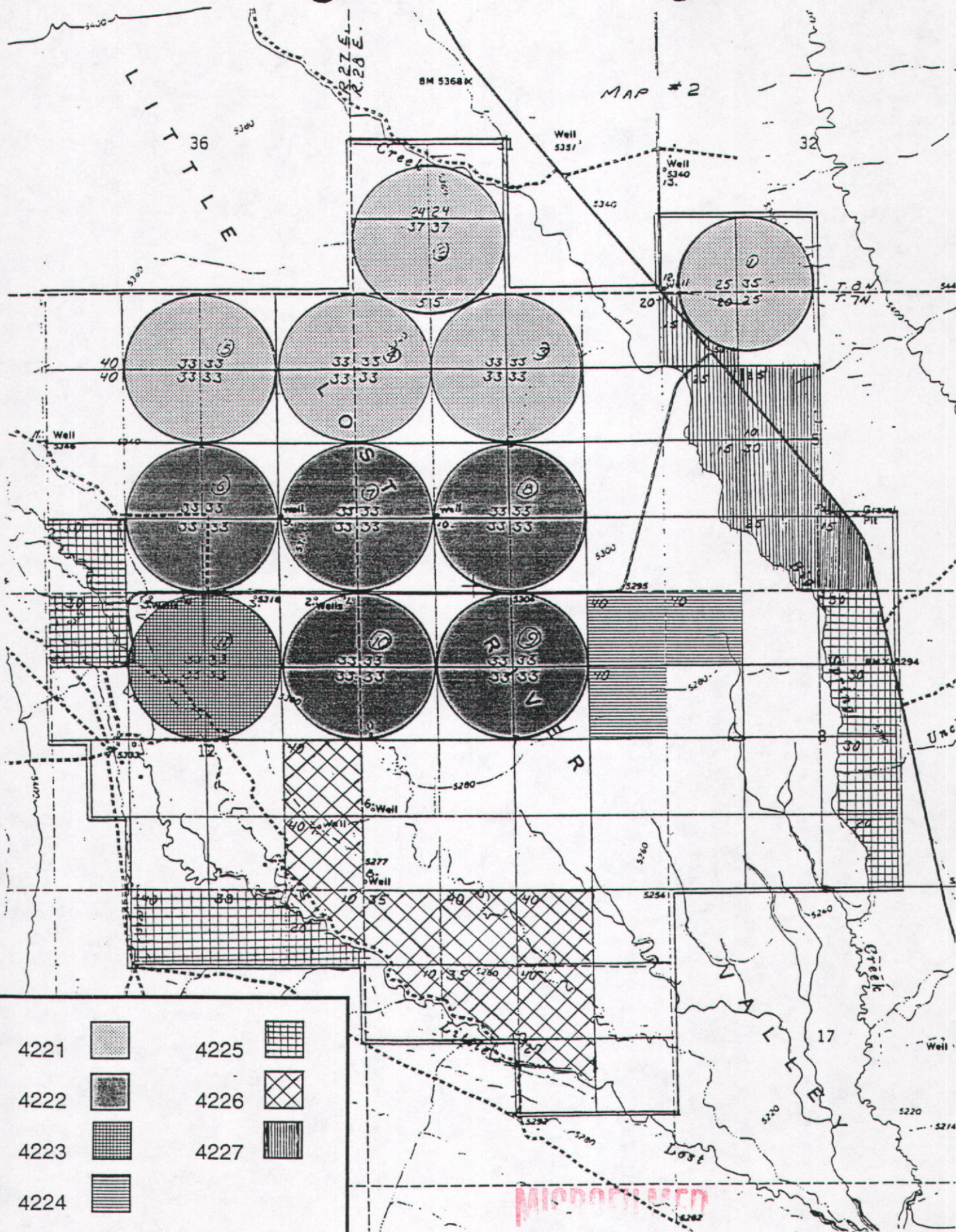




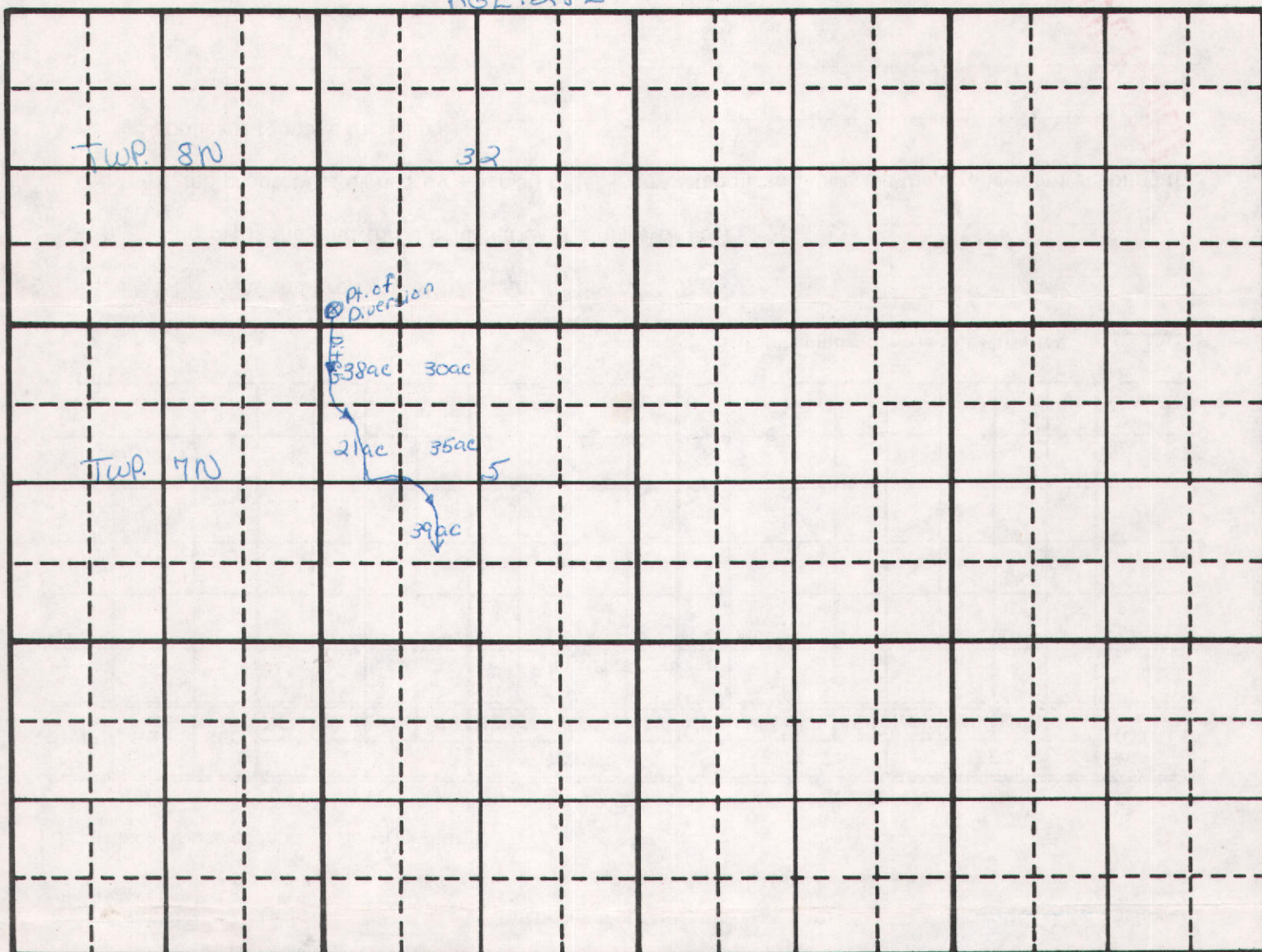
ATTACHMENT No. 1

MAR 27 1996

Complete the following map by showing land and point of diversion as proposed by this amendment.

Show 40-acre subdivisions, townships, ranges and ditches.

RGE. 28E



Scale: 2 inches equal 1 mile.

That no one will be injured by such change, and that such change will be made at permit holder's own risk.

Signed at Bow Lake, this 20 day of April, 19 80.

William Drew
(Signature)

