to promote health by affording rest and relaxation are assuredly beneficial." Id. at 128.

The Court denied the appropriation; however, the denial was not based on the fact that the uses to which the plaintiff sought to put the water were not beneficial, but that such uses were wasteful. The use to which the Department of Parks seeks to place the water in Malad Canyon are similar to the uses contemplated in the Empire case, supra, however, in the case involving Malad Canyon, there is no degree of waste involved, for the use is not a consumptive use; therefore, the water cannot be wasted by applying it to the use contemplated by the State.

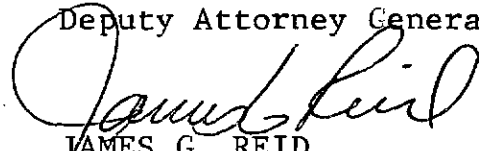
The protestants contend that by not requiring an actual diversion, no valid appropriation may be obtained. However, it must be remembered that the basis of the appropriation doctrine is not that of diversion but of beneficial use. The diversion is merely physical evidence of an appropriation to a beneficial use. In 1 University of Wyoming, Land and Water L. Rev., No. 1, at p. 217, the authors speak to the question of requiring actual diversion and state:

Idaho, Department of Parks, would be an appropriative right in every sense of the word and within the meaning of the Idaho Constitution and statutes made pursuant thereto.

D A T E D This 6th day of March, 1972.

W. ANTHONY PARK
Attorney General

JOHN MAGEL
Deputy Attorney General



JAMES G. REID
Assistant Attorney General
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Statehouse, Boise, Idaho 83707

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CERTIFICATE OF MAILING

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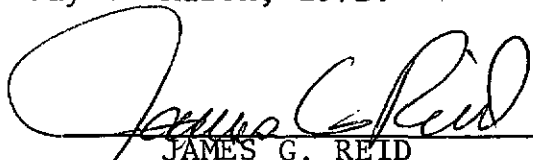
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D A T E D This 6th day of March, 1972.


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BOISE, IDAHO
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February 17, 1972

FILE
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FEB 18 1972

Department of Water Administration
POST OFFICE BOX 5402
TELEPHONE 343-2641

BDF

Mr. Keith Higginson
State Reclamation Engineer
Idaho Water Department Administration
614 W. State Street
Boise, Idaho 83707

Re: Malad Canyon Springs - Permit No. 37-7108

Dear Mr. Higginson:

I am enclosing herewith a brief of protestants Gem Irrigation District and Owyhee Project South Board of Control in the above-captioned matter.

As indicated by the Certificate of Mailing, a copy is today being mailed to Mr. John A. Rosholt, attorney for Malad Canyon Springs.

Very truly yours,

Maurice H. Greene
Maurice H. Greene

MHG:ih
Encl.

37 7108

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FEB 18 1972

Department of Water Administration

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

In the Matter of Permit)
Application No. 27-7108,)
in the Name of the State of Idaho,)
Department of Parks)
(Malad Canyon Springs))
_____)

BRIEF OF PROTESTANTS
GEM IRRIGATION DISTRICT AND
OWYHEE PROJECT SOUTH BOARD OF CONTROL.

MAURICE H. GREENE, Attorney for
Protestants Gem Irrigation District
and Owyhee Project South Board of Control

2619 Camas Street, P. O. Box 5402
Boise, Idaho 83705

DATED: February 17, 1972
DUE DATE: February 23, 1972

37 7108

In the Matter of Permit)
Application No. 27-7108,)
in the Name of the State of Idaho,)
Department of Parks)
(Malad Canyon Springs))

"A. Is it Constitutional in Idaho for a state agency to appropriate, without explicit constitutional authorization, the waters of a natural stream and thereby to obtain a water right having a priority over water rights of private persons who have appropriations on said stream made subsequent in time to that of the state agency?

"B. Are the uses described in Idaho Code, §67-4307 "beneficial uses" so as to support an appropriative water right under the Idaho Constitution?

"C. Can there be created a valid appropriative water right in Idaho without an actual, physical reduction of the water claimed to possession through an actual diversion of the water from, or artificial control of the water in, the water's natural locus or condition?

A.

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"Section 15 of the act, entitled 'Powers and Duties of Board' furnishes conclusive evidence that the Board so created cannot be 'performing a governmental function' of the state in the exercise of the powers conferred by that section, for the reason that it runs directly counter to sec. 3, art. 15, of the Constitution, which provides among other things that

'The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes,' etc.

"Section 15 of this act provides:

' . . . the Board shall have the right to appropriate any of the unappropriated waters of this state in the method provided by law.'

"The section says inter alia:

'The Board shall have power to institute in any of the Courts of this state, or in any other state, or in any of the Federal Courts of this state or any other state, any actions, suits, and special proceedings necessary to enable it to acquire, own, and hold title to lands for dam sites, reservoir sites, water rights, rights of way or diversion and distributing canals, and lateral ditches, and other means of distribution of water, and may also in all said Courts institute, maintain, and prosecute to final determination any and all actions, suits and special proceedings necessary to have the unadjudicated water rights adjudicated upon any stream or source of water supply from which is derived the water for such reservoir, diversion and distributing canals, lateral ditches and other means of distribution of the water; and said Board may join any and all owners of waters theretofore appropriated by any person, association or corporation from any of the streams of the State of Idaho, so that adjudication may be had of all unadjudicated water upon all the streams and sources of water supply of any project so constructed by said Board. In all such actions, suits or special proceedings, costs shall be awarded by the Court as provided by statute.'

