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

SAGEWILLOW, INC.,

Petitioner,

v.

IDAHO DEPARTMENT OF WATER  
RESOURCES, JAMES MAYS, MAYS  
LAND AND LIVESTOCK, AND  
BLAINE COUNTY CANAL  
COMPANY,

Respondents.

Case No. CV-96-39

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Department of Water Resources

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**RESPONSE BRIEF OF JAMES MAYS, MAYS LAND & LIVESTOCK AND  
BLAINE COUNTY CANAL COMPANY**

Appeal on Judicial Review from the Idaho Department of Water Resources

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Respondents James Mays, Mays Land & Livestock and Blaine County Canal Company (collectively "Mays") hereby submit their brief in response to the Petitioner's Opening Brief, filed by Sagewillow, Inc. ("Sagewillow") in the above-captioned matter. For the reasons set forth herein, the Final Order of the Idaho Department of Water Resources ("Department") should be affirmed.

## STATEMENT OF THE CASE

### Facts and Arguments Below

This is a water right transfer case in which Sagewillow seeks to overturn the final order of the Department which approved with conditions seven applications to transfer 21 separate water rights (the "Sagewillow Rights"). Sagewillow claimed the water rights to be appurtenant to lands known as the Knollin Ranch<sup>1</sup> in the Little Lost River Basin. Sagewillow's applications sought to change the place of use of the water rights to allow irrigation of 2,383 acres of land. R., pp. 1-230.

Mays and the Canal Company protested the applications. The grounds for protest were that the Sagewillow Rights had been partially or totally forfeited, and that approval of their use as proposed in the applications would result in injury to other water rights, including water rights belonging to Mays and the Canal Company. R., p. 238; R., p. 237. Clear, convincing and unrefuted evidence was presented at the hearing showing that two of the Sagewillow Rights (33-2090 and 33-2091) had been

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<sup>1</sup>The "Knollin Ranch" referred to herein includes the Knollin Ranch proper, together with parcels referred to in the record as the "North of the Road Property", the Bird Ranch and the "Homestead Property". The "Frew Place" was not part of the Knollin Ranch holdings, but were acquired by Sagewillow through a separate acquisition. See Exhibit A attached hereto.

entirely forfeited due to the failure by Sagewillow's predecessor, the original appropriator of the rights, to beneficially use water under those rights for approximately 20 years. Clear and convincing evidence also showed that the remaining primary rights included in the transfers had been partially forfeited to the extent that, for in excess of five consecutive years, no more than 1,412 acres had ever been irrigated with them.

Mays' evidence included testimony by Vance Hawley concerning the extent of use of the Sagewillow Rights. Vance Hawley is the son of Sagewillow's grantor Slim Hawley. Vance Hawley grew up on the Knollin Ranch and also farmed the land for a time as an adult. Tr., Vol. 2, p. 3, l. 13-p. 6, l. 8. Mr. Hawley testified that rights 33-2091 and 33-2090, which originally were appurtenant to the 320 acres of the Bird Ranch, and to 320 acres of land located on the northern portion of the Knollin Ranch, respectively, had never been used since the late 1960s and up through the time the property was acquired by Sagewillow in 1989. As to the use of the remaining primary Sagewillow Rights, Mr. Hawley testified that they had been used on no more than 1,176 acres of the Knollin Ranch<sup>2</sup> during any time that he had been familiar with the properties. Tr., Vol. 2, p. 26, l. 1-20.

Mays also presented expert testimony by Mr. Terry Scanlan, a hydrogeologist who demonstrated that the surface and ground water sources were interconnected in the vicinity of the Knollin Ranch, and interconnected with the Little Lost River and the ground water aquifer downstream therefrom. Based on Mr. Scanlan's review of

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<sup>2</sup>Mr. Hawley did not testify regarding use of rights appurtenant to the Frew Place.

various aerial photographs, his inspection of the Knollin Ranch lands from adjacent lands, discussions with Sagewillow's expert witness Dr. Charles Brockway, and based on Mr. Hawley's testimony, Mr. Scanlan concluded that prior to 1989, no more than 1,412 acres of land on the Knollin Ranch and the Frew Place had been irrigated. Tr., Vol. 2, p. 76, l. 20. Mr. Scanlan concluded that the increase in irrigated acres from 1,412 historical acres to 2,383 acres as proposed by the Sagewillow applications would: 1) increase the consumptive use of water in the Little Lost River basin above historical levels; 2) reduce surface flows in the Little Lost River; and 3) reduce the amount of water accruing to the aquifer below the Knollin Ranch that otherwise would be available to other water right holders. Tr., Vol. 2, p. 77-82, l. 14.

Protestant James Mays testified that he held surface and ground water rights with points of diversion downstream from the Knollin Ranch. Among his rights, Mays owns two ground water rights with 1961 priority dates. Protestants Exhibit 22. The District 33 Watermaster, David Andreason, testified that in administering the diversions from the Little Lost, Mays most senior surface rights were subject to curtailment to satisfy more senior rights, and that reduced surface flows resulting from increased consumptive use above the Knollin Ranch would increase the likelihood of cutting such senior surface rights in the future. Tr., Vol. 1, p. 197, l. 18-p. 199, l. 25.

A substantial amount of evidence at the hearing bore on the nature and extent of Sagewillow's attempts to increase the acres of land irrigated under the Sagewillow Rights after Sagewillow acquired the Knollin Ranch from Vance Hawley's mother

Venice in 1989. But as summarized by the Department in its Final Order, Sagewillow's and Mays' witnesses had no substantial disagreement concerning the fact that increasingly more than 1,412 acres were irrigated after 1989. Nor did the witnesses disagree significantly concerning the approximate number of acres actually added between 1989 and 1993.

What the parties do disagree about is the legal effect of Sagewillow's irrigation of the new acres after 1989. Sagewillow contends that this constituted a valid resumption or revival of "dormant" rights. Mays demonstrated convincingly that the common law doctrine of resumption of use, to the extent it has any continuing vitality today, does not apply under the facts here. Mays also argued that Slim Hawley already had forfeited the subject water rights, in whole or in part, when he conveyed the Knollin Ranch "together with their appurtenances", and Sagewillow could take only what Slim Hawley had to give. The Department agreed.