FOR DEPARTMENT USE ONLY

Preliminary check by jo Fee = \$20.00

Received by mg Date 5/5/80 #16007

Publication prepared by _____ Date _____

Published in N/A

Publication dates N/A

ACTION OF THE DEPARTMENT OF WATER RESOURCES

I, C. STEPHEN ALLRED, of the Department of Water Resources hereby

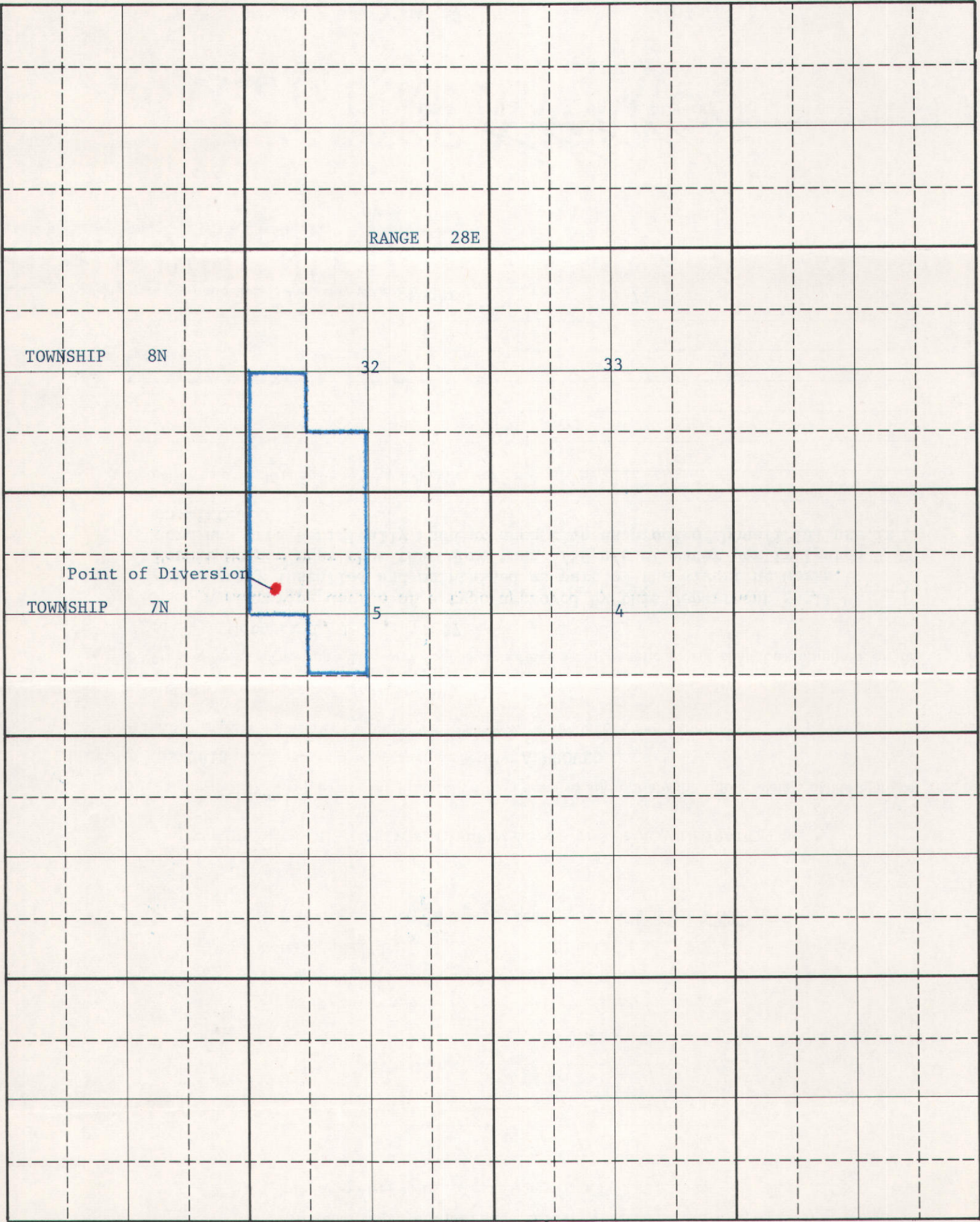
APPROVE the above referenced Amendment for Permit No. 33-7018.

Witness my hand this 16 day of May, 19 80.