"Now it is clear that this attempts to authorize the Board to appropriate any or all the unappropriated public waters of the state, and thereby to withdraw them from private appropriation by any person who may desire to comply with the Constitution and statute in the diversion and appropriation of public waters. By this act the Board may rise superior to a settler or land owner in withdrawing waters from diversion and use and the settler be thereby forced to ultimately pay arbitrarily fixed water rates for the use of water he might otherwise have been able to personally divert and apply to a beneficial use. In addition to authorizing the Board to withdraw unappropriated water from private appropriation, this act also authorizes the Board to condemn private water rights for the purposes of carrying on the proposed enterprises the act contemplates. (Sec. 4.) We are not discussing what the Board is actually doing, but rather what the act

authorizes it to do. (Boise-Payette Lumber Co. v. School Dist., 46 Ida. 403, 268 Pac. 26; Atkinson v. Board of Ada County Comms., 18 Ida. 282, 108 Pac. 1046, 28 L.R.A., N.S., 412) If the Board is merely an arm of the state performing 'governmental functions,' it cannot, in face of these constitutional provisions be authorized to withdraw from private appropriation the unappropriated waters of the state. In other words, the state cannot by legislative act authorize its own agency to monopolize or withdraw the very rights that sec. 3 of art. 15 of the Constitution says 'shall never be denied' the people of the state. (State v. Twin Falls etc. Water Co., 30 Ida. 41, 67, 166 Pac. 220.)

"The people of Idaho in adopting the Constitution thought it a matter of primary importance that they insert in the fundamental law of the state an express prohibition against the legislative ever, by any kind of legislation, taking away from the humblest settler the right 'to divert and appropriate' any of 'the unappropriated waters of any natural stream to beneficial users.' (Sec. 3, art. 15, Const.) The legislature cannot circumvent or thwart that purpose by operating either a state agency or a special corporation and vesting it with power to appropriate and seel the unappropriated waters of the state (sec. 15 of the act) or condemn waters already appropriated (sec. 4)." (Emphasis added)

These protestants have underlined the latter portion of the quotation from the Enking case where the Court specifically held that the Legislature could not circumvent Article 15, Section 3 of the Constitution by creating a state agency and vesting it with the power to appropriate water. There is no question in this case but what the Department of Parks of the State of Idaho is a state agency. If it has the right to appropriate the natural stream flow of Malad Canyon Springs, as it was directed to do by the Legislature when the latter enacted Section 67-4307 of the Idaho Code, and the right of appropriation were to be upheld, then the effect of the appropriation would be to withdraw that amount of water from appropriation by a private citizen. The Enking case is so clear that a state agency acting pursuant to a legislative authority cannot, under our present state Constitution, legally appropriate public waters flowing in a stream in this state that protestants believe it is the only answer that can be given to the first question propounded by the Director.

B.

THE APPROPRIATION OF THE ENTIRE NATURAL FLOW OF A
STREAM IN ITS NATURAL CHANNEL IS NOT AN APPROPRIATION
FOR A BENEFICIAL USE BUT AN ATTEMPT TO CREATE A RIPARIAN RIGHT.

Protestants are not here arguing the merits of whether the state should be permitted to withdraw public waters from appropriation for the

uses set forth in Section 67-4307, Idaho Code. The uses as stated in the statute are as follows:

"The preservation of water in the area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the State of Idaho is hereby declared to be a beneficial use of such water."

Protestants do not believe it is necessary for the Director to determine whether an "appropriation" of water can lawfully be made for scenic beauty and recreational purposes. Protestants know of at least one instance where water is being diverted from a natural stream to fill an artificial lake that is used for recreational purposes.⁽¹⁾ There may be other instances of a similar nature. Here the issue is whether an appropriation can lawfully be made of the entire natural stream flow of Malad Canyon to keep the water flowing in its natural channel. The "beauty and recreational purposes" referred to in the statute is to prevent diversion of the stream flow by keeping it in the natural channel. Protestants do not believe a lawful appropriation of water can be made simply to keep the natural flow in the natural channel of the stream. Such an "appropriation" is not an appropriation for a beneficial use.

Section 67-4307 further provides as follows:

"The unappropriated lands belonging to the state of Idaho between the high water mark on one (1) bank to the high water mark on the opposite bank, of the area described, are hereby declared to be devoted to a public use in connection with the preservation of the area in its present condition as a place of recreation for the citizens of the state of Idaho."

The State Park Board is directed by the statute to appropriate only the unappropriated natural stream flow in the area. The lands belonging to the State of Idaho between the high water mark on one bank and the high water mark on the opposite bank are declared to be devoted to a public use "as a place of recreation for the citizens of the State of Idaho." This "natural stream flow" that is the subject of the appropriation for the sole purpose of having the water remain in the natural stream channel between

(1) The instance referred to is a permit issued by the Department to Karney Lakes Club, Inc., to divert and use the waters of Karney Creek in Boise County to fill Karney Lakes, artificial lakes that are utilized for beauty and recreational purposes.

the high water mark on one bank and the high water mark on the other bank, is simply the natural stream flow being retained in the natural stream channel. The question propounded in the Director's order states that there is to be no actual physical possession of the water right claimed through an actual diversion or artificial control of the water. In other words, it is contemplated that the appropriation is for the sole purpose of freezing the natural stream flow in the natural stream channel. Nothing is contemplated in connection with the use of the water except that it remain in the natural stream channel.

Protestants parties to this brief have attempted to analyze this so-called "appropriation" of water. Notwithstanding that the Legislature has by statute termed the use of the water to constitute an appropriation, protestants cannot help but believe that there is no "appropriation." In fact what the Legislature has attempted to do, under the guise of an "appropriation," is to create a riparian right in the water, a right that does not exist in the public waters of the State of Idaho. As the Commissioner is well aware, the doctrine of riparian rights in water came from the common law of England. It is founded on the legal maxim that "water runs and ought to run as it used to run." This is exactly what the Legislature has attempted to do by the enactment of Section 67-4307 of the Code in that it seeks to have the natural stream flow of the waters in Malad Canyon flow in the natural channel of the stream as those waters have flowed in the past. In effect, the proposed appropriation is to freeze the current of the stream so that it will forever flow in the same stream channel to the extent and in the amount that it has flowed in the past. Protestants believe it is well established by the law of this state that riparian rights in water do not exist in Idaho.

The discussions in the Constitutional Convention, Volume 2, pp. 1115-1146, 1154-1166, and 1340 to 1365, throw considerable light on the fact that, by the adoption of Article 15, Section 3 of the Constitution, the framers of the Constitution intended that the public waters in the streams of the state should be subject to diversion and use which would involve

something more than having the natural flow of the stream continuing to flow in the natural stream channel. They intended that these public waters should be put to some practical use than was something more than merely continuing to flow in the natural stream channel. The courts have repeatedly held to the theory that the current of a stream is not subject to appropriation in Idaho.

