

**SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
SUBCASE NO. 33-69 et. al**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
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October 1, 2003

I. INTRODUCTION

The Director of the Idaho Department of Water Resources (“IDWR” or “the Department”) submits this Supplemental Director’s Report regarding subcase nos. 33-69 et al. in accordance with Idaho Code § 42-1412(4) and Administrative Order I. This report is also submitted in response to Special Master Bilyeu’s *Amended Trial Scheduling Order* dated July 22, 2003, setting forth the deadline of September 30, 2003 for a 706 Report from IDWR.¹ This report sets forth the basis of the Department’s recommendation for water right nos. 33-69 et al. and was prepared under the supervision of Karl J. Dreher, Director, and David R. Tuthill, Jr., Adjudication Bureau Chief for IDWR. That same order also requests that the Department submit Amended Director’s Reports for subcase nos. 33-69 et al. on September 30, 2003. Thus, filed on September 30, 2003, are Amended Directors Reports, or Director’s Reports, whichever the case may be, for all of the subcases that are the subject of this Report.

Ernest Carlsen, Water Rights Supervisor, IDWR, Eastern Region Office in Idaho Falls has knowledge of the information contained in this report.

There are 33 subcases discussed in this report and all of them have objections except 33-11003 which was reported to the SRBA Court for the first time in July, 2003. Attached hereto is Table 1 that summarizes the status of each subcase in the SRBA. The United States Forest Service is the only objector to water right nos. 33-69, 33-70, 33-71, 33-72, 33-73, 33-74, 33-76, 33-78, 33-79, 33-80, 33- 81, and 33-82. The Forest Service also has an objection filed to water right no. 33-2057F. The Forest Service’s objections relate only to a typographical error in the place of use description. That error has been corrected in the Amended Director’s Reports for

¹ By permission of the Court and the parties, IDWR is filing this report one day after the deadline.

these subcases that were filed on September 30, 2003. These subcases also share common remarks with the other subcases that are objected to by Sagewillow, Inc. (“Sagewillow”).² The common remarks have also been corrected to account for the Amended Director’s Reports on any related water rights.

Sagewillow has objected to the recommendations for subcase nos. 33-2007, 33-2008, 33-2057A, 33-2057B, 33-2057C, 33-2057D, 33-2057E, 33-2057F, 33-2083A, 33-2083B, 33-2083C, 33-2083D, 33-2083E, 33-2083F, 33-2086A, 33-2086B, 33-2090, 33-2091, 33-2133, and 33-7018. Mays Land and Livestock and Blaine County Canal Co. filed responses to all of Sagewillow’s objections except 33-2133.³ The only subcase without an objection at this time is subcase no. 33-11003; however, the Department has filed an Amended Director’s Report for this subcase in order to make the place of use description compatible with related water rights.

II. PROCEDURAL BACKGROUND

In October 1990, Sagewillow filed an application to transfer the place of use and point of diversion of the ground water right from the “Homestead Place” to the “North of Road” place.⁴ Nobody protested the transfer and the Department approved the transfer in October of 1992 (“1992 transfer”). Attached hereto is Sagewillow Diagram 1 that illustrates the various properties. The Diagram shows the recommended places of use for the various water rights and also notes the location of the water rights not recommended by the Department in parentheses

² Sagewillow, Inc. is the official name of the entity on file with the Secretary of State’s office. Although the objections filed in the SRBA are under Sage Willow, Inc. this report will refer to Sagewillow as one word.

³ The United States Bureau of Land Management filed an objection to 33-2133 but that objection was resolved with the filing of the Amended Director’s Report for that subcase on 2/2/2001. Thus, BLM is no longer a party to this subcase.

⁴ Note, the Supreme Court’s decision in *Sagewillow v. Idaho Dept. of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003) erroneously states that the transfer was intended to transfer water from the “Bird Ranch” to “North of Road” place. *Id.* at 836, 70 P.3d at 673.

underneath the claimed property location. Diagram 1 also contains the locations of the points of diversion for the surface water rights and the locations of certain wells discussed in this report.

Two years later in 1994, Sagewillow filed seven more transfer applications with the Department of Water Resources seeking to change the place of use for its six ground water rights (“1994 transfers”). James Mays, Mays Land and Livestock, and the Blaine County Canal Company filed protests to the transfers claiming that the transfers would expand Sagewillow’s surface water rights and that the ground water rights had been forfeited by non-use. Following the hearing, the Department found that the water rights appurtenant to the “North of Road” place and the “Homestead Place” had been forfeited and that water rights appurtenant to the “Knollin” and “Bird Ranches” and the “Frew Place” had been partially forfeited. Sagewillow was allowed to irrigate only 1,412 acres. Furthermore, the Department voided the transfer it had originally approved in 1992.