C. Stephen Allred

js

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



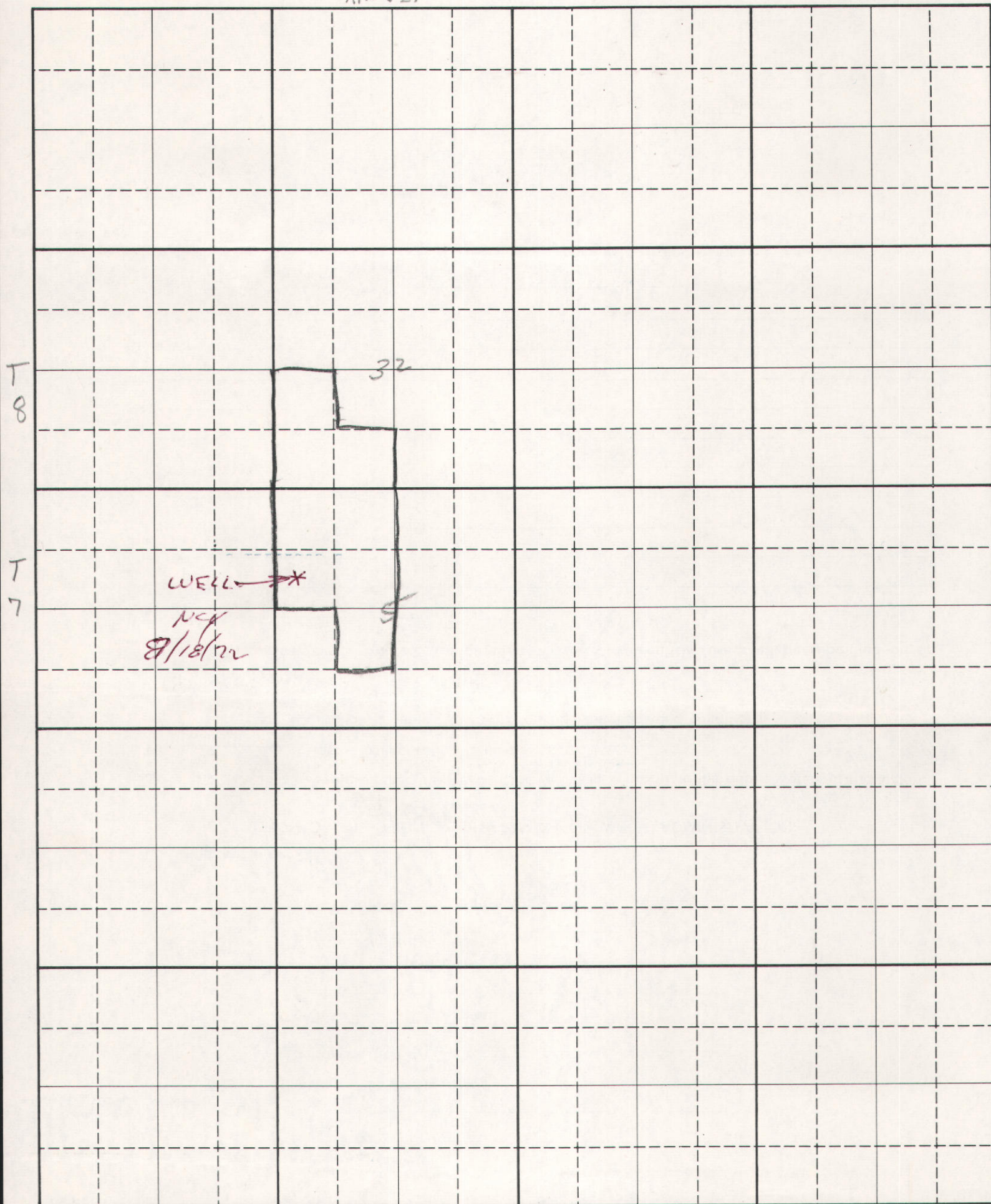
Scale: 2 inches equal 1 mile

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

William Frew
(Applicant)

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

R. 28 E.



Scale: 2 inches equal 1 mile

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

William Drew
(Applicant)

33 7018

SEP 27 1972

Department of Water Administration
Eastern District Office

Affidavit of Publication

I, L. E. L. Carrasack, of the Arco Advertiser, a weekly newspaper of general circulation, published weekly at Arco, Idaho, since March, 1909, do solemnly swear that a copy of this notice, per clipping attached, was published weekly in the regular and entire issue of said newspaper, and not in any supplement thereof,

for 2 consecutive weeks, commencing with

the issue dated August 31, 1972

and ending with the issue dated Sept. 7, 1972

L. E. L. Carrasack

Subscribed and sworn to before me this

26th day of September, 1972

Nesma Paulsen
Notary Public

Residence: Arco, Idaho.

My commission expires 7-27, 1974

NOTICE OF APPLICATION FOR WATER PERMIT

Notice is hereby given that William Frew, Howe, Idaho has on 8/18/72 submitted Application No. 33-7018 for a permit to appropriate 4.0 cubic feet per second of water from a ground-water source by means of well and pump within the SW $\frac{1}{4}$ -NW $\frac{1}{4}$, Sec. 5 T. 7N, R. 28E, B.M., Butte County; to be used from Jan. 1 to Dec. 31 for stockwatering purposes for 200 head of dairy cows, within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M., and from Apr. 1 to Nov. 1 for the irrigation of 320 acres within the W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 32, T. 8N, R. 28E; NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, 240 South Holmes, Idaho Falls, Idaho, 83401 on or before September 18, 1972.

R. KEITH HIGGINSON
Director

Published in the Arco Advertiser, Arco, Idaho on August 31 and September 7, 1972.