Many years ago the Supreme Court of the United States had before it the question of whether an owner of land abutting upon Snake River, who had constructed water wheels operated by the current of the river to elevate water from the stream to be used for the purpose of irrigation on his land, had a water right that would prevent the construction of a dam in Snake River which would reduce the current of the stream at the point where the water wheels were constructed so that the wheels could no longer be used. The Supreme Court of the United States did not hold that riparian rights in water might not exist in Idaho. It did hold, however, that under the doctrine of appropriation of water, the owner of the water wheels could not appropriate the current of the stream for the purpose of operating the water wheels. The opinion of the Supreme Court of the United States is too long to be quoted in this brief, but a reading of the Court's opinion clearly points up the distinction between the use of the current of Snake River by the land owner to operate the water wheels as compared to his use of the water elevated by the wheels which were actually used in irrigating his lands. The Court held he could not appropriate the current of the stream to operate the wheels but that he could do so to irrigate his land. This same distinction exists in protestants' minds in the use that is contemplated of the waters of Malad Canyon by the Park Board as compared to a diversion of the waters from the natural channels of the stream for the purpose of mining, irrigation, domestic, or commercial use. What difference in reality is there between maintaining the current of the stream in Malad Canyon for the purpose of swimming, boating, or fishing and maintaining that same stream in the same channel for the purpose of operating water wheels? In either case, the end result is exactly the same--that is to have the waters in Malad Canyon "flow as they used to flow."

Since the decision in the Shodde case, there have been more recent decisions of the Idaho Supreme Court and the Federal Courts that clarify the fact that riparian rights in water in Idaho do not exist. In Jones v. McIntire, 60 Idaho 338, the Court flatly said:

"The right of riparian ownership has been abrogated in Idaho. (Sec. 3, art. 15, Idaho Const.; secs. 41-101, 41-103, 41-106, I.C.A.; Hutchinson v. Watson Slough Ditch Co., 16 Ida. 484, 101 Pac. 1059, 133 Am. St. 125.)"

In Johnson v. Utah Power & Light Company, 215 F. 2d p. 814, the Court had before it the question of the right of a land owner to enjoin an increase in the flow of a stream resulting from construction of a dam that prevented him from fording the stream as a means of access between parcels of land located on opposite sides of the stream. The Court held that the land owner had no such right to control the flow of water in a stream. It said:

"No claim was made that the water overflowed his land or in any way departed from the natural channel of the river. Nor was it asserted that appelle is using the water or the channel of Bear River for purposes other than those authorized by law. Basically, appellant's position would seem to be that as a riparian proprietor he has a right to insist that the water of the stream continue to flow as it has been wont to flow. The assumption, we think, runs counter to the system of water law prevailing in nearly all the arid states, including Idaho * * *.

"The case of Schodde v. Twin Falls Land and Water Co., 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686, which came up to the Supreme Court from the federal court for Idaho via the Ninth Circuit Court of Appeals, 161 F. 43, established the proposition that the current of a river can not be appropriated by a riparian proprietor in Idaho, even assuming the possible persistence in that state of the doctrine of riparian rights side by side with the doctrine which that state has so long espoused. In our opinion the Schodde case supplies a complete answer to appellant's contentions. Compare also Jeffers v. Montana Power Co., 68 Mont. 114, 217 P. 652. No Idaho State decisions at all in point have been cited to the contrary." (Emphasis added)

To protestants, no matter how adroit the Legislature was in its choice of language in directing the State Park Department to make the filing in question, the proposed filing is nothing more than an attempt to create a riparian water right in the stream in Malad Canyon and is not a diversion and appropriation of water as contemplated by Article 15, Section 3 of the State Constitution. The Johnson decision of the Idaho Supreme Court is the final word that the state may not withdraw public water for the purpose of maintaining the natural flow in a stream.

C.

THERE MUST BE A DIVERSION AND APPROPRIATION
OF NATURAL STREAM FLOW TO CREATE A WATER RIGHT.

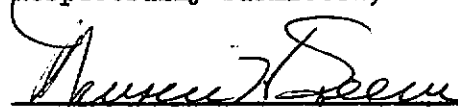
What protestants have said in the second part (B) of this brief applies equally to the third question propounded by the Director of the Department of Water Administration. Under Article 15, Section 3 of the Constitution, there must be a "diversion" of water in the first instance and there must be an "appropriation" which latter must include the application of the water to a beneficial use. A reading of the proceedings of the Constitutional Convention relating to the adoption of that portion of the State Constitution covering water rights shows clearly that the framers contemplated some type of "diversion" of the waters of the stream to be applied to a particular purpose. The framers repeatedly referred to such uses as domestic, agricultural, livestock, mining, power, and commercial use. At the time of the adoption of the Constitution, the discussion in the Convention clearly indicated that the term "divert" as used in the document contemplated some physical act of segregation of a certain quantity of water from the current of a stream that could be the subject of physical measurement in some manner, whether in miner's inches or acre-feet. It further seems clear that the framers of the Constitution contemplated the diversion would extend to the point where the actual use of water for a specific purpose could be identified. They contemplated a physical diversion through some form of artificial means. Since 1890, science has advanced a long way in accomplishing end results that were unknown when the Constitution was fashioned. Protestants are not prepared to say at this time that there may never come a time but what, through some scientific means, there can be made a diversion and an appropriation of water to a beneficial use under Article 15, Section 3 of the Constitution that can be accomplished without there being a physical diversion of the waters being diverted from the remaining waters in the stream channel. They know of no such method as of this time. They do say, however, that in order for there to be a diversion of the water and an application of the amount diverted to a beneficial use,

something must be accomplished to segregate the amount of water diverted from other waters in the stream for the purpose of measurement and for the purpose of determining that it be applied to a beneficial use. They do say that to attempt to make an appropriation of all of the natural stream flow in a stream for the simple purpose of maintaining the flow of water in the stream is not a diversion under the Constitution and does not constitute an application of the water to a beneficial use. They say such an appropriation is simply an attempt to create a riparian right in the natural stream flow of a stream for the sole purpose of maintaining the stream flow in the channel so that it may not be the subject of diversion. Further, they say that simply to maintain the natural stream flow in a stream for the mere purpose of letting it flow down the stream channel is not putting the water to a beneficial use.