Sagewillow appealed the Department’s decision to the Seventh Judicial District Court, which affirmed the Department’s Order. Sagewillow then appealed the matter to the Supreme Court. The Supreme Court held that the Snake River Basin Adjudication (SRBA) District Court had exclusive jurisdiction to review the Department’s decision, thus, vacating the Seventh Judicial District Court’s decision based on lack of jurisdiction. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 135 Idaho 24, 13 P.3d 855 (2000). The case was then remanded back to the SRBA District Court.

The Legislature enacted Idaho Code § 42-1401D in response to the Supreme Court’s action; this statute prohibits any Department actions under the Idaho Administrative Procedure Act from being heard in the SRBA District Court. The SRBA District Court then transferred the

case back to the Seventh Judicial District Court and without further hearing, the District Court reissued its prior decision. Sagewillow then appealed again to the Supreme Court.

One of the key issues on appeal was whether or not the Department of Water Resources correctly applied the doctrine of resumption of use. The Department's conclusion of law regarding resumption stated:

17. Other users are not required to assert a specific claim to the water rights or water represented by rights held by the user attempting to resume his use. The existence or establishment of a junior water right is sufficient to claim the water. The resumption doctrine cannot restore portions of water rights forfeited by Sage Willow's [sic] predecessor in interest to the detriment of other water right holders.

Amended Final Order, In the Matter of Application for Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226, 4227 in the Name of Sagewillow, Inc., p. 19 (April 8, 1996).

The Supreme Court found that the Department's conclusion was incorrect. The Supreme Court clarified the requirements to be met under the resumption of use doctrine, stating that to resume a water right the resumption needed to occur:

1. Prior to the time others "initiated their appropriation," citing *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937);
2. In the case of ground water, the water user must have retaken possession of his wells and canals prior to the "initiation of any right therein by others," citing *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400, (1945); and,
3. Be upon the land to which the water right was appurtenant, citing *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3rd 693, (2001).

Sagewillow at 842, 70 P.3d at 680.

A key to determine whether other water users had initiated or claimed a right to the water is whether the stream is fully appropriated. In a previous Supreme Court decision, the Supreme Court held, "a person making a subsequent appropriation will be injured by resumption of the abandoned or forfeited water right. 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."

Jenkins v. State, Dept. of Water Resources, 103 Idaho 384, 387-88, 647 P.2d 1256, 1259-60 (1982). The Supreme Court clarified this statement in *Sagewillow* and expressly held “that the mere existence of a junior appropriator, however, is not sufficient to show that the junior appropriator has made a claim of right to the water not used by the senior appropriator.” *Sagewillow* at 836, P.3d at 676. Thus, the Department’s conclusion that the mere existence of a junior water right user was enough to defeat resumption was incorrect. Rather, a showing that the junior water user actually relied upon the water right prior to the resumption of use and put the water to beneficial use must be shown. *Id.*

The Supreme Court in *Sagewillow* discussed *Jenkins* further, noting that there was an express finding in that case that the watercourse was fully appropriated. The Court said that “the junior appropriators would be harmed if there would not be sufficient water to fill their water rights due to the senior appropriator being permitted to resume his use.” *Id.* The Court noted that this would typically occur when the watercourse was fully appropriated. If the watercourse was fully appropriated and the junior appropriators were using water to the extent that it was available, then according to the Supreme Court’s decision in *Sagewillow*, the junior appropriator would have made a claim to the water not used by the senior appropriator.

The Supreme Court remanded the case back to the Department because the Department did not make any finding that after the statutory period of non-use and before resumption of use by *Sagewillow* that any junior appropriator used water that was available because of continued non-use of the water by *Sagewillow*.

III. LEGAL PARAMETERS USED FOR THE ATTACHED DIRECTOR’S REPORTS

When filing these Director’s Reports, the Department considered how the water rights existed in 1987. The Department did not take into consideration the 1992 transfer that was found

by the Supreme Court to be properly voided⁵ and the seven 1994 transfers that have since been withdrawn by Sagewillow. In addition, the Department considered the following legal requirements:

1. Is there clear and convincing evidence that the water user failed to use and apply the water to a beneficial use for a continuous 5-year period? I.C. § 42-222.
2. Is a transfer required under I.C. § 42-222? Did the change in the point of diversion or place of use of the water right occur prior to 1987?
3. If a resumption of the water right occurred, did it occur upon the same land to which the water right was originally appurtenant?
4. If a resumption of the water right occurred, did it occur prior to any claim of right by a third party to the water not used by the senior appropriator?