Another significant issue before the Department, and now the District Court, is the appropriateness of the Department's determination to void a previously approved transfer (Transfer 3785) involving Right No. 33-2091. At the hearing Sagewillow's principal, Mr. Dumke testified that he was not familiar with the facts stated in the application when he signed it, but instead relied on the people working for him to make sure the statements were accurate. Tr., Vol. 1, p. 27-28, l. 5; p. 28, l. 18-20. In other words, he had no personal knowledge of the facts stated in the application, and he made no independent inquiry to verify them. The application contained a material omission concerning whether any of the rights had undergone

a five-year period of nonuse. R., p. 1002. The Department's employee who processed the application, Mr. Harold Jones, testified that he made no independent investigation concerning the facts alleged in the application either; nor did he make any inquiry whatsoever regarding whether water had *ever* been diverted to beneficial use after the licenses were issued or whether *any* diversion works even continued to exist. Tr., Vol. 2, p. 128, l. 23-p. 130, l. 6. The record before the Court today contains nothing to suggest that the Department made any investigation concerning *any* of the criteria required by I.C. § 42-222(2) to be considered by the Department in reviewing a transfer application. It was in large part for these reasons, and because of the obvious injury that would occur to other right holders if the Department's omissions were not corrected, that the Department determined to void the prior approval of Transfer 3785.

A more detailed summary of the history of development and use of the Sagewillow Rights, and the evidence presented at trial is contained in the Mays' Post-Hearing Brief and Response to Applicant's Closing Argument, R. pp. 391-414.

### **STANDARD OF REVIEW**

Mays agrees with the recitation of the standard of review contained in the Department's Response Brief.

### **ISSUES PRESENTED**

Mays agrees with the statement of the issues presented on judicial review contained in the Department's Response Brief.

## ARGUMENT

### **I. The Department's Conclusion of Forfeiture of the Sagewillow Rights is Supported by Clear and Convincing Evidence.**

Idaho law requires that forfeiture be proved by clear and convincing evidence. *Jenkins v. State Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). However, clear and convincing evidence is not synonymous with absolute proof. *See e.g., Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944) (court sustains finding of abandonment in the face of conflicting testimony concerning historical beneficial use, and accepts as clear and convincing, testimony of a witness who had lived on and farmed adjacent tract of land). Evidence that land had not been irrigated for many years, that the ditches and diversion facilities were no longer in use or repair, or that the land had been used as grazing land will support a finding of forfeiture. *Id.*, 65 Idaho at 293.

#### **A. The Department's decision that Right Nos. 33-2091 and 33-2090 were forfeited in their entirety is supported by substantial, clear and convincing evidence.**

The Department correctly determined that Right Nos. 33-2091 (originally appurtenant to the Homestead Property) and Right No. 33-2090 (originally appurtenant to lands north of the county road on the Knollin Ranch and referred to in the record as the "North of the Road Property") had been forfeited in their entirety by Sagewillow's predecessor Slim Hawley. Testimony and exhibits introduced at hearing by Mays and Sagewillow conclusively show that the points of diversion, and

Mr. Hawley testified that he had occasionally seen wastewater from the adjacent Bird Ranch property running through a low spot on the Homestead property. Tr., Vol. 2, p. 8., l. 18 - p. 9., l. 12. Sagewillow's manager, Mr. Pancheri, testified that he "tried" to irrigate the Homestead Property in 1989 using tail water from the water right appurtenant to *the Bird Ranch property*, but that he succeeded only in getting some water into the gully and onto several acres southwest of the gully. Tr., Vol. 1, p. 83, l. 12 - p. 84, l. 22.<sup>4</sup> There was no evidence that the flow of tail or waste water down this "gully" on the Homestead property amounted to beneficial use of water.

A September 1975 orthophotoquad and aerial photos taken in 1990, 1991 and 1992, Protestant's Exhibits 6, 11, 12 and 13, demonstrate that the 320 acres of the Homestead Property was never irrigated during those years. The total non-irrigation of the Homestead Property from as early as 1975 is substantiated by every aerial photo of the property introduced into evidence by Sagewillow or Mays.

**2. Evidence of continuous nonuse of Right No. 33-2090 also was undisputed.**

Well 11 originally was developed and used as the diversion point for Right No. 33-2090 by Mr. Hawley's aunt and uncle to irrigate and prove up on the 320 acres known as the North of the Road Property. However, Well 11 was large and expensive to run, and consequently was never used to irrigate its designated place of use after approximately 1966 while Mr. Hawley was familiar with the property. Tr., Vol. 2, p. 17, l. 7-25; p. 28, l. 17 - p. 30, l. 4. Vance Hawley testified that he understood from

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<sup>4</sup>The maps and aerial photo exhibits indicate that the lands southwest of this gully are federal lands and outside the place of use of Right No. 33-2091.

his father that like the Homestead Place, the North of the Road Property was irrigated initially to obtain the federal patent, and thereafter was seeded to crested wheatgrass and managed as dry rangeland. Mays' Exhibits 3, 5, 6 and 13 confirm the total lack of beneficial use of Right No. 33-2090 on the North of the Road Property for the years 1975 through 1990. Sagewillow offered no evidence to rebut the evidence of nonuse. Indeed the exhibits introduced by Sagewillow completely substantiate Mr. Hawley's testimony concerning the extent of irrigation on the Knollin Ranch prior to its purchase by Sagewillow in 1989.

**B. Clear and unrefuted evidence exists concerning the extent of non-use of the primary rights (Right Nos. 33-2057, 33-2083, 33-0076 and 33-2133) on the Knollin Ranch.**

Vance Hawley testified that no more than 1,176 acres of the Knollin Ranch proper ever had been irrigated with the Sagewillow Rights during his tenure there. Tr., Vol. 2, p. 26, l. 13-20. This testimony is substantiated by the Agricultural Conservation and Stabilization Service ("ASCS") aerial photographs and field acreage maps, Protestants' Exhibits 2, 3, 5, 9, 13; Tr., Vol. 2, p. 19, l. 10-p. 20, l. 18, and by Mr. Scanlan's testimony.<sup>5</sup> Like the evidence concerning Right Nos. 33-2091 and 33-2090, there is no real doubt that portions of the primary rights originally appurtenant to the Knollin Ranch proper, and to the Bird Ranch, went unused for many years prior to Sagewillow's purchase of the land. Sagewillow's witnesses, including Mr. Pancheri and Mr. Brockway, testified concerning Sagewillow's attempts

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<sup>5</sup>Mr. Scanlan could find evidence of only 1,182 acres of actual irrigation.

to reinstitute irrigation on the Knollin Ranch after 1989, and to place other areas not previously irrigated under sprinklers. These efforts were significantly impeded initially by the absence or poor condition of any diversion and delivery systems for the lands.