CONCLUSION

When the State Constitution was adopted, the State certainly was concerned with the use of its water resources for purposes other than ecology. In fact the proceedings of the Constitutional Convention would indicate that maintaining the ecology of the state was the last thing the members had in mind in drafting the sections of the document relating to water rights. Perhaps the time has arrived when the State should change its thinking. If that time has arrived, the change should be made as contemplated by the Constitution, that is by amendment and not by legislative fiat.

Respectfully submitted,

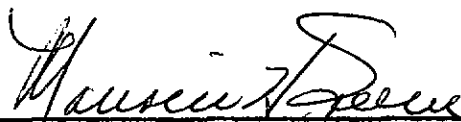

MAURICE H. GREENE, Attorney for
Protestants Gem Irrigation District
and Owyhee Project South Board
of Control

2619 Camas Street, P. O. Box 5402
Boise, Idaho 83705

CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing brief to Mr. John A. Rosholt of the firm of Parry, Robertson, Daly & Larson, P. O. Box 525, Twin Falls, Idaho 83301, attorney for applicant.

Dated at Boise, Idaho this 17th day of February, 1972.


MAURICE H. GREENE

January 25, 1972

C
John A. Rosholt, Esq.
PARRY ROBERTSON, DALY, & LARSON
P.O. Box 525
Twin Falls, Idaho 83301

O
Raymond D. Givens, Esq.
GIVENS & GIVENS
P.O. Box 964
Boise, Idaho 83701

P
Maurice H. Green, Esq.
P.O. Box 4402
Boise, Idaho 83705

RE: Permit Application No. 37-7108
(Malad Canyon Springs)

Gentlemen:

Y I enclose herewith the Order of the Director of the Department of Water Administration dated January 24, 1972, which requires that the above-entitled matter be submitted on Briefs on the three stipulated questions of law. You will note that the Order provides for submission of simultaneous Briefs in thirty (30) days with ten (10) days thereafter for filing reply Briefs.

If you have any questions concerning the Order or any other aspect of this matter, please do not hesitate to contact me.

Sincerely,

FOR THE ATTORNEY GENERAL

PHILLIP M. BARBER
Assistant Attorney General 37-7108

PMB/ac Enclosure

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of the State of)
Idaho, Department of Parks)
(Malad Canyon Springs).)

ORDER

WHEREAS it has been stipulated between the parties in the above-entitled water permit application proceedings, Applicants and Protestants, by and through counsel, as follows:

1. That the Protestants all have standing to protest the issuance of a permit as applied for in Application No. 37-7108;
2. That the waters affected thereby are waters of a natural stream;
3. That the natural spring flow of said waters was nine hundred forty (940) cubic feet per second;
4. That Exhibit B attached to said Stipulation accurately portrays the land ownership pattern and the preliminary plan for a park project, by means of which the applicant proposes to use said water pursuant to Idaho Code, §67-4307, in the area of appropriation;

5. That there are three and only three substantial questions of law which constitute the entire basis of Protestants' protests, which questions are set out hereinbelow;

WHEREAS there are no other parties, either Applicants or Protestants, other than those who have so stipulated, before the Department on this application;

AND WHEREAS these matters having been stipulated to there remain no factual issues which require a hearing for determination:

NOW THEREFORE IT IS ORDERED that the parties before the Department with respect to Application No. 37-7108, each and all of them, shall have thirty (30) days from the date of this Order in which to file Memoranda or Briefs on the three principal questions of law to which they have stipulated and which are set out hereinbelow. It is further ordered that all the parties, both Applicants and Protestants, before the Department with respect to said application shall have ten (10) days after said thirty (30) days in which to file any reply Memoranda or Briefs for the purpose of responding to or clarifying any points raised by the Memoranda or Briefs offered by any of the other parties.

The three questions of law to which the parties have stipulated and which shall be discussed in said Memoranda or Briefs are:

PAGE 2 - ORDER

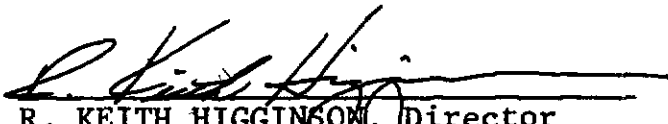
37 7108

A. Is it Constitutional in Idaho for a state agency to appropriate, without explicit constitutional authorization, the waters of a natural stream and thereby to obtain a water right having a priority over water rights of private persons who have appropriations on said stream made subsequent in time to that of the state agency?

B. Are the uses described in Idaho Code, §67-4307 "beneficial uses" so as to support an appropriative water right under the Idaho Constitution?

C. Can there be created a valid appropriative water right in Idaho without an actual, physical reduction of the water claimed to possession through an actual diversion of the water from, or artificial control of the water in, the water's natural locus or condition?

DATED this 24 day of January, 1972.


R. KEITH HIGGINSON, Director
DEPARTMENT OF WATER ADMINISTRATION
State of Idaho

RAYMOND L. GIVENS
RAYMOND D. GIVENS

GIVENS AND GIVENS
ATTORNEYS AT LAW
COLUMBIA BUILDING, 500 WASHINGTON STREET
P. O. BOX 964
BOISE, IDAHO 83701

RECEIVED

JAN 16 1972

Water Administration

BDF

January 5, 1972

*Forward
Stipulation to
Barber
or to our
file*

Mr. John Magel
Deputy Attorney General
Attorney General's Office
Statehouse
Boise, Idaho

Dear John:

I enclose herewith the original copy of the Stipulation which apparently everyone has now signed.

Yours very truly,

GIVENS & GIVENS

[Signature]
Raymond D. Givens

RDG:ph
Enc/ 1

cc: Maurice H. Green
John A. Rosholt

RECEIVED

JAN 6 1972

OFFICE OF ATTORNEY GENERAL
STATE OF IDAHO

37 7108

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JAN 13 1972
Department of Water Administration

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

In the Matter of Permit)
Application No. 37-7108,)
in the Name of State of)
Idaho, Department of Parks)
(Malad Canyon Springs).)
STIPULATION

IT IS STIPULATED by and between the under-
signed parties in the above-entitled water permit
application proceedings, Applicants and Protestants,
by and through counsel, as follows:

1. That the Protestants who are parties to this
Stipulation have standing to appear before the Department
of Water Administration to protest the issuance of a
water permit as applied for in application number 37-7108.