IV. DISCUSSION

This section of the report will discuss the Department's basis for its recommendations contained in the Director's Reports and Amended Director's Reports filed on September 30, 2003.

A. Water Right Nos. 33-69, 33-70, 33-71, 33-72, 33-73, 33-74, 33-76, 33-78, 33-79, 33-80, 33-81, and 33-82

These water rights are used on the "Knollin Ranch." These are commonly referred to as the "high water rights." The United States Forest Service filed the only objections to the Department's original recommendations for these water rights; there was a typographical error in the place of use legal description placing these water rights on Forest Service property. This error has been corrected on these water rights and thus, the USFS's objections should be resolved with the filing of the Amended Director's Reports. The Amended Director's Reports for these water rights also incorporate appropriate combined use remarks to account for any related overlapping water rights.

⁵ See *Sagewillow, Inc. v. IDWR*, 138 Idaho at 671, 70 P.3d at 683.

1. Background. These water rights were decreed in *Blaine County Investment Co. v. Mays*, Decree, (6th Jud. Dist. Idaho, March 4, 1927). The relevant portion of the decree is attached as Exhibit 1. Water right nos. 33-69, 33-70, 33-71, 33-72, 33-80, 33-81 and 33-82 are the more senior of the high water rights with priority dates ranging from October 1, 1906 to March 15, 1909. Water right nos. 33-73, 33-74, 33-76, 33-78 and 33-79 are the more junior high water rights with priority dates ranging from April 1, 1912 to October 15, 1913. Water right nos. 33-69, 33-72, 33-74, 33-76, 33-78 and 33-79 were decreed with the Little Lost River as the source and water rights nos. 33-70, 33-71, 33-73, 33-80, 33-81, 33-82 were decreed with Spring Creek as the source.⁶ On the Amended Director's Reports filed along with this report, the priority dates for the various water rights did not change. All the high water rights now have Big Spring Creek and Little Lost River as their source.

2. Recommendations. The discussion for the recommendations for these water rights will focus on the number of acres and quantity elements for these water rights. The sum of these water rights equals 32 cfs. However, only 655 acres were historically irrigated according to Mr. Vance Hawley's testimony at the administrative hearing on Sagewillow's application for transfer. In his testimony, Mr. Hawley describes the irrigated acres field by field. The sum of the acres historically irrigated according to his testimony equals 655 acres.⁷ 1987 NAPP photography, 1992 aerial photos and a 1975 orthophotoquad map further support the recommended number of acres. These water rights were historically used on property located in T7N, R28E Sections 1, 7, 8, 12, 13 and 18 when they were available. Sub-irrigation occurs primarily in T7N R28E Sections 7 and 19 on lands not irrigated by these water rights. The high water rights are not available on a regular basis.

⁶ Diagram 1 shows Big Spring Creek however, Spring Creek and Big Spring Creek are one and the same.

⁷ Refer to Exhibit 2, IDWR administrative hearing transcript, page 13, line 18 through page 24, line 25.

If the total quantity of 32 cfs were recommended on the land historically irrigated under these water rights, then the resulting flow rate would be 2.5 miners inches per acre. These water rights were decreed at 0.02 cfs/acre. The Department's Amended Director's Reports are consistent with the decreed rates of diversion providing for the delivery of 0.02cfs/acre at the field headgate.

The quantity on the Amended Director's Reports for the more senior of the high water rights is cumulative until one inch of water per acre is provided on the 655 acres. The more junior high water rights are then limited with quantity and place of use remarks that say when combined with the senior high water rights, that all the water rights are limited to the delivery of 0.02 cfs/acre at the field headgate and the irrigation of 655 acres. The original recommendations for these high water rights also contained a combined limit of 0.02 cfs/acre, however, the condition specified a total combined diversion rate. The remarks on the Amended Director's Report are more administrable from the Department's perspective and do not limit the more senior high water rights unnecessarily.

B. Water Right Nos. 33-2007 and 33-2008

These two water rights are recommended to be disallowed because they are recommended as 33-71 and 33-73 respectively. The Department concludes that license nos. 33-2007 and 33-2008 were superceded by the decree in *Blaine County Investment Co. v. Mays*, (6th Jud. Dist. Idaho, March 4, 1927). This conclusion is based on the following reasons: (1) the license holders' predecessors in interest were parties in that case and (2) the sources and places of use for the two licenses are covered by water rights decreed in that case.