August 25, 1972

Re: Application No. 33-7018 - William Frew

Arco Advertiser
Box "C"
Arco, ID 83213

Gentlemen:

Enclosed you will find a legal notice which we wish to have published once a week for two consecutive weekly issues of your newspaper. We have inserted the publication dates allowing ample time for you to submit us a galley proof for our review before publication.

After sending us a galley proof, proceed with the publication on the dates we have inserted assuming the notice is correct. If we have any corrections, we will notify you before the first publication date. If you cannot publish the notice on the proposed dates, please contact us immediately.

An affidavit of publication must be submitted to the Department along with the publication bill. In order to receive payment, the following certification must appear on the bill:

"I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid."

(signature of claimant)

Very truly yours,

Norman C. Young
District Engineer

NCY:BA
Enc: Legal notice

NOTICE OF APPLICATION
FOR WATER PERMIT

Notice is hereby given that William Frew, Howe, Idaho has on 8/18/72 submitted Application No. 33-7018 for a permit to appropriate 4.0 cubic feet per second of water from a ground-water source by means of well and pump within the SW $\frac{1}{4}$ -NW $\frac{1}{4}$, Sec. 5 T. 7N, R. 28E, B.M., Butte County; to be used from Jan. 1 to Dec. 31 for stockwatering purposes for 200 head of dairy cows, within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M., and from Apr. 1 to Nov. 1 for the irrigation of 320 acres within the W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 32, T. 8N, R. 28E; NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, 240 South Holmes, Idaho Falls, Idaho, 83401 on or before September 18, 1972.

R. KEITH HIGGINSON
Director

Published in the Arco Advertiser, Arco, Idaho on August 31 and September 7, 1972.

*Bill submitted to
Baize 9/27/72
C.W.*

33 7018

7/14/03
RECEIVED

JUL 14 2003

Department of Water Resources

IN CHAMBERS AT BLACKFOOT
BINGHAM COUNTY, IDAHO

7/14/03

4:30p

James C. Herndon
JAMES C. HERNDON
District Judge

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BUTTE

SAGEWILLOW, INC.,	)	CASE NO. CV-1996-39
Plaintiff,	)	
-vs-	)	ORDER OF REMAND
IDAHO DEPARTMENT OF WATER,	)	
RESOURCES, JAMES MAY, MAYS	)	
LAND AND LIVESTOCK, BLAINE	)	
COUNTY CANAL COMPANY,	)	
Defendants,	)	

The Court having reviewed the Supreme Court's Opinion on appeal and having received the Remittitur in the above referenced matter;

IT IS HEREBY ORDERED that the above-referenced matter be remanded to the Department of Water Resources, pursuant to agreement of the parties hereto.

DATED this 14th day of July, 2003.

James C. Herndon

JAMES C. HERNDON
District Judge

MICROFILMED

JUL 23 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing document was mailed by first-class mail, with pre-paid postage, sent by facsimile, or hand delivered this 14th day of July, 2003 to the following:

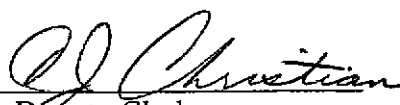
NORMAN SEMANKO ESQ
TRAVIS THOMPSON ESQ
PO BOX 2139
BOISE IDAHO 83701-2139

KENT FOSTER ESQ
PO BOX 50130
IDAHO FALLS IDAHO 83405-0130

PHILLIP RASSIER ESQ
1301 N ORCHARD DR
BOISE IDAHO 83706-2237

MICHAEL CREAMER ESQ
PO BOX 2720
BOISE IDAHO 83701-2720

TRILBY McAFFEE, Clerk of the Court

By 
Deputy Clerk

MICROFILMED

JUL 23 2003

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	)	AMENDED
TRANSFER NOS. 4221, 4222, 4223, 4224,	)	FINAL ORDER
4225, 4226 AND 4227 IN THE NAME OF	)	
SAGE WILLOW, INC.	)	
_____	)	

INTRODUCTION

Sage Willow, Inc. (Sage Willow) filed seven applications for transfer with the Idaho Department of Water Resources (Department). The applications propose changing the place of use for several surface and ground water rights. The multiple applications were filed to define portions of various ground water and surface water rights that would be appurtenant to each of seven independent delivery systems. A map depicting the system described by each application is attached at the end of this decision. Some of the applications were protested by the Blaine County Canal Co. (the Canal Co.), James Mays, Mays Land and Livestock Co. (collectively referred to as "Mays") and Simplot Land and Development Co. Simplot Land and Development Co. subsequently withdrew its protest.

After expiration of the protest period Mays discovered they had not protested all of the applications for transfer filed by Sage Willow. Mays filed a motion to amend the protest to include protests opposing all of the applications for transfer and to add issues of forfeiture and enlargement to the issues raised by the original protests. The motion to amend was granted prior to the hearing.