2. That the waters which are sought to be
appropriated through said application and permit are
waters of a natural stream.

3. That the natural spring flow of the waters
sought to be appropriated through said application and
permit, which flow was as existed prior to the augmenta-
tion thereof which resulted from irrigation development,
was nine hundred forty (940) cubic feet per second, according to

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JAN 6 1972

37 7108

OFFICE OF ATTORNEY GENERAL
STATE OF IDAHO

to Exhibit A attached hereto and made a part hereof, (a letter of 20 July, 1971, from the United States Department of the Interior, Geological Survey, Water Resources Division, Acting District Chief Alfred H. Harder, to R. Keith Higginson, Director of the Idaho Department of Water Administration), which exhibit embodies the best information available concerning said flow.

4. That Exhibit B attached hereto and made a part hereof (a large map prepared by the Idaho Department of Parks) accurately portrays, by outlining in various colors, the land-ownership pattern in the area of the place of appropriation of the waters sought to be appropriated through said application and permit and the preliminary plan for the park project by which the Applicant proposes to use said water pursuant to Idaho Code §67-4307.

5. That there are three substantial questions of law which are raised by this application and which constitute the entire basis of Protestants' Protests herein. These questions are:

A. Is it Constitutional in Idaho for a state agency to appropriate, without explicit constitutional authorization, the waters of a natural stream and thereby to obtain a water right having a priority over water rights of private persons who have appropriations on said stream made subsequent in time to that of the state agency?

B. Are the uses described in Idaho Code §67-4307 "beneficial uses" so as to support an appropriative water right under the Idaho Constitution?

C. Can there be created a valid appropriative water right in Idaho without an actual, physical reduction of the water claimed to possession through an actual diversion of the water from, or artificial control of the water in, the water's natural locus or condition?

W. ANTHONY PARK
ATTORNEY GENERAL, STATE OF IDAHO
Attorney for Applicant
Department of Parks

DATED: December 29, 1971 by John Magel
JOHN MAGEL
Deputy Attorney General

Parry, Robertson, Daly, & Larson
Attorneys for Protestants
Idaho State Reclamation Association,
North Side Canal Co., Ltd.
Twin Falls Canal Company;

DATED: DECEMBER 29, 1971 by John A. Rosholt
JOHN A. ROSHOLT

Maurice H. Greene
Attorney for Protestants
Owyhee Project,
South Board of Control,
Gem Irrigation District;

DATED: January 3, 1972 by Maurice H. Greene

Givens & Givens
Attorneys for Protestants
Boise Project Board of Control;

DATED: January 5, 1972 by Raymond D. Givens
RAYMOND D. GIVENS



UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WATER RESOURCES DIVISION
Room 365, Federal Building
550 West Fort Street
Boise, Idaho 83702

July 20, 1971

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

Dear Mr. Higginson:

The following tabulation is provided in response to your request for data on flow of some Snake River canyon springs prior to development on the Snake River Plain.

<u>Spring</u>	Year	
	<u>1902</u> (cfs)	<u>1969</u> (cfs)
Niagara spring at gage	107	264
Box Canyon Springs at mouth	300	850
Big, Blue Heart, or Blue Spring ($\frac{1}{2}$ -mile below mouth of Box Canyon Spring)	48	100
Thousand Springs group - total (includes diversion from Sand Springs)	840	1,120
Malad Springs	<u>940</u>	<u>1,260</u>
Total	2,235	3,594

We hope the above information fulfills your need. If we can provide additional spring flow data, do not hesitate to call on us.

Sincerely yours,

Alfred H. Harder
Acting District Chief

EXHIBIT A

37 7108

MAURICE H. GREENE
ATTORNEY AT LAW
BOISE, IDAHO
83701

POST OFFICE BOX 1554
TELEPHONE 343-2347 5402

January 3, 1972

Mr. Raymond D. Givens
Givens & Givens
P. O. Box 964
Boise, Idaho 83701

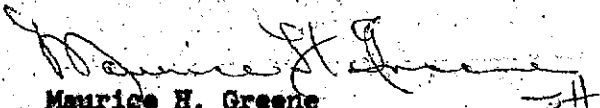
Re: Permit Application No. 37-7108
Malad Canyon

Dear Ray:

I am enclosing herewith original stipulation prepared by the Attorney General's Office in connection with the above matter.

The same has been signed by all of the parties except you. I would appreciate it if you would go over the stipulation and, if you find it in order, sign it and return it to Mr. John Magel in the Attorney General's Office.

Sincerely yours,


Maurice H. Greene

MHG:ih
Encl.

CC: Mr. John Magel
Mr. Phillip M. Barber
Mr. John A. Rosholt
Mr. Tom Cotton

37 7108

December 15, 1971

C
John A. Rosholt, Esq.
PARRY, ROBERTSON, DALY, & LARSON
P.O. Box 525
Twin Falls, Idaho 83301

RE: Malad Canyon - Department of Parks
Water Permit

O
Dear Mr. Rosholt:

P
Y
I have enclosed with this letter a copy of the Stipulation to which we agreed concerning your protests in the above-entitled matter. The original has been delivered to John Magel for his signature. From there it will be forwarded to each of the Protestants' attorneys in turn for signing. When you receive it, please sign it and pass it on to any of the Protestants' attorneys who may have not had signed it at that time. If your signature is the final one necessary, please deliver the fully signed original Stipulation to me.

When the completely signed Stipulation has been returned, the Department of Water Administration will then issue an Order that the matter be submitted on briefs on the three questions presented. If you have a desire that oral argumentation be held, please so indicate at an early date.

If you have any questions concerning any aspect of this or the related Thousand Spring permits, please do not hesitate to contact me.