1. Background. License no. 33-2007 was in the name of Adolph M. Myrup for 3.2 cfs with a February 1, 1909, priority date from the Little Lost River. License no. 33-2007 is attached as Exhibit 3. Decreed right no. 33-71 was decreed from Spring Creek with a March 15, 1909, priority date to Merchants Trust & Savings Bank to be used on property titled in the decree as “A.M. Myrup Desert Entry.” *Blaine County Investment Co.* ¶ XXI. The land in the decree and the license are summarized in the following table:

Licensed POU for 33-2007	Decreed POU for 33-71
T7N, R28E, S18, SENW, SWNE, NWSE, NESE	T7N, R28E, S18, SENW, SWNE, NWSE, NESE

License no. 33-2008 was developed in the name of Lillian Myrup for 6.4 cfs from Spring Creek with a June 12, 1909, priority date. License no. 33-2008 is attached as Exhibit 4. Water right no. 33-73 was decreed from Spring Creek with an April 1, 1912, priority date to Merchants Trust & Savings Bank to be used on property titled in the decree as “Lillian Myrup Entry.” *Id.* The land in the decree and the license are summarized in the following table:

Licensed POU for 33-2008	Decreed POU for 33-73
T7N, R28E, S8, NENW, SENW, SWNW, NESW, NWSW, SESW, NWSE, SWSE	T7N, R28E, S8, NENW, SENW, SWNW, NESW, NWSW, SESW, NWSE, SWSE

2. Recommendation. Since the decree involves the same lands that were subject to the prior licenses (33-2007 and 33-2008) and the parties on the licenses were also involved in the decree by the fact that their predecessors in interest were parties to that decree, the Department concludes that decreed right nos. 33-71 and 33-73 replace license nos. 33-2007 and 33-2008. This conclusion is further bolstered by the fact that if 33-2007 and 33-2008

were considered to be separate water rights, then the licensed place of use would have a combined total of 0.04 cfs/acre from surface water rights. This would result in the Department putting a combined used limit of .02 cfs/acre on the water rights, even if 33-2007 and 33-2008 were considered separate and apart from decreed water right nos. 33-71 and 33-73.

C. Water Right Nos. 33-2057, 33-2057A, 33-2057B, 33-2057C, 33-2057D, 33-2057E, 33-2057F, 33-2083, 33-2083A, 33-2083B, 33-2083C, 33-2083D, 33-2083E, and 33-2083F

These ground water rights are used on the “Knollin Ranch” but also serve the “Bird Ranch.” Because the transfers that created the splits of water right nos. 33-2057 and 33-2083 have been withdrawn, the Amended Director’s Reports disallow the “A” through “F” splits. Instead, these water rights are recommended under the “parent” water right nos. 33-2057 and 33-2083 in Director’s Reports filed along with this report.⁸ Water right no. 33-2057F had a USFS objection due to the typographical error discussed previously. That objection should be resolved with the filing of the Director’s Report for water right no. 33-2057.

1. Background. Water right no. 33-2057 was licensed for 24 cfs from ground water on 1,483 acres with a February 1, 1950, priority date. The land originally irrigated under this water right was located on the “Knollin Ranch” and the “Bird Ranch.” Water right no. 33-2083 was licensed from ground water with an August 23, 1957, priority date for 5 cfs on the same 1,483 acres as 33-2057. These water rights are diverted from well numbers 1, 2, 3, 4, 5 and 11 as depicted on Diagram 1. The water from wells 1, 2, and 3 is applied directly to the land. The water diverted from wells 4, 5, and 11 is diverted into a ditch and then injected into the Little Lost River at the point of injection recommended on the Amended Director’s Report in T7N R27E Section 12. The ground water is then rediverted either by exchange or by commingling

⁸ This is the first time that these water rights without the splits have been recommended in the SRBA.

from four points of redirection onto the two properties. The points of redirection for these two water rights are the same points of diversion as recommended for the high water rights plus the point of redirection located in T8N, R27E Section 15. From this point of redirection, water from the Little Lost River is transported by a ditch and put on the “Bird Ranch” for irrigation purposes.

2. Recommendation. The Department has concluded that a total of 1181.9 acres are irrigated under these water rights. This conclusion is based in part on Vance Hawley’s testimony at the administrative hearing on Sagewillow’s transfer applications. Mr. Hawley testified that he remembered a total of around 1,200 acres being irrigated.⁹ IDWR’s shape file, based on this testimony and coupled with 1987 NAPP photography, 1992 aerial photographs, 1975 orthophotoquad map, and the topography of the land resulted in a total of 1181.9 acres.