Mays Exhibit 21 is a composite illustration of Mr. Pancheri's testimony as constructed by him at the stand concerning the acres on the Knollin Ranch that were irrigated between 1989 and 1993. By its nature this exhibit and the testimony demonstrates what was not irrigated as much as it demonstrates what was irrigated. Indeed, Sagewillow's summary of the level of irrigation that could be and in fact was accomplished on the Knollin Ranch as of 1989 was 1,300 acres (100 acres less than Mays' estimate). *See Amended Final Order, R., p. 741.* Thus, the evidence of non-use of the Sagewillow rights on the Knollin Ranch is abundantly clear.

**C. The Department correctly concluded that Sagewillow was entitled to irrigate no more than 230 acres under Right Nos. 33-02086 and 33-7018.**

Sagewillow argues that the Department incorrectly limited Sagewillow to irrigation of 230 acres of land on the Frew Place instead of the requested 260 acres. Sagewillow argues that since the two water rights are licensed for irrigation of 260 acres, it should be permitted to irrigate 260 acres even though it purchased only 229 acres of the 260. As Sagewillow originally put it:

Sagewillow purchased all of the water rights, but not all of the land, and it was contemplated that Sagewillow would transfer the place of use of the two water rights and dry up the 31 acres formerly irrigated within the quarter-quarter section retained by the Hawleys.

Exceptions to Amended Recommended Order, R., p. 673. However, Sagewillow either overlooks or ignores a fundamental principle of water law, which is that water is appurtenant to the land on which it is used, and that absent a stated intent to the contrary, a conveyance of land "together with appurtenances thereto" convey's only so much of the water right that actually is "appurtenant thereto" by virtue of its having been beneficially used thereon. As summarized by Weil,

The water-right will pass as an appurtenance in parts on a sale of the land in parts. In subdividing a tract it will be presumed that a water-right passes in proportion to the relative size of the subdivision. The purchase of part of land for which water was appropriated will be assumed to own the proportion of the water awarded to the entire tract as his tract bears to the entire tract.

Weil, 1 *Water Rights in the Western States* § 553 (3d ed. 1911). See also *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984).

Nothing in the record suggests the Grantor's intention to convey more than the appurtenant rights to Sagewillow. R., p. 735. The March 9, 1993 deed from David and Connie Hawley to Sagewillow conveyed

a single parcel of property. . . contain[ing] 252 acres, more or less, minus 6.5 acres, more or less, within said roads for a net acreage of 245.5 acres, more of [sic] less. . . TOGETHER with all water and ditch rights appurtenant thereto, including, but not limited to: State of Idaho Water rights License Nos. 33-2086 and 33-07018. . . Together with tenements, hereditaments, appurtenances, ditches and ditch rights and water and water rights thereunto belonging or in anywise appertaining. . . TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, its heirs and assigns forever.

R., pp. 224-226.<sup>6</sup>

On this record, the Department was entitled to presume that Sagewillow was granted such portion of Right Nos. 33-2086 and 33-07018 as were appurtenant to the lands granted, or approximately 230 acres. The fact that ASCS aerial photos examined by Mr. Scanlan showed no more than 230 acres of land included within the licensed place of use as actually irrigated is entirely consistent with this presumption—and with the Department's conclusion to allow no more than 230 acres of irrigation under the two rights. In its rebuttal case, Sagewillow never attempted to overcome this presumption with any evidence of an intent contrary to what must be presumed from the warranty deed's language. As such, the Department was fully entitled to conclude that any portion of Right Nos. 33-02086 and 33-07018 in excess of what was appurtenant to Sagewillow's property could not be transferred.

In resolving the differences between Mays' and Sagewillow's estimates of historical beneficial use prior to 1989, the Department gave the benefit of any discrepancies between the two to Sagewillow. Thus, based on the unrefuted and credible testimony of Vance Hawley, on the numerous exhibits, including maps and aerial photos, the Department determined that those portions of the Sagewillow Rights<sup>7</sup> appurtenant to lands exceeding 1,412 total acres had been forfeited due to historical nonuse. The Department's conclusions of forfeiture as to each of the

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<sup>6</sup>Where the Grantors wished to clarify their intent, they knew how to do so. See "Note" at page 2 of the Warranty Deed expressly describing the Grantor's intent with respect to an irrigation well and an area of land for access, maintenance, etc. R., p. 225.

<sup>7</sup>Exclusive of Right Nos. 33-2091 and 33-2090, which the Department concluded had been completely forfeited.

Sagewillow Rights are supported by clear and convincing evidence, and by the Department's findings of fact, and should be upheld on appeal.

**D. Based upon the Department's conclusions of forfeiture, the Department correctly reduced the combined diversion rate for the Sagewillow Rights to 28.24 cfs.**

Sagewillow complains that the Department reduced the cumulative diversion rate under its water rights to 28.24 cfs for the irrigation of 1,412 acres. But to do otherwise would violate the duty of water limitations explicit in both Idaho Code § 42-220, and the prior appropriation system. The Department's limitation of the duty of water in a transfer proceeding to one inch per acre was upheld by the Idaho Supreme Court in *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992). Moreover, Sagewillow incorrectly characterizes the record as establishing that more than one inch per acre is required to irrigate the Sagewillow lands. This is simply wishful thinking.