On January 18, 1995, the Canal Co. filed a motion to amend its protests. The hearing officer initially denied the motion to amend from the Canal Co. because it was untimely. At the hearing, however, the hearing officer revoked the order denying the motion to amend and granted the motion to amend. The Canal Co. and Mays participated as full parties in all the proceedings. A hearing regarding the protest was conducted on January 31 and February 1, 1995.

A recommended order was issued on May 22, 1995. Counsel for Sage Willow timely filed a petition for reconsideration that the hearing officer granted. The order granting reconsideration limited reconsideration to two (2) issues:

1. Whether use of water pursuant to water right no. 33-02091, although previously transferred/abandoned, should be recognized because of the approval of transfer no. 3785, which was approved in 1992.

2. Whether the number of acres authorized for irrigation pursuant to rights nos. 33-02086 and 33-07018 should have been reduced solely on the basis of Terry Scanlan's testimony.

Briefs were to be filed regarding the petition for reconsideration on or before July 14, 1995.

Sage Willow requested a transcript of the record, and after issuance of the order granting reconsideration, the parties agreed to delay briefing until the transcript was prepared. The parties both filed briefs on or about September 1, 1995.

An amended recommended order (ARO) was issued on November 7, 1995. Sage Willow filed a second petition for reconsideration which was denied.

Sage Willow filed exceptions to the amended recommended order, and Mays filed a brief in response to the exceptions. The exceptions will be discussed in the following analysis portion of the decision. Findings of fact, conclusions of law and the order will follow the analysis section.

ANALYSIS

Sage Willow filed exceptions to the amended recommended order as follows:

- (1) The ARO misinterprets the resumption of use doctrine and its application to any portion of the water rights that may have been unused for a period of five or more years, but have since been resumed;
- (2) The ARO improperly concludes that transfer number 3785 can, and should, be voided; and
- (3) The ARO improperly concludes that only 230 acres have historically been irrigated on the Frew Place, rather than 260.

Resumption of Use

Sage Willow alleges several elements must be satisfied before a resumption of use after forfeiture can be defeated:

1. A new water right must be established by appropriation that will prevent a resumption of use.

2. A new water right established by appropriation to prevent a resumption of use must be established after the five (5) year forfeiture period has run. Water rights perfected with dates of priority between the priority of the alleged forfeited right and the date when forfeiture occurred cannot prevent a resumption of use.

3. Use of water must be by adverse possession. There must be open and notorious use, and the notice must be directed toward the original owner.

4. A person wanting to appropriate the forfeited water cannot simply sit by and wait, holding a water right in the ladder of priority. He is required to do something affirmative once the right in question has been forfeited.

5. A forfeited water right can be resumed until it is declared forfeited by a competent authority.

There must be an appropriation of water with an intervening priority date that will be injured by the resumption to prevent a resumption of use. All of the other criteria proposed by Sage Willow are inconsistent with the prior appropriation doctrine.

If a new appropriation is required, a water user holding a water right with a date of priority between the priority of the alleged forfeited right and the date of forfeiture who wanted to improve his water supply would be required to file another application for appropriation. If the new appropriation assumes its place in the order of priority, water users with earlier in time priority water rights would receive the excess water. This result would require that a water user would be required to file for a new appropriation simply as a matter of form to receive water which he would have received pursuant to the priority system anyway. This is promoting form over substance.

Idaho Code § 42-222(2) states that when a water right is forfeited the water right reverts back to the state and is subject to appropriation. If the water reverts back to the state upon forfeiture, and is subject to appropriation, the original owner has no title to a water right that can be acquired through adverse possession. To allow a person to gain ownership of a water right after it has been forfeited is inconsistent with the doctrine of prior appropriation.

Sage Willow argues that the owner of an existing water right with a date of priority later than the alleged forfeited right cannot sit and wait to defeat a resumption of use, but must act affirmatively as described above. This theory would require a water right holder on a stream to continuously monitor the uses of water of all the users up and down a river, hoping to improve his

water supply. When continuous monitoring reveals a forfeited right, he must file an application for a new appropriation of water, in addition to somehow taking the water of another person openly and notoriously, even though he may be diverting that water several miles upstream or downstream from the point of diversion for the water right alleged to be forfeited. This kind of requirement is outside of the law. A water user who has forfeited his water rights should not be allowed to resume the right where junior users have come to rely on the water made available as a result of the forfeiture.

Finally, Sage Willow argues that a resumption of use cannot be defeated unless forfeiture is declared prior to the time the resumption occurs. Recognition of this theory would result in a race for declaration of forfeiture prior to any resumption.