Sincerely,

FOR THE ATTORNEY GENERAL

PHILLIP M. BARBER
Assistant Attorney General 37 7108

PMB/sc
Enclosures

December 15, 1971

C
O
P
Y

Maurice H. Greene, Esq.
P.O. Box 4402
Boise, Idaho 83705

RE: Malad Canyon - Department of Parks
Water Permit

Dear Mr. Greene:

I have enclosed with this letter a copy of the Stipulation to which we agreed concerning your protests in the above-entitled matter. The original has been delivered to John Magel for his signature. From there it will be forwarded to each of the Protestants' attorneys in turn for signing. When you receive it, please sign it and pass it on to any of the Protestants' attorneys who may have not had signed it at that time. If your signature is the final one necessary, please deliver the fully signed original Stipulation to me.

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If you have any questions concerning any aspect of this or the related Thousand Spring permits, please do not hesitate to contact me.

Sincerely,

FOR THE ATTORNEY GENERAL

PHILLIP M. BARBER
Assistant Attorney General

PMB/sc
Enclosures

37 7108

December 15, 1971

C
O
P
Y
Raymond D. Givens, Esq.
GIVENS & GIVENS
P.O. Box 964
Boise, Idaho 83701

RE: Malad Canyon - Department of Parks
Water Permit

Dear Mr. Givens:

I have enclosed with this letter a copy of the Stipulation to which we agreed concerning your protests in the above-entitled matter. The original has been delivered to John Magel for his signature. From there it will be forwarded to each of the Protestants' attorneys in turn for signing. When you receive it, please sign it and pass it on to any of the Protestants' attorneys who may have not had signed it at that time. If your signature is the final one necessary, please deliver the fully signed original Stipulation to me.

When the completely signed Stipulation has been returned, the Department of Water Administration will then issue an Order that the matter be submitted in briefs on the three questions presented. If you have a desire that oral argumentation be held, please so indicate at an early date.

If you have any questions concerning any aspect of this or the related Thousand Spring permits, please do not hesitate to contact me.

Sincerely,

FOR THE ATTORNEY GENERAL

PHILLIP M. BARBER
Assistant Attorney General

PMB/sc
Enclosures

37 7108

BEFORE THE DEPARTMENT OF WATER ADMINISTRATION
OF THE
STATE OF IDAHO

In The Matter of Protests Against Approval)
of Application for Permit No. 37-7108 in)
the name of the IDAHO DEPT. OF PARKS)

NOTICE OF CONFERENCE

On July 12, 1971, the Idaho Dept. of Parks, Statehouse, Boise, Idaho, filed with the Idaho Department of Water Administration an application to appropriate the public waters of the State of Idaho. This Department has received protests against approval of this Application for Permit from the following: Boise Project Board of Control; Gem Irrigation District and South Board of Control, Owyhee Project; Idaho State Reclamation Assn.; North Side Canal Co., Ltd.; Twin Falls Canal Company.

The Department of Water Administration has set the matter of protests for conference on October 27, 1971, at 10:00 a.m.; in the Statehouse, Room #420, Boise, Idaho.

Dated this 8th day of October, 1971.

Bobby D. Fleenor
BOBBY D. FLEENOR
Assistant Director

37 7108

Mailed this 8th day of October, 1971, to:

State of Idaho, Dept. of Parks, Statehouse, Boise, Idaho.....23103
Boise Project Board of Control, Gayle Johnson, Chairman,
214 Broadway, Boise, Idaho, 83702.....23104
Gem Irrigation District and South Board of Control, Owyhee Project,
Tom Cotton, Sec-Mgr., Box 67, Homedale, Idaho, 83628.....23105
Idaho State Reclamation Assn., Jack A. Barnett, 520 Idaho Bldg.,
Boise, Idaho, 83702.....23106
North Side Canal Co., Ltd., 921 North Lincoln, Jerome, Idaho, 83338.....23107
Twin Falls Canal Company, Tom Olmstead, Pres., 163-2nd Ave. West,
Twin Falls, Idaho, 83301.....23108

by Darlene Reich

37 7108

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

September 24, 1971

Re: Applications for Permit No. 36-7198, 36-7199, 36-7200 & 37-7108

State of Idaho, Dept. of Parks
Attn: Earl Gunnell
Statehouse Mail

Gentlemen:

We have enclosed copies of the protests filed against the issuance of permits pursuant to your applications as referenced above. You should be aware that the following are the items we can consider at a conference and/or hearing in either approving or denying an application for permit (Section 42-203, Idaho Code):

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purposes intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?

The waters intended to be appropriated must be public water of the State of Idaho. If private waters, as defined under Section 42-212, Idaho Code, the applicant must have authority to divert the water from the owner of the land on which the water lies.

A permit issued by this office is subject to all prior water rights and does not in any way establish or convey right-of-ways over private or governmental lands. Right-of-ways or easements must be obtained by the applicant through action outside of the water right proceedings.

You will be notified at a later date as to the time and place set for a conference and/or hearing. If we may be of any assistance, please contact us.

Very truly yours,

BOBBY D. FLEENOR
Assistant Director

BDF:DR
Enclosures

37 7108

September 24, 1971

Re: Applications No. 36-7198, 36-7199, 36-7200 & 37-7108
Idaho Dept. of Parks

Twin Falls Canal Company
Tom Olmstead, Pres.
163 - 2nd Ave. West
Twin Falls, Idaho 83301

Gentlemen:

We are in receipt of your protest to issuance of a permit pursuant to the above referenced application. The following are the items we can consider at a conference and/or hearing in either approving or denying an application for permit (Section 42-203, Idaho Code):

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purposes intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?

The Department may reject an application and refuse issuance of a permit, partially approve the permit, approve the permit for a quantity of water less than applied for, or approve the permit subject to special conditions.

A permit issued by this office is subject to all prior water rights and does not in any way convey or establish right-of-ways over private or governmental lands. Right-of-ways or easements must be obtained by the individuals concerned through action outside of the water right proceedings.

You will be notified at a later date as to the time and place set for a conference and/or hearing to discuss the matters of protest. If we may be of any assistance, please contact us.