To begin with, the sworn affidavits submitted by the original appropriator in making proof of beneficial use establish that the Knollin Ranch lands can be irrigated with one inch per acre *or less*.<sup>8</sup> The Sagewillow Transfer applications seek no more than an inch to the acre. As Sagewillow's counsel explained to the Department:

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<sup>8</sup>See R., pp. 817-822 (sworn depositions stating for Right No. 33-02057 that 1,200 inches is sufficient for 1,400 acres); R., pp. 911-916, 923, 926 (sworn depositions, Report of Engineer and license stating for Right No. 33-02086 that three-quarters of an inch per acre is sufficient); R., pp. 947, 950, 952, 959 (sworn depositions stating for Right 33-2090 that one inch per acre is sufficient and report of field examiner recognizing beneficial use of 296.5 miners inches for 320 acres); R., pp. 982, 985, 987, 991 (sworn depositions stating for Right No. 33-2091 that 1 inch per acre is sufficient and Report of Engineer recognizing beneficial use of 0.68 inches per acre); R., pp. 1161-62, (proof of beneficial use report requesting for Right No. 33-07018, 200 inches for 320 acres and Report of Field Examiner finding beneficial use of one inch per acre).

There are, of course, transmission losses through the ditch and pond systems, and some transmission loss charge will probably be made by the watermaster for the exchange wells pursuant to the resolution adopted by the water users at the Annual Meeting of District 33 this year. . . Much more water per acre is required for the lands flood irrigated with the open ditch systems than for the lands sprinkled through the closed conveyance systems. However, it seems clear that the entire 2,383 acres can be adequately watered as described with the total of the 46.65 cfs [2,332.5 miners inches] under the six rights.

R., p. 8.

As rebuttal to these admissions Sagewillow cites to a single letter containing the opinion of the local Soil District Conservationist to the effect that 1.25 inches per acre would be required to *flood* irrigate the 163 acres of the Frew Place under water right 33-07018. Petitioner's Opening Brief at 10; R., p. 1094. (Sagewillow now proposes to irrigate the Frew Place lands with sprinklers. *See e.g.*, exhibit to Transfer Application 4224, R., p. 90). Yet, ultimately the Department determined that 1 inch per acre was sufficient. R., p. 1108. In his testimony regarding the irrigation requirements for the Sagewillow property, Dr. Brockway simply observed he did not think one inch per acre would be adequate "in all cases". For example, he observed that the winter "root zone storage" right (33-02133) (which was not seriously contested in this case) would require more than one inch. Dr. Brockway agreed that one inch per acre was certainly adequate for lands under sprinkler (the lions share). Other than with respect to the root zone storage right, Dr. Brockway did not identify any particular lands that would require more than an inch per acre, nor did he state an opinion regarding how much more than one inch such lands might need. Tr.,

Vol. 1, p. 163, l. 1-19. That is hardly sufficient evidence to warrant increasing the duty of water above its originally licensed amounts, or to diverge from the longstanding and statutorily recognized one inch per acre duty of water. I.C. §§ 42-202, 220. The determination of the duty of water is on the fact properly left to the Department. *See Uhrig v. Coffin*, 72 Idaho 271, 274, 240 P.2d 480 (1952). Because all rights appurtenant to more than 1,412 acres had been forfeited, the Department correctly limited the cumulative diversion rate under the rights to 1,412 miners inches (28.24 cfs). That decision should be affirmed by the Court.

## **II. The Forfeited Sagewillow Rights Were Not Revived Under the Resumption of Use Doctrine.**

In light of the clearly established nonuse of the Sagewillow Rights prior to 1989, Sagewillow invokes the resumption of use doctrine as a defense to forfeiture. Sagewillow's reliance on this doctrine, under the instant facts, is misplaced. Sagewillow also attempts to transform the usufruct system of use which includes forfeiture into a system of nonuse of water, in which at end of five years of non-use a water right simply becomes "dormant",<sup>9</sup> and transfixed in an indeterminable state of suspended animation. Under the Dormancy Doctrine Sagewillow has fashioned, the public stands by unable to lay any certain claim to the unused water; unable to maximize its beneficial use.

But Idaho's common law resumption doctrine is not a dormancy doctrine—it provides a narrow exception to abandonment and forfeiture, which in limited

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<sup>9</sup>Petitioner's Opening Brief at 11.

circumstances allows an appropriator to reclaim his original priority. The resumption doctrine as recognized in Idaho was stated succinctly in *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944):

[F]orfeiture is not effective if, after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party.

The requirements are specific, and have not been satisfied by Sagewillow.

**A. Sagewillow did not acquire title to the forfeited water rights.**

The resumption of use doctrine does not recognize any form of "tacking" onto the rights of an original appropriator. The reason for this is clear: When rights are abandoned or forfeited, there is no right remaining to be conveyed, received or revived. In other words, Sagewillow could acquire by deed from Slim Hawley only such rights as Slim Hawley held title to at the time. If the water rights or portions thereof had been abandoned or forfeited prior to the 1989 grant to Sagewillow, then they were not Slim's to give. *McDaniel v. Jones*, 235 Kan. 93, 679 P.2d 682 (1984) (a grantee acquires no greater title or interest in the real property conveyed by warranty deed than his grantor had).

This principle is especially applicable in the case of usufruct water rights, which revert to the state and become subject to appropriation once use ceases for the required period. I.C. § 42-222(2). Consequently, a mere recitation in the deed from Venice Hawley to Sagewillow purporting to convey "appurtenant" water rights was ineffective as to those rights or portions of rights that no longer were appurtenant because they previously had been abandoned or forfeited. See e.g., *Stanley v. Shierry*,

322 P.2d 502, 504 (Cal. 1958) (grantor cannot convey by deed what belonged to someone else merely by including it within the legal description); Weil, 1 *Water Rights in the Western States*, *supra* at 607 (once a water right is abandoned, it cannot be revived by a sale, and the sale passes nothing); *Colorado Land & Water Co. v. Rocky Ford Canal, Reserv., Land Loan & Trust Co.*, 3 Colo. App. 545, 34 P. 580 (1893) (where work of appropriator is begun and abandoned, all incipient rights acquired are forfeited and revert to the public, and cannot thereafter be sold or transferred).

Wells Hutchins has summarized the law on this point as follows:

After a water right has been abandoned, a subsequent sale of the right, whether made in good faith or not, cannot revive the abandoned right. Neither the original appropriator nor any person now attempting to connect himself with the original right can thereafter successfully assert ownership as against other persons holding rights in the water supply (citations omitted).

Wells Hutchins, 2 *Water Rights in the Nineteen Western States*, Miscellaneous Publication No. 1206 at 277 (U.S.D.A. 1977).