Sagewillow’s objections originally filed in the SRBA to the “A” through “F” splits of 33-2057 and 33-2083 contended that 2,383 total acres is irrigated under these water rights when combined with various other water rights. However, the Department concludes that the total number of acres historically irrigated on the “Knollin Ranch” and the “Bird Ranch” is only 1181.9 acres. Water right nos. 33-2057 and 33-2083, like the high water rights, are limited to .02 cfs at the field headgate, thus, more than an inch per acre can be diverted from ground water and redirected from surface water so that the water user suffers no conveyance loss.

D. Water Right Nos. 33-2086A, 33-2086B and 33-7018

These water rights are located on the “Frew Place.” The “A” and “B” splits of water right no. 33-2086 reflect a change in the ownership of the water right that resulted when David Hawley sold a portion of the “Frew Place” to Sagewillow in March 1993. The Deed is attached as Exhibit 5.

⁹ Refer to Exhibit 2, page 26, lines 1-20.

1. Background. Idaho Law recognizes that a water right is a real property interest. I.C. § 55-101. A water right is an appurtenance to the land on which the water is actually applied. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). Idaho Code § 42-220 states that: “all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted.” When land is conveyed together with all appurtenances, the land carries with it all appurtenant water rights unless the deed conveying the land expressly reserves some or all of the water rights. See *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911). The converse must be equally true: a deed purporting to convey only appurtenant water rights cannot be construed to convey water rights not appurtenant to the lands being sold unless it can be clearly shown that the intent of the parties was to convey the water rights in their entirety, regardless of the number of acres sold. The deed conveying the property from David Hawley to Sagewillow states:

TOGETHER With all water and ditch rights appurtenant thereto, including, but not limited to: State of Idaho Water Rights License Nos. 33-2086 and 33-0718.¹⁰ (sic)

The Department concludes that the controlling phrase in the deed is “appurtenant thereto” which indicates only the water under license nos. 33-2086 and 33-7018 that was appurtenant to the land purchased by Sagewillow was conveyed.¹¹ Thus, the Amended Director’s Reports filed along with this report are based on this conclusion.

¹⁰ Although the deed states water right no 33-0718 instead of 33-7018, it is understood that 33-7018 is correct and that the deed contains a typographical error.

¹¹ The Department has two documents in its files that also discuss these water rights. These documents are attached hereto as Exhibits 6 and 7. The first document is titled “Notice Concerning Water Rights for Property” and the second document is titled “Assignment of Notice of Claim(s).” The Department concludes that neither of these documents is sufficient to convey all of the water right under license nos. 33-2086 or 33-7018. If conveying all the water right was in fact the parties intent, then, that can be easily remedied with another deed from Mr. Hawley to Sagewillow removing the water from the 31 acres still owned by Mr. Hawley and conveying it to Sagewillow. At that point, however, a transfer would be required to change the place of use for that portion of the water right.

2. Recommendation. The place of use for license no. 33-2086 lists 260 acres with 4.10 cfs. However, only 230 acres were ever historically irrigated; thus, the water right appurtenant to the “Frew Place” is for 230 acres. The conclusion on the number of acres irrigated is based on testimony on historical usage during the administrative proceeding plus 1987 NAPP photography. In accordance with Department policy, the quantity of the license will not be reduced and remains 4.10 cfs since it does not exceed .02 cfs/acre. According to the Warranty Deed, David Hawley still owns the NWSW Section 32, T08N, R28E containing 31 acres originally irrigated under this license. Of the property purchased by Sagewillow, 199 acres were actually historically irrigated as depicted on Diagram 1. Therefore, the recommendation for 33-2086A, still owned by Mr. Hawley is for 31 acres and 0.550 cfs and the recommendation for 33-2086B, purchased by Sagewillow is for 199 acres and 3.55 cfs.

Water right no. 33-7018 was originally licensed for 3.26 cfs on 163 acres with a September 12, 1972, priority date. This water right originally irrigated lands located on the “Frew Place” in T7N, R28E Section 5. This water right has been recommended for a total of 163 acres within a permissible place of use of 199 acres on the “Frew Place” but shares combined use remarks with 33-2086B. This conclusion is based on what was historically irrigated at that location which is supported by 1987 NAPP photography.

E. Water Right No. 33-2090

The Department recommended water right no. 33-2090 as disallowed for the following reasons: 1) clear and convincing evidence shows that the water right was not used from 1969 to 1989; and 2) the current points of diversion used under 33-2090 on the “North of Road” place are unauthorized.