Sage Willow analyzes the Idaho cases on resumption of use along with cases from other jurisdictions. Sage Willow argues convincingly that Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952) recognizes resumption of use for a right diverted from a fully appropriated stream long after the forfeiture period had expired. In Boyer, the protestants produced evidence that the water rights allegedly forfeited had not been used for several decades. The evidence also showed that use of water under the right had been resumed only a short time period prior to consideration of the application for transfer by the State Reclamation Department (predecessor to the Department of Water Resources). Sage Willow argues that the hearing officer misinterpreted the case and its finding by implying that the right may never have been forfeited because the water was used on a different place of use. Sage Willow argues that the right was forfeited, but resumed, even though there were intervening water rights.

The Boyer case leaves some questions about when a forfeited right can be resumed and whether some of the earlier requirements raised by Sage Willow, such as adverse possession, must be proven. Even more important, the resumption of use analysis in Boyer does not discuss injury to other water rights that would result from a resumption of use.

The issue of injury is central to the considerations of the Department in reviewing an application for transfer. There was uncontroverted evidence presented at the hearing that Sage Willow's resumption of use would enlarge the traditional use of water on the lands now owned by Sage Willow, would deplete stream flows in the Little Lost River, and would make further demands on the ground water resources of the basin. The Department will not ignore the injurious effects on other water users that will be caused by Sage Willow's diversion and use of water beyond the traditional use of water on the lands acquired by Sage Willow. The original holding regarding the resumption of use in the amended recommended order will not be changed.

Voiding of Transfer No. 3785

The ARO held that transfer no. 3785, previously approved by the Department in 1992, should be voided. The transfer approved moving the point of diversion and place of use for water

right no. 33-02091. At the hearing on the applications for transfer now pending, evidence was presented to show that water right no. 33-02091 was forfeited prior to the approval of transfer no. 3785.

The ARO recognized administrative *res judicata*. The Department should not entertain duplicative "claims" or "issues" except under extraordinary circumstances. The purpose for *res judicata* before administrative agencies is similar to the purpose before the courts: (1) to prevent litigation of the same matter with inconsistent results; (2) to avoid repetitious litigation; and (3) to avoid the harassment of repetitive claims. The Department should exercise restraint in disturbing a prior decision. Nonetheless, the Department of Water Resources is charged not only with deciding what should be done where there are disputed proposals for use of water before the Department, but also with general oversight of the water resources of the state of Idaho. Because of its oversight responsibility, the Department should have wider latitude in setting aside a prior decision.

Sage Willow asserts that the ARO did not sufficiently analyze *res judicata*, and its component parts. The Idaho Supreme Court has adopted the Restatement (Second) Judgments (1982). *Res judicata* is divided into two component parts, claim preclusion and issue preclusion. Claim preclusion prevents a party from pursuing other remedies "with respect to all or any part of the transaction . . . out of which the action arose." Aldape v. Akins, 105 Idaho 254, 259, 668 P.2d 130 (1983). Issue preclusion, or collateral estoppel, "bars the relitigation of issues actually adjudicated and essential to the judgment in a prior litigation between the parties." Aldape at 256.

The most compelling reason for voiding transfer no. 3785 and reviewing water right no. 33-02091 against the test of forfeiture is set forth in Section 28 of the Restatement:

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:

- (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 interest 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 issues would arise in the context of a subsequent action, or (c) because the parties 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.

At the hearing for the now pending transfers, the evidence showed that there would be adverse impacts to the public interest and interests of water users not parties to the initial action if the approval of transfer no. 3785 is not reconsidered.

Sage Willow criticizes the Department for discussing some equitable reasons why transfer no. 3785 should be reconsidered. These reasons included a short time period since the approval of transfer no. 3785, the expenditure of money by Sage Willow prior to approval of transfer no. 3785, the attempt in the pending transfers to correct a misdescription of the place of use in the approval of transfer no. 3785, and the omissions regarding questions of forfeiture on the application for transfer form. Sage Willow alleges these facts should not be considered by the Department.

Sage Willow supplemented its submittal of legal authority on January 2, 1996. In the supplemental brief, Sage Willow quotes Keller v. Magic Water Co., 92 Idaho 276, 441 P.2d 725 (1968). The Keller court states that principles of equity should be applied in determining whether issues before the Department should be reconsidered. It raises three of those equitable issues: (1) the long period of time which had expired since the permit approval, (2) the substantial sums of money which had been expended by the permit holder in reliance on the approval, and (3) the issue of whether other water users were damaged by the omission of the financial information. Two of the three equitable issues raised by the Keller court, the injury issue and the expiration of time issue, are resolved in Mays' favor. Only the expenditure of money by Sage Willow is a consideration in its favor, and Sage Willow's expenditure occurred prior to the transfer approval. Furthermore, there are other equitable reasons briefly discussed above why this reconsideration does not impose an unreasonable hardship on Sage Willow. Issue preclusion does not prohibit the Department from voiding transfer no. 3785 and reconsidering the issue of forfeiture.