Given the law concerning the effect of abandonment on an appropriator's ability to convey title to his appropriation, it is apparent why the Idaho Supreme Court has held in *Carrington* that resumption of use may be affected only by the "original owner or appropriator". Further, as discussed in the next section, because water within the Little Lost River Basin historically has been overappropriated, it is apparent that even Slim Hawley, as the original owner and appropriator could not have lawfully negated the forfeiture of his water rights by a resumption of use.

**B. The forfeited water rights, and the right to resume their use, could not be conveyed to Sagewillow because title in them already had vested in the State or junior appropriators.**

A water right, once abandoned or forfeited immediately reverts to the state and becomes subject to appropriation once again. I.C. § 42-222(2). As the Idaho Supreme Court held in *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256, 1260 (1982)

If a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. Other parties may then perfect a water right in those waters. . . If a senior right has been abandoned or forfeited, the priority of the original appropriator is lost, and the junior appropriators move up the ladder of priority.

In other words, junior appropriators from the same source obtained title to those quantities of water that were forfeited by Slim and Venice Hawley long before Sagewillow took delivery of the deed to the Knollin Ranch and attempted to revive them. Particularly in a fully or overappropriated system like the Little Lost River, the ascension of juniors up the ladder of priority (and consequently the extinction of the right to resume use) is immediate.:

. . . upon cessation and extinction of an appropriative right to divert and use water of a stream as a result of forfeiture, the quantity of water thereby left flowing in the stream instantaneously either (1) ceases to be appropriated water and instead becomes unappropriated water available for reappropriation, or else (2) it becomes part of the supply to which existing junior rights theretofore not fully satisfied immediately attach to the extent of their lawful requirements.

[I]n overappropriated streams all or part of the water released by consummation of forfeiture does not become unappropriated, because the stream is already *overappropriated*. Therefore, part or all of such released water, as the case may be, instantly and automatically, with no lapse of time, inures to the benefit of junior appropriators who have first claim upon the increment for the purpose of "feeding" their rights up to the maximum to which they are entitled when water is available therefore.

Hutchins, *supra* at 315.

The record demonstrates that Mays and numerous others hold junior, intervening rights in the Little Lost River Basin. For example, Mays' holds water right license nos. 33-02107 and 33-02103, which have priority dates of 1961. These are junior to every Sagewillow Right except Right No. 33-07018, which has a priority date of 1972. Mays Exhibit 22; R., p. 737-738. *See also* Blaine County Canal Company Exhibit 1. These are precisely the intervening rights on the fully appropriated system that must preclude any resumption of use under the common law resumption doctrine. These are the rights that must have moved up the ladder five years after Slim Hawley ceased diverting all or portions of his water rights to beneficial use on the Knollin Ranch. These are the intervening rights which each in some measure have succeeded to title in the forfeited Sagewillow Rights.<sup>10</sup>

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<sup>10</sup>As noted by Mays in briefing before the Department, the resumption doctrine may well have had some broad vitality and applicability years ago when there were fewer appropriators on the stream, and fewer consumptive uses of the water. But in a fully appropriated stream, there simply are too many junior rights waiting in line to be "fed" for a forfeited or abandoned right to be revived by resumed use. However, one can easily conceive of situations in Idaho where resumption might be possible. For example, there are many tributaries to the Main and Middle Forks of the Salmon River, where mining and limited irrigation development occurred during the Idaho's early history. The water rights that supported those developments, like the developments themselves, subsequently may have been forfeited or abandoned. But significant quantities of unappropriated water continue to exist on those streams. On many of these there likely have been no subsequent appropriations. It is conceivable that an original appropriator could return to the stream, resume his or her mining or irrigation uses, and revive the original appropriation and

**C. Sagewillow did not resume the original use of the forfeited rights.**

The resumption of use doctrine as defined by the Idaho Supreme Court shields a water right from forfeiture if the original owner or appropriator "resumed the use of the water" prior to an intervening appropriation. *Carrington, supra*, 65 Idaho at 532. The "use of water" that may be resumed is the "use of water" as originally authorized under the original appropriation.

Once forfeiture has been proven by clear and convincing evidence, the burden was on Sagewillow to prove that it had met the strict requirements of the resumption defense. Part of that proof necessarily would be that Sagewillow resumed the use of the forfeited water rights consistent with their original use. Sagewillow failed to do so.

License 33-02091 authorized diversion of water from a well located north of the Bird Ranch/Homestead Property to irrigate the Homestead Property. Sagewillow's attempts to irrigate the Homestead Property from 1989 to 1992 were through a ditch with its heading on the Little Lost River, using waste water resulting from water diverted and used on the Bird Ranch under Right Nos. 33-2057 and 33-2083. Those efforts resulted only in some wastewater reaching a gully on the Homestead property, and distribution of some of the wastewater onto federal lands southwest of the Homestead Property, which hardly amounts to resumed use, let alone beneficial use.

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priority.

License 33-2090 authorized diversion of water from Well 11 located on the westernmost boundary of Section 1, T7N,R27E, to irrigate lands in Section 1, T7N,R27E and Section 6, T7N,R28E. Sagewillow's alleged resumption of use of this right was based on diversion of water from wells 9, 10 and 1, which was applied to 132 acres in Section 1, T7N,R27E, under pivots 6 and 7 *to which no water rights were appurtenant*.<sup>11</sup> Sagewillow was completely unable to identify what water right use was being resumed, if any, through irrigation of this 132 acres.

Power records of the wells on the Knollin Ranch obtained and analyzed by Mr. Scanlan showed that from 1985 to 1989, the highest annual volume of water pumped from all of the Knollin Ranch wells was approximately 5,183 acre-feet, 337 acre-feet of which was pumped during the winter months. After 1989, annual diversions more than doubled and reached a high of nearly 12,000 acre-feet in 1994. Winter pumping from the wells approached 2,000 acre-feet during 1993. Protestant's Exhibit 16. Sagewillow has suggested that this 2,000 acre-feet of "resumed use" was the exercise of the domestic use authorized under license no. 33-2057. However, there is no evidence that anyone was living on the property during this period, let alone evidence that they or their personal livestock required 2000 acre-feet of water over the winter months.