1. Background. Water right no. 33-2090 was licensed for 5.93 cfs with a December 21, 1959, priority date from ground water. The point of diversion for this water right is located in the T7N R27E S1 NWSW and was licensed to irrigate 320 acres located in T7N R27E S1 and T7N R28E S6, shown on Diagram 1 as “North of Road” place. Sagewillow purchased the “North of Road” property in 1989. Shortly thereafter, Sagewillow drilled two wells, one in T7N R27E S1 SWNESE (Well #10 on Diagram1) and one in T7N R28E S6 SWNESW. (Well #9 on Diagram 1). Sagewillow’s intent was to place three new pivots on the “North of Road” place using these two new wells and an existing well located in T7N R27E S12 NENENE. (Well #1 on Diagram 1) Thus, Sagewillow filed an application for transfer No. 2222 to recognize three new points of diversion for the “North of Road” place. Application for transfer no. 2222 was protested. After an administrative hearing on this transfer, the Department denied transfer of water right no. 33-2090 because it found that this water right had not been used since the late 1960s and the Department determined that resumption of use for this water right was not valid. After the Supreme Court reviewed the Department’s decision on this transfer and remanded the matter back to IDWR for further findings on the resumption issue, Sagewillow withdrew application for transfer no. 2222. Thus, when making the Amended Director’s Reports to the SRBA Court for water right no. 33-2090, the Department reviewed this water right without regard to the transfer application.

2. Recommendation.

a) Forfeiture. Sworn testimony during the administrative hearing on application for transfer no. 2222 by Vance Hawley, who had personal knowledge of the irrigation practices on the “North of Road” place and whose testimony was credible, demonstrated that no water had been used on the “North of Road” place since 1969. Mr.

Hawley's testimony stated that his aunt and uncle owned this property and that irrigation on the property was to secure a patent under the Desert Land Entry Act. Mr. Hawley did not recall the land ever being irrigated when he was on the property.¹² Furthermore, NAPP imagery also shows that in 1987 no water was applied to this property. Hence, the Department concludes that this water right has been forfeited due to non-use from 1969 to 1989.

b) Unauthorized Points of Diversion. There is no valid defense to forfeiture for 33-2090. In order to change a water right's point of diversion, a transfer must be filed pursuant to I.C. § 42-222 unless the transfer occurred prior to 1987 and then the transfer can be recognized under the "accomplished transfer" statute, I.C. § 42-1425. In Sagewillow's case, the three points of diversion currently used on the "North of Road" place were not used until after Sagewillow purchased the property in 1989. Thus, absent a valid transfer, there is no legal way to recognize the points of diversion currently being used by Sagewillow under 33-2090. Not only has water right 33-2090 been forfeited for non-use for over 20 years, but also the points of diversion described under the water right are unauthorized.

It is impossible to find that 33-2090 was legally resumed using illegal points of diversion. The new points of diversion have no legal basis to be recommended in the SRBA. The Supreme Court in *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001), held that resumption is not a valid defense to forfeiture when the place of use has been changed for the resumed water right prior to the filing of a transfer. *McCray* at 518, 20 P.3d at 702. In *McCray*, the Court noted that although the water user was trying to claim that certain water rights were resumed by changing the place of use of the water rights, the Court specifically stated "it has not been alleged that he sought the permission of the water district as required by Idaho Code § 42-108, or that he made application to change the place of use with the IDWR as required by Idaho

¹² Refer to Exhibit 2, page 28 line 17 through page 30, line 7.

Code § 42-222.” *Id.* (emphasis added). The Court held that “[i]t is clearly the law in Idaho that a water right cannot be resumed when the facts clearly establish that water was not applied to the land of which it was appurtenant.” *Id.* A logical application of this holding is that resumption is not available as a defense against forfeiture when the resumption occurred in a manner that would require a transfer under I.C. § 42-222. Thus, in this case, because the points of diversion on “North of Road” place are unauthorized, resumption is not a valid defense against forfeiture. Therefore, the Department has not analyzed, for purposes of this report, whether any resumption occurred prior to the initiation by a third party of a right to use the water not diverted under the forfeited water right or whether resumption would cause injury to other water users.¹³

F. Water Right No. 33-2091

1. Background. The Department also recommended water right no. 33-2091 as disallowed because the water right had been forfeited for non-use from 1969 to 1989. Water