Very truly yours,

Bobby D. Fleenor
Assistant Director

BDF:DR

37 7108

September 24, 1971

Re: Applications for Permit No. 36-7198, 36-7199, 36-7200 &
37-7108 - Idaho Dept. of Parks

North Side Canal Co., Ltd.
921 North Lincoln
Jerome, Idaho 83338

Gentlemen:

We are in receipt of your protest to issuance of a permit pursuant to the above referenced application. The following are the items we can consider at a conference and/or hearing in either approving or denying an application for permit (Section 42-203, Idaho Code):

1. Will the proposed use reduce the quantity of water under existing water rights?
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Very truly yours,

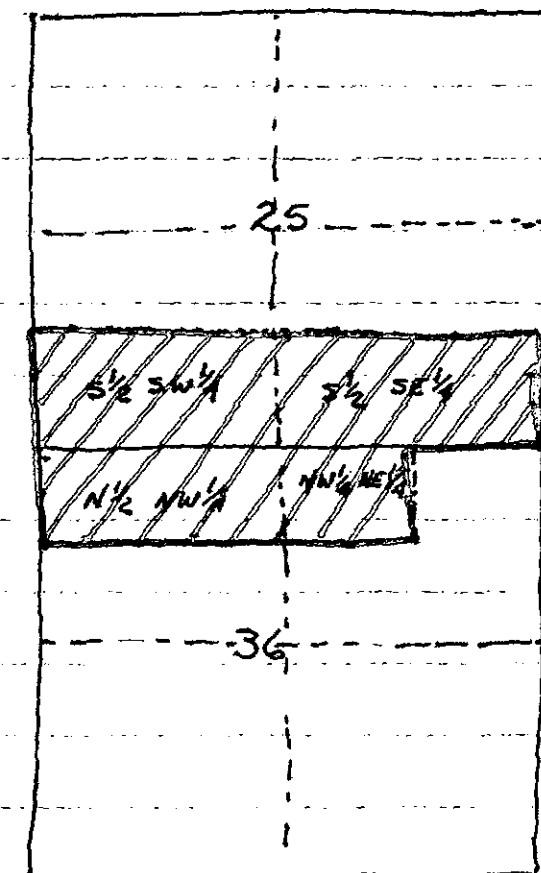
Bobby D. Fleenor
Assistant Director

BDF:DR

37 7108

Mylar Overlay indicating areas of water appropriation under H.B. 69

Malad Canyon



Niagra Springs

Idaho DEPT. OF PARKS

MAIL: STATEHOUSE, BOISE, IDAHO 83707
OFFICE: 2261 WARM SPRINGS AVENUE
PHONE: 384-2154 (AREA CODE 208)



STATE PARK BOARD

EARL T. GUNNELL, Chairman
Box 215
Soda Springs, Idaho 83276

WILLIAM M. FROME, Member
505 East Main Street
St. Anthony, Idaho 83445

MRS. BETH DURHAM, Vice-Chairman
221 7th Avenue
Lewiston, Idaho 83501

GEORGE P. MILLER, Member
Box 247
Bonners Ferry, Idaho 83805

KENT GIST, Member
Box 349
Fruitland, Idaho 83619

MERLE ALLISON, Member
Box 336
Eiler, Idaho 83328

R. P. PETERSON
Acting Director
RECEIVED

OCT 6 1971

October 8, 1971

Keith Higginson
Department of Water Administration
Statehouse
Boise, Idaho 83707

Dear Keith:

Please find enclosed per your Department's request the ownership plats
for the Malad River Gorge and Crystal Springs areas. If additional
information is needed please feel free to contact this office.

Sincerely,

R. P. Peterson
Acting Director

37 7108

"VISIT IDAHO STATE PARKS"

RAYMOND L. GIVENS
RAYMOND D. GIVENS

GIVENS AND GIVENS
ATTORNEYS AT LAW
COLUMBIA BUILDING, 500 WASHINGTON STREET
P. O. BOX 964
BOISE, IDAHO 83701

RECEIVED

OCT 27 1971

Department of Water Administration

October 26, 1971

Mr. Royse VanCuren, Manager
Boise Project Board of Control
214 Broadway
Boise, Idaho

Dear Royse:

Herewith my reply to your request for a statement with regard to the hearings to be held by the Director of the Department of Water Administration.

As I understand it, these are applications filed by the Idaho Department of Park, pursuant to Chapter 207, 1971 Session Laws, which Chapter creates a new Code, Sections 67-4307 through 67-4311. These statutes, in combination, direct the Park Board to appropriate in trust for the people of the state of Idaho, the unappropriated natural spring flow which arises on five different tracts of land. The statute declares that the preservation of water in the area for scenic beauty and recreational facilities is necessary and desirable for all citizens of the State and that preservation is declared to be a beneficial use. Each of these statutes further declare that the public use of unappropriated waters in these specific areas is declared to be of greater priority of any other use except that of domestic consumption.

The act generally provides that the permits to be issued by the Director of Water Administration, pursuant to the Act, shall only be issued to the extent, as determined by the Director, of the historic water flow, but further provides that any future appropriation of water in excess of such determined flow shall not involve a diversion that shall detract from or interfere with the "geological interpretation of value of historical significant in scenic attraction for public use under the administration of the State Park Board of the stream from the natural high water

37 7108

October 26, 1971

Mr. Royse VanCuren
Boise, Idaho

mark on the one bank to the natural high water mark on the other bank and of the springs specifically described as those that arise upon lands listed in this act." This would appear to prevent diversion of any of those waters prior to reaching the Snake River.

It does not appear that any diversion of water is contemplated by the Act, but on the contrary that it is an attempt to appropriate waters without any diversion, and in fact to limit, if not prohibit, any diversion of these waters by any subsequent appropriator.

It would appear that an attempt to permit an appropriation without a diversion is not only a most undesirable precedent to set at this point, but in fact this particular Chapter of the Session laws is unconstitutional. The Constitution, particularly Article 15, Section 1 grants to the state the power to regulate and control the use of the waters of the State, both appropriated and unappropriated. Article 15, Section 3 of the Constitution guarantees that the right to divert and appropriate waters of the State to a beneficial use, shall never be denied. The fact that the framers of the Constitution employed the conjunctive "and" rather than the disjunctive "or", does not appear to have been an idle choice of language, but in fact to clearly state the contemplation of the draftsmen of the Constitution, because at that time when "appropriation" doctrine was adopted in Idaho and the doctrine of riparian rights was rejected, the three prime beneficial uses of water, i.e., domestic, agriculture and mining, each required a factual diversion. Indeed, the remaining beneficial uses, manufacturing or power, also required diversion of the waters, in the strictest sense, from the natural stream bed.