Given that the resumption doctrine must be construed narrowly so as not to swallow the forfeiture statute and its underlying policies of certainty and maximum beneficial use, the evidence of resumed use presented by Sagewillow is insufficient

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<sup>11</sup>This unauthorized use occurred in NE1/4,SW1/4, NW1/4,SE1/4, SW1/4,SE1/4 of Section 1 under pivot 6, and in the SE1/4,SE1/4 of Section 1 under pivot 7.

to overcome the clear evidence of forfeiture. Sagewillow has not satisfied the element of the resumption doctrine that requires the original owner or appropriator to resume the original use of the forfeited right.

Sagewillow never obtained title to the forfeited water rights through the Venice Hawley Deed. The unused water under those rights has been consumed by the intervening rights of Mays and others who continue to rely on its availability to fill their rights an already fully appropriated system. Sagewillow never resumed the original use of the water in any event. At best the record demonstrates a determined, but improper effort to spread as much water across the Knollin Ranch as possible, in the shortest amount of time prior to filing the transfer applications. The resumption doctrine offers Sagewillow no safe harbor, and the Department's determination that Sagewillow had not revived the forfeited rights must be affirmed.

### **III. Neither Mays nor the Department were estopped from reconsideration of Transfer 3785.**

#### **A. Mays is not collaterally estopped from objecting to the Sagewillow transfers on the grounds that Right Nos. 33-2091 and 33-2090 have been forfeited.**

Sagewillow argues that Mays was collaterally estopped from challenging the Department's prior approval of Transfer 3785. This is incorrect.

The test for whether a party may be collaterally estopped to litigate an issue has been described by the Idaho Supreme Court:

1. Did the party against whom the earlier decision is asserted have a full and fair opportunity to litigate that issue in the earlier case?

2. Was the issue decided in the prior litigation identical with the one presented in the action in question?
3. Was there a final judgment on the merits?
4. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

*Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 849 P.2d 107, 112 (1993) (quoting *Anderson v. City of Pocatello*, 112 Idaho 176-183-4, 731 P.2d 171, 178-9 (1987)).

Mays was not a party to Transfer 3785. Moreover, the issues of forfeiture or abandonment were never decided in that matter. The record shows that the application was submitted and summarily approved without any action on the Department's part to investigate the issues of forfeiture or abandonment. Consequently, there was no "adjudication" "on the merits" of the validity of Right No. 33-2091. Transfer 3785 involved the act of processing and approving an application without any inquiry of its merits other than to determine that a license for the water right had been issued previously. Indeed, this cursory processing of Transfer 3785 even failed to satisfy the minimum requirements of 42-222(2) that the Department investigate the issue of forfeiture and abandonment. *See Jenkins, supra*, 103 Idaho 384, 647 P.2d 1256, 1259 (the Director of the Department has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether the proposed transfer would injure other water rights. Emphasis added).

Finally, Sagewillow itself has called into question the validity of Transfer 3785 in the instant transfer proceedings. Sagewillow proposed to ignore the transfer

because its result was to stack Right No. 33-2091 on top of the place of use of Right No. 33-2090. As Sagewillow put it:

In fact, 2 new wells were drilled in order to obtain sufficient water to operate the pivots, and we need to straighten that whole matter out in this proposed transfer. On Map No. 1, we have ignored the 1992 transfer [3785] because the stacking of water rights, 33-2090 and 33-2091, appears to have been inadvertent and was certainly neither necessary nor intended. We also have 1 extra well unaccounted for on paper.

R., p. 4. In other words, Sagewillow's position going into these transfers was either that the original transfer was a nullity (Sagewillow prepared its applications as if the Transfer 3785 had never occurred), or that it intended to unwind the transfer here. Mays is not estopped from raising the issue of forfeiture or abandonment of right 33-2091 because the issue was never decided in Transfer 3785, and because Sagewillow itself made the validity of that transfer an issue here.

Even if Sagewillow could make out the essential elements of collateral estoppel, including a final judgment on the merits, that doctrine does not bar the voidance of Transfer 3785 now, because a specific exception to collateral estoppel applies to the facts here. The Second Restatement delineates the exceptions to collateral estoppel.<sup>12</sup>

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

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<sup>12</sup>Idaho has adopted the Restatement (2d) Judgments (1982) treatment of issue and claim preclusion. *Aldape v. Akins*, 105 Idaho 254, 668 P.2d 130 (Idaho App. 1983).

(5) There is a clear and convincing need for a new determination of the issue (a) because of the *potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action*, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Restatement (Second) of Judgments § 28 (emphasis added).

The public interest is harmed where a forfeited or abandoned water right is permitted to be revived after other rights in the source have accrued. That is the reason the common law resumption doctrine, and later the statutory resumption provision, were worded to protect intervening rights. The harm to the public that would result from Transfer 3785 outweighs even the policy against relitigating issues already decided. *See e.g., State v. Gusman*, 125 Idaho 810, 874 P.2d 1117 (Idaho App. 1993). In *Gusman*, Gusman was arrested for driving under the influence. She refused to submit to an alcohol concentration test and her license was suspended by the Idaho Department of Transportation. A hearing was held concerning the administrative suspension and the magistrate found that Gusman was not the driver of the car, and that there had been no probable cause to stop the car. *Gusman*, 874 P.2d at 1118.

At the criminal trial Gusman sought to dismiss the government's case based on the doctrine of collateral estoppel. Gusman argued that the issues concerning the driver's identity and probable cause already had been determined. The court held

that collateral estoppel did not bar the litigation of the state's case because

Even though we might conclude that the five elements enumerated in *Anderson* and quoted in *Powell* are present here, we nevertheless decline to apply collateral estoppel because to do so would undermine the legislative purpose and effect of the existing statutory scheme. As the Oregon Supreme Court has stated:

[The] principles of collateral estoppel and the other principles of *res judicata* are not to be applied in the abstract; they have validity only if their application will carry out the policy which these principles were designed to express. It is necessary, therefore, to examine ... the nature of the proceedings ... and to determine what ends would be served by permitting or denying further litigation on the issue [sought to be precluded].