¹³ If the Court determines that the basis for the Department’s finding that water right no. 33- 2090 is forfeited and disallowed is not appropriate and that resumption should be considered at the unauthorized points of diversion, the Department can submit an expert report at the Court’s request that details whether or not resumption causes injury to other junior water right holders. The Department has already determined in its Final Order that:

12. A geologic formation near the confluence of the Little Lost River and Spring Creek impedes the southward flow of ground water in the underlying aquifer, causing the ground water and surface water to merge in the southern half of Knollin Ranch. The Little Lost River loses water to the underground aquifer above the Knollin Ranch, but as the ground water and surface water merge, the Little Lost River and Spring Creek gain water as they flow through the Knollin Ranch. The Little Lost River continues to gain water downstream several miles to the Canal Co. diversion.

13. The Little Lost River and the aquifer underlying the Little Lost River Basin downstream of the Knollin Ranch are dependent on water flows which pass the Knollin Ranch, either on the surface or underground.

14. The Hawley wells were drilled into the shallow portion of the aquifer which is hydrologically connected to the surface water. There is a direct hydrologic connection between the water pumped by the Hawley wells and the surface water that flows downstream into the Little Lost River below the Knolling Ranch.

right no. 33-2091 was licensed for 5.60 cfs with a January 22, 1960, priority for use on 320 acres of property known as the “Homestead Place.” (See Diagram 1.) In 1990, Edmund Dumke, as President for Sagewillow Inc., filed application for transfer no. 3785 to change the point of diversion and place of use for this water right to the “North of Road” place. The application for transfer was not protested and was approved to change the place of use and point of diversion for license no. 33-2091 based upon the verified information contained in the application without conducting an independent investigation of the facts. This transfer resulted in an overlap of the place of use under license no. 33-2090.¹⁴ Apparently, pursuant to transfer no. 3785 two pivots were installed on the “North of Road” lands in 1990 and the irrigation of the property commenced that same year.¹⁵

2. Recommendation. Sworn testimony at the administrative hearing by Mr. Vance Hawley who had personal knowledge of the irrigation practices on the “Homestead Place” and whose testimony was credible provided that this property was only irrigated by his parents for the purpose of obtaining a patent to the land. Irrigation was discontinued after the patent process was complete due to the condition of the ditches.¹⁶ Furthermore, 1987 NAPP photography shows, that license no. 33-2091 originally appurtenant to the “Homestead Place,” ceased being used once the patent for the land was issued in the late 1960’s. Water right no. 33-2091 was not used again until after Sagewillow purchased the property in 1989, but it was then used on the “North of Road” property. Thus, the Department concludes that water right no. 33-2091 is forfeited due to non-use from 1969 to 1989.

¹⁴ One of the reasons Sagewillow filed its series of transfer applications that were ultimately appealed to the Supreme Court was to change transfer no. 3785 by moving license 33-2091 to lands not already covered under license 33-2090.

¹⁵ The development of the new points of diversion actually occurred prior to authorization as Transfer no. 3785 was not approved until October, 1992.

¹⁶ Refer to Exhibit 1, page 8, line 15 through page 12, line 11.

The Department's Final Order in application for transfer no. 2222 found that transfer no. 3785 was void because water right no. 33-2091 had not been used since 1969. Whether or not it was proper to void this transfer because the water right had been forfeited was addressed by the Supreme Court in *Sagewillow*. The Supreme Court specifically stated:

it would be a substantial burden upon the Department to require that in response to every transfer application it conduct an investigation into whether the water right(s) involved had been lost or reduced by forfeiture or abandonment. Therefore, we hold that if forfeiture or abandonment is not actually raised as an issue in a proceeding to transfer the point of diversion or place of use of a water right, the final order in the transfer proceeding is not *res judicata* on the issue of whether or not the water right had been forfeited or abandoned.

Sagewillow, 138 Idaho at 671, 70 P.3d at 683. The Court went on to say that “[w]hen approving the transfer in 1992, the Department expressly stated that the approval did not preclude later review of the validity of the water right.” *Id.* Thus, the Supreme Court affirmed that the Department had the authority to void the transfer.

Regardless, however, of whether or not the transfer is void, the Supreme Court acknowledged that transfer no. 3785 did not find that water right 33-2091 was valid and did not consider forfeiture. *Id.* The Department concludes, as reflected in the Amended Director's Reports for water right no. 33-2091 that the water right is invalid because of non-use from 1969 to 1989.