Each of these beneficial uses is constitutionally recognized in Article 15, Section 3 and priorities were therein set, (1) domestic, (2) agricultural, except in an organized mining district, and (3) manufacturing. The intent of the present statute

October 26, 1971

Mr. Royse VanCuren
Boise, Idaho

appears to be to permit an appropriation for a purpose not constitutionally recognized which would engraft in this area, upon the doctrine of appropriation, the previously discarded riparian rights doctrine with all of its littoral benefits.

The decisions of our Courts up to this point have declared that riparian rights in Idaho have been abrogated, Jones v McIntire, 60 Idaho 338, or never did exist in Idaho, Albion-Idaho Land Company v NAF Irrigation Company, 97 Fed. 2d 439, at least beyond the right of the owner of riparian lands to protect the flow and his lands against any unlawful interference with the natural flow of the adjacent stream, Hutchinson v Watson Slough Ditch Co., 16 Idaho 484.

In short, insofar as the legislation giving rise to the application permits a denial to members of the public, the right to divert and appropriate the unappropriated waters of the natural stream to beneficial uses, it appears to be unconstitutional. To the extent that it appears to permit an appropriation without diversion, it likewise appears to be unconstitutional and where it seeks to set up a system of priority in conflict with the system of priority provided in the Constitution, it is additionally unconstitutional.

If the preservation of this area or any similar area in the state of Idaho, in its natural state, is deemed this essential, it certainly could and should be constitutionally accomplished. A procedure should be adopted within the framework of the Constitution for preserving natural landmarks of historic or geologic or scenic value, without locking up the water so as to prohibit future diversion and appropriations or applications to beneficial use. The precedent of permitting appropriations in the absence of diversion, developed to its fullest extent, could only assure the impounding of the waters of the state so as to permit no further reclamation of arid lands. From the constitutional aspect, the test is not what is being done, but what can be done. If

September 24, 1971

Re: Applications No. 36-7198, 36-7199, 36-7200 & 37-7108
Idaho Dept. of Parks

Idaho State Reclamation Assn.
Jack A. Barnett
520 Idaho Bldg.
Boise, Idaho 83702

Gentlemen:

We are in receipt of your protest to issuance of a permit pursuant to the above referenced application. The following are the items we can consider at a conference and/or hearing in either approving or denying an application for permit (Section 42-203, Idaho Code):

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Very truly yours,

Bobby D. Fleenor
Assistant Director

37 7108

BDF:DR

September 24, 1971

Re: Applications No. 36-7198, 36-7199, 36-7200 & 37-7108
Idaho Dept. of Parks

Gem Irrigation Dist. & South Board of Control, Owyhee Project
Tom Cotton, Sec.-Mgr.
Box 67
Homedale, Idaho 83628

Gentlemen:

We are in receipt of your protest to issuance of a permit pursuant to the above referenced application. The following are the items we can consider at a conference and/or hearing in either approving or denying an application for permit (Section 42-203, Idaho Code):

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Very truly yours,

Bobby D. Fleenor
Assistant Director

BDF:DR

37 7108

September 24, 1971

Re: Applications No. 36-7198, 36-7199, 36-7200, 37-7108
Idaho Dept. of Parks

Boise Project Board of Control
Gayle Johnson, Chairman
214 Broadway
Boise, Idaho 83702

Gentlemen:

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Very truly yours,

Bobby D. Fleenor
Assistant Director

BDF:DR

37 7108

August 25, 1971

Re: Application No. 36-7197 - Lester Bornt
36-7198 - Idaho Dept. of Parks
36-7199 - " " " "
36-7200 - " " " "
37-7108 - " " " "

Gooding County Leader
Box 56
Gooding, Idaho 83330

Gentlemen:

Enclosed you will find a legal notice which we wish to have published once a week for two consecutive weekly issues of your newspaper. We have inserted the publication dates allowing ample time for you to submit us a galley proof for review before publication.

After sending us a galley proof, proceed with the publication on the dates we have inserted assuming the notice is correct. If we have any corrections, we will notify you before the first publication date. If you cannot publish the notice on the proposed dates, please contact us immediately.

An affidavit of publication must be submitted to the Department along with the publication bill. In order to receive payment, the following certification must appear on the bill:

"I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid."

(signature of claimant)

Very truly yours,

Donald W. McEldowney
Appropriation Supervisor

DWM:CR

Enc: Legal Notices

Bill submitted _____ By _____

37 7108

NOTICE OF APPLICATION FOR WATER PERMIT

Notice is hereby given that the Idaho Department of Parks, Statehouse, Boise, Idaho, has on July 12, 1971 submitted Application No. 37-7108 for a permit to appropriate 1,260 cubic feet per second of water from springs (tributary of Snake River) arising in Malad Canyon within the S $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 25; N $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T. 6S, R. 13E, B.M., Gooding County, to be used from January 1 to December 31 for scenic beauty and recreational purposes. The water will not be diverted, but will be preserved in its natural state in trust for the people of the State of Idaho, pursuant to Chapter 207, 1971 Session Laws.

Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, Statehouse, Boise, Idaho 83707, on or before September 20, 1971.

R. KEITH HIGGINSON

Director

Published in the Gooding County Leader, Gooding, Idaho on Sept. 2 and Sept. 9, 1971.

**NOTICE OF APPLICATION
FOR WATER PERMIT**

Notice is hereby given that the Idaho Department of Parks, Statehouse, Boise, Idaho, has on July 12, 1971 submitted Application No. 37-7108 for a permit to appropriate 1,260 cubic feet per second of water from springs (tributary of Snake River) arising in Malad Canyon within the S $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 25; N $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T. 6S, R. 13E, B.M., Gooding County, to be used from January 1 to December 31 for scenic beauty and recreational purposes. The water will not be diverted, but will be preserved in its natural state in trust for the people of the State of Idaho, pursuant to Chapter 207, 1971 Session Laws.

Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, Statehouse, Boise, Idaho 83707, on or before September 20, 1971.

R. Keith Higginson
Director

9-2-2tc

O.K.
9-1-71
J.S.

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