*Gusman*, 874 P.2d at 1120 (quoting *Griffin v. City of Roseburg*, 255 Or. 103, 464 P.2d 691, 693 (1970)). See also *Dana's Housekeeping, Inc. v. Department of Labor & Industr.*, 886 P.2d 1147, 1154 (Ct.App.Wash. 1995) ("While administrative agency adjudications may be accorded preclusive effect in subsequent litigation, issues will not be precluded when the benefits of finality are outweighed by adverse impact on public interest."); Restatement (Second) of Judgments § 28(5)(a).

Accordingly, because the public interest in protecting intervening water rights outweighs any benefit of finality in this case, collateral estoppel does not apply to prohibit the voiding of Transfer 3785.

**B. Equitable Estoppel Does not Prohibit the Voiding of Transfer 3785.**

Equitable estoppel does not prohibit the voiding of Transfer 3785 because (1) equitable estoppel can be applied to a government agency only where required by

justice and fair play *and* where there is no damage to the public interest, and (2) even if equitable estoppel might be applicable to a state agency such as the Department, Sagewillow has failed to establish all the elements for such relief.

As always, one who invokes equity must do so with clean hands; justice and fair play require it. What justice would there be in rewarding Sagewillow for submitting an application that was incomplete as to the critical issue of beneficial use? Can one who developed and irrigated lands without the required approvals argue that equity should reward him? On the facts, Sagewillow must concede that over 130 acres of land under two different pivots in Section 1, T7N, R27E have been irrigated since 1991, without the benefit of any appurtenant water right whatsoever. How should the benefits Sagewillow continues to derive from this unauthorized use weigh in the equity scales? Does it comport with justice and fair play for Sagewillow to contend that Transfer 3785 should be treated in these transfers as if it never occurred, yet object when the Department agrees? Sagewillow has presented no facts or argument that would compel the Department, or a court, to ignore the public policies that Idaho's water code was designed to serve. The equities in this case all weigh in favor of the public and the Department's Amended Recommended Order.

**1. Equitable Estoppel Should Not Be Applied Against the Department.**

Although Sagewillow has correctly noted in previous briefing that equitable estoppel "*can* apply to a government agency acting in its sovereign capacity," R., p. 669, the cases it cites in support of that point actually establish that the doctrine

is to be applied against a government only in exceptional cases. For example, Sagewillow cites *Brandt v. State*, 126 Idaho 101, 878 P.2d 800 (Idaho App. 1994), which provides that "[e]stoppel, which is an equitable doctrine, cannot ordinarily be applied to a governmental agency acting in its sovereign capacity." 126 Idaho at 105, 878 P.2d at 804. And while the *Brandt* decision did discuss applying equitable estoppel to a governmental agency, the court never actually reached the merits of that issue because *Brandt* did not raise the issue before the magistrate. Moreover, the equitable estoppel discussion in *Brandt* confirms how rare a situation it would be for estoppel to apply to a governmental agency:

'[W]here justice and fair play require it' estoppel will be applied against the government, even when the government acts in its sovereign capacity if the effects of estoppel do not unduly damage the public interest.

*Brandt*, 126 Idaho at 105 (emphasis added, quoting *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982)). Thus, the estoppel must not unduly damage the public interest, and justice and fair play must require its application. Given the public interest considerations recognized by the Department's Final Order, and the balance of equities here, equitable estoppel is not a defense that is available to Sagewillow.

Sagewillow also points to *Boise City v. Sinsel*, 72 Idaho 329, 241 P.2d 173 (1952) to support its theory that equitable estoppel should apply in this case. Petitioner's Opening Brief at 33. But *Boise City* indicates only that equitable estoppel *may* be invoked against a municipality, and then, only under exceptional circumstances. In *Boise City*, the City granted Sinsel a permit to build a structure which encroached on Front street in 1927. In 1949 the City Council canceled and

revoked the permit and sued for an injunction against Sinsel. The Supreme Court refused to apply equitable estoppel against the City, stating,

In this jurisdiction we have recognized that equitable estoppel will lie against a municipality but that *it must be invoked with caution and only in exceptional cases* and that *its application is the exception and not the rule.*

*Boise City*, 72 Idaho at 338 (emphasis added).

Sagewillow has failed to show that this is such an "exceptional case" that it would warrant the application of equitable estoppel to the Department. The Department must be able to void those of its prior decisions governing use of the State's water that subsequently are shown to have been in error and to be adverse to the rights of others.

## **2. Sagewillow has Failed to Establish the Elements of Equitable Estoppel**

Sagewillow also cannot establish the elements of equitable estoppel under the facts of this case. The elements of equitable estoppel are as follows:

(1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) the party asserting estoppel did not know or could not have discovered the truth; (3) the false representation or concealment was made with the intent that it be relied upon; and (4) the person to whom the representation was made or from whom the facts were concealed relied and acted upon the representation or concealment to his prejudice.

*Young v. Idaho Dept. of Law Enforcement*, 123 Idaho 870, 853 P.2d 615, 619 (Idaho App. 1993). In *Young*, the plaintiffs sought to estop the Department of Law Enforcement from denying their liquor license after they failed to comply with the

Department's notice procedures. The court could not reach the question of whether estoppel could be applied against the government agency because the plaintiffs did "not allege that the Department made any false statements or concealed material facts." *Young*, 853 P.2d at 620. Here, Sagewillow has likewise failed to assert that the Department engaged in misrepresentation or concealed facts which would permit equitable estoppel to be applied. Moreover, if any "concealment" is evident by the facts in this case, it could be attributable only to Sagewillow.

### **3. Quasi-Estoppel Does Not Apply to Prohibit the Voiding of Transfer 3785.**

Sagewillow also contends that the doctrine of quasi-estoppel prohibits the Department from changing its position and voiding Transfer 3785. Petitioner's Opening Brief at 34. Again, Sagewillow's argument fails to address two elements of the doctrine of quasi-estoppel. First, the person to be estopped must have had full knowledge of the facts, *see, KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971); and *Young, supra*, 853 P.2d at 620, and second, the doctrine applies only when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position. *See Mitchell v. Zilog, Inc.*, 125 Idaho 709, 874 P.2d 520 (1994) (citing *KTVB, supra*); *see also Willig v. Idaho Department of Health and Welfare*, 127 Idaho 259, 899 P.2d 969 (1995) (a showing of hardship and not "irreparable harm," is insufficient; unconscionability is required). "Unconscionable Conduct" has been defined as "conduct that is monstrously harsh and shocking to the conscience." Black's Law Dictionary (4th ed., West Publishing Co., 1968). Here,

Sagewillow has not alleged and cannot establish that voiding Transfer 3785 amounts to unconscionable conduct. Sagewillow argues that it has suffered hardship because it expended resources developing sprinklers. However, these funds were expended prior to the approval of Transfer 3785. Moreover, Sagewillow received the benefit of crops raised under the sprinklers for four years to the detriment of Mays and other water right holders who were adversely impacted by Sagewillow's use of the water.