G. Water Nos. 33-2133 and 33-11003

Water right no. 33-2133 was licensed for 2,960 acre feet with a June 22, 1949, priority date for “Soil Root Zone Storage only.” This water right is used for soil root zone storage on lands located on the “Knollin Ranch.” This water right allows the diversion of waters from the Little Lost River and Upper Spring Creek¹⁷ to be diverted and applied to land to raise the subwater table so the root zone is saturated. Some of this water is collected in a series of ponds

¹⁷ Upper Spring Creek is the same as Big Spring Creek shown on Diagram 1.

to accomplish this purpose. Water right no. 33-11003 accompanies licensed right no. 33-2133. This water right allows diversion of the storage water collected in the ponds so it can be applied on the recommended place of use for this water right.

The Amended Director's Reports filed along with this report for these two water rights show that these two water rights can be used on 1436.1 acres. Attached hereto as Diagram 2 shows the place of use for these water rights. The conclusion for the number of acres and location of the acres is based in part on information in water right license file no. 33-2133 and on information received from Dr. Charles Brockway, the engineer employed by Sagewillow to confirm the place of use for these two water rights.

V. CONCLUSION

The Department's analysis of the various water rights and the basis of its recommendations in the Director's Reports and Amended Director's Reports filed contemporaneously with this report are based upon solid facts and law. The water rights should be partially decreed as recommended in the Director's Reports and Amended Director's Reports filed herewith.

Respectfully submitted this 1st day of October, 2003.



Ernest Carlsen
Water Rights Supervisor, IDWR

CERTIFICATE OF MAILING

I certify that on October 1, 2003 I mailed and/or delivered the original and copies of this form, including all attachments, to the following interested parties, by placing them in sealed envelopes, addressed as follows:

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

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☒ Regular Mail
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2. Copies to:

Office of the Attorney General
Natural Resources Division
Box 83720
Boise, ID 83720-0010

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Environment & Natural Resources Div.
550 West Fort Street MSC 033
Boise, ID 83724

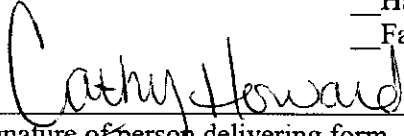
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Table 1
Subcase Nos. 33-69 et al.'s SRBA Procedural History

Sagewillow Subcase No.	SRBA Claim filed 10/6/89	Recommended in Basin 33 Director's Report 2/1/2000	Objection Filed by Sagewillow 3/23/2000	Objection Filed by USFS 4/6/2000	Responses Filed by BCCC & Mays L & L 8/9/2000	SF5 Filed 1/13/00 & SMRR Filed 10/27/2000	Motion to Alter and Amend SMRR Denied 2/22/2001
33-00069	x	x		x		x	x
33-00070	x	x		x		x	x
33-00071	2/22/1993	x		x		x	x
33-00072	x	x		x		x	x
33-00073	x	x		x		x	x
33-00074	2/22/1993	x		x		x	x
33-00076	2/22/1993	x		x		x	x
33-00078	2/22/1993	x		x		x	x
33-00079	2/22/1993	x		x		x	x
33-00080	x	x		x		x	x
33-00081	x	x		x		x	x
33-00082	x	x		x		x	x
33-02007	x	x	x		x		
33-02008	x	x	x		x		
33-02057A	11/9/1999	x	x		x		

33-02057B	11/9/1999	x	x		x		
33-02057C	11/9/1999	x	x		x		
33-02057D	11/9/1999	x	x		x		
33-02057E	11/9/1999	x	x		x		
33-02057F	11/9/1999	x	x	x	x		
33-02083A	11/9/1999	x	x		x		
33-02083B	11/9/1999	x	x		x		
33-02083C	11/9/1999	x	x		x		
33-02083D	11/9/1999	x	x		x		
33-02083E	11/9/1999	x	x		x		
33-02083F	11/9/1999	x	x		x		
33-02086A	11/9/1999	x	x		x		
33-02086B	11/9/1999	x	x		x		
33-02090	x	x	x		x		
33-02091	x	x	x		x		
33-02133	3/31/1993	x	x ¹	²			
33-07018	4/4/1990	x	x		x		
33-11003	9/18/1990	7/31/2003	³				

¹ Second Objection by Sagewillow filed 3/1/2001 following the Amended Director's Report Filed on 2/28/2001

² The USFS did not file an objection to this subcase, rather the United States Bureau of Land Management did, however, the BLM's objection was resolved after the filing of the Amended Director's Report on 2/28/2001.

³ No objections were received to the Director's Report for this subcase, however, IDWR filed an Amended Director's Report for this subcase in order to properly describe the place of use element with related water rights.