Sagewillow also cites to *Alder v. Mountain States Telephone & Telegraph Co.*, 92 Idaho 506, 446 P.2d 628 (1968) in support of its quasi-estoppel argument. But *Alder* is authority for the proposition that "the party relying upon the acts of the party who is to be estopped must be 'excusably ignorant of the true facts.'" *Alder*, 446 P.2d at 633 (citation omitted). The testimony shows that if Sagewillow's principal, Mr. Dumke, did not have all the facts when he submitted the various Sagewillow applications, including the application for Transfer 3785, he could blame only himself or his employees, whom he testified he relied upon. Sagewillow's argument that *it* had no independent duty to inquire into the beneficial use of its own water rights at or prior to the time it purchased them or attempted to transfer them, must be rejected. Sagewillow was not "excusably ignorant" of the true facts concerning the non-use of its own claimed water rights. Sagewillow also has not demonstrated how voiding the transfer would be unconscionable. Accordingly, the doctrine of quasi-estoppel is inapplicable in this case.

**C. The Waters of the Little Lost River Basin are a Public Resource which the Department Must Manage in the Public's Interest.**

There can be no doubt that the Department's decisions concerning the use of the State's water resources are imbued with the public interest and trust. Consequently, the Department's decision regarding the transfer of Sagewillow's water rights is subject to correction if it later is found that the decision conflicted with the public interest when it was made. The determination of the public interest in the allocation and administration of the State's water is a duty vested in the Department. *See e.g.*, I.C. §§ 42-203 and 42-222. *See also Shokal v. Dunn*, 109 Idaho 330, 207 P.2d 441 (1985). The importance of the State's trust responsibility over public resources such as water is the basis for the limitations on the application of the doctrines of *res judicata*, collateral estoppel, and equitable estoppel against the government, and one of the reasons that the Department's decision in this case is not subject to those doctrines.

Thus, even if collateral estoppel or *res judicata* otherwise might be applicable to the Department's decision to void Transfer 3785, the Department's responsibility to the public gives the Department the authority to void the transfer. *See Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983) (lease of boat dock area on Lake Coeur d'Alene permissible, but Department later could determine that the conveyance no longer is compatible with the public trust imposed on the conveyance). The Court in *Kootenai* added that

[t]he public trust doctrine takes precedent even over vested water rights. Grants, even if purporting to be in fee simple, are given subject to the

trust and to action by the state necessary to fulfill its trust responsibilities. Grants to individuals of public trust resources will be construed as given subject to the public trust doctrine unless the legislature explicitly provides otherwise.

*Kootenai*, 671 P.2d at 1094 (emphasis added). Therefore, under the rule adopted by the Idaho Supreme Court in *Kootenai*, the Department can void the transfer if it finds that its initial approval was and remains inconsistent with the public trust.

The record also establishes that if the forfeited Sagewillow Rights could be revived by resumed use, there would be less water available in the hydrologic system to satisfy these junior rights *and many senior rights as well*. The resulting injury to other water rights occurs because of the increased consumptive use of the water that would result if irrigation was increased from 1,412 acres to 2,383 acres. Mr. Scanlan's opinion was that authorizing full diversion and use under the Sagewillow Rights would increase consumptive use (and decrease water available to the hydrologic system) by approximately 1,809 acre-feet per year. Tr., Vol. 2, p. 77, l. 2-15; Mays Exhibit 20. Mr. Scanlan also estimated that the resulting reduction in stream flows in the Little Lost River below the Knollin Ranch would be between 2.5 cfs and 5 cfs. Tr., Vol. 2, p. 79, l. 13-18; p. 82, l. 5-14. Dr. Brockway agreed that such impacts would occur, but he had no opinion on what their extent. Tr., Vol. 1, p. 148, l. 6 - p. 149, l. 18. These impacts are the kind of impacts on the public that the Department is required to prevent under I.C. § 42-222(2).

**IV. The Sagewillow Rights are subject to partial forfeiture under I.C. § 42-222(2) to the extent of partial non-use for the statutory period.**

The Sagewillow Rights are subject to forfeiture for non-use, in whole or in part, to the extent they have not been used for any consecutive five-year period. Sagewillow is correct that the partial forfeiture issue currently is pending before the Idaho Supreme Court, on appeal from the order of the SRBA District Court in Basinwide Issue 10. However, a decision by the SRBA Court that a water right is preserved in its entirety if any portion continues to be used is *not* binding precedent.

Moreover, the SRBA Court's decision runs contrary to the plain language of I.C. § 42-222(2) and the overarching policy of beneficial use enunciated in Idaho's Constitution. Idaho Const., art. XV, § 3 (the right to divert and appropriate the unappropriated waters of any natural stream *to beneficial uses*, shall never be denied). It also is contrary to the decisions of the Idaho Supreme Court in *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418 (1924), *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992), *Olson v. Bedke*, 97 Idaho 825, 555 P.2d 156 (1976) and *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944). The District Court for the Fourth Judicial District has affirmed the Department's determination of partial forfeiture of water rights under I.C. § 42-222(2). *Enterprise Canal Co. v. Idaho Dept. of Water Resources, et al.*, Memorandum Decision, Case No. 96371 (Fourth Judicial District 1993).

The issue of partial forfeiture has been set for determination on an expedited basis. Briefing is completed and argument is set for February 12, 1996<sup>7</sup>.

## CONCLUSION

For the foregoing reasons, the Department's Final Order in this matter should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December, 1996.

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By:



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## CERTIFICATE OF SERVICE

I hereby certify that on December 5, 1996, I caused to be served a true and correct copy of the foregoing to each of the persons named below by the method indicated below each of their names.

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