Whether the Department of Water Resources characterizes the issues before it as claim preclusion or issue preclusion, the result is the same. The Department should not be barred from reconsidering a prior decision which is inconsistent with the general statutory scheme of protecting other water users. It also should not be barred from reconsidering a prior decision where there are extraordinary reasons for the reconsideration.

Sage Willow also argues that the Department is prohibited from voiding or reconsidering transfer no. 3785 because of equitable estoppel. Both parties agree that equitable estoppel can apply to government agencies acting in their sovereign capacity under extraordinary circumstances. In addition to applying only in extraordinary circumstances, the proponent of equitable estoppel must establish that the Department either concealed or falsely represented facts with actual or constructive knowledge of the truth. Sage Willow did not prove that the Department concealed or falsely represented the facts. Equitable estoppel does not apply to the Department in this case.

Finally, Idaho Code § 42-350 states:

If the director of the department of water resources finds, on the basis of available information *at any time after a license is issued*, that the licensee has ceased to put the water to a beneficial use for a period of five (5) continuous years . . . then the director of the department of water resources may issue . . . an order to show cause before the director of the department . . . why the director of the department should not revoke said license (Emphasis added).

While this statute directs a specific administrative process and does not discuss the effect of a transfer approval, it supports a holding that the director can review forfeiture issues, even after a transfer approval has been granted.

Forfeiture of a Portion of the Frew Place of Use

In the ARO, the hearing officer held that the place of use for water right nos. 33-02086 and 33-07018 should be limited to 230 acres because of the testimony of Terry Scanlan (Scanlan) and corroborating evidence by Charles Brockway (Brockway), the expert for Sage Willow. Sage Willow states that Brockway's testimony and exhibits do not corroborate Scanlan's testimony. Sage Willow recites facts regarding the purchase of the water rights and the land by Sage Willow which were not introduced into evidence at the hearing and were not available to the hearing officer in reaching his decision. The number of acres in the Frew Place, authorized by water right nos. 33-02086 and 33-07018, will be limited to 230 acres.

Based on the above analysis, the Director issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. In 1989, Sage Willow acquired a ranch, located near the confluence of the Little Lost River and Spring Creek, commonly known as the Knollin Ranch. At the same time, Sage Willow also acquired other parcels contiguous to or nearby the Knollin Ranch.

2. One of the other parcels is located approximately 1½ miles northwest of the Knollin Ranch. The parcel is divided into two pieces by the east 16th line of Sec. 35, T27N, R28E, B.M. The property located on the west side of the 16th line is commonly known as the Bird Ranch. The property located east of the 16th line is commonly known as the Homestead Place.

3. Another parcel is located on the north side of an east-west county road, which was the northern boundary of the original Knollin Ranch, and will herein be referred to as the "North of Road Place."

4. In 1993, Sage Willow acquired additional land contiguous to and northeast of the Knollin Ranch from David and Terry Hawley (the Frew Place).

5. The Knollin Ranch was originally owned by A.J. Knollin. Several surface water rights were appurtenant to the Knollin Ranch. Because of financial difficulties, A.J. Knollin conveyed his interest in the Knollin Ranch to the first mortgage holder in 1942. In the same year, the Canal Co. purchased the Knollin Ranch from the mortgage holder. During the late 1940's, the Canal Co. sold the ranch land to L.R. "Slim" Hawley (Hawley). The earliest priority water rights appurtenant to the Knollin Ranch were not conveyed to Hawley, however, but were retained by the Canal Co. and later transferred to downstream lands. The Canal Co. rights are some of the earliest water rights diverted from the Little Lost River, bearing priority dates of 1879 to 1891.

6. Several late priority surface water rights remained appurtenant to or were developed for use on the Knollin Ranch. These later rights are described below:

Irrigation Rights

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-00069	3.2	06/01/1908	Little Lost River
33-00070	2.8	10/01/1906	Spring Creek
33-00071	3.2	03/15/1909	Spring Creek
33-00072	.8	05/01/1908	Little Lost River
33-00073	6.4	04/01/1912	Spring Creek
33-00074	1.6	08/06/1913	Little Lost River
33-00076	6.8	04/01/1913	Little Lost River
33-00078	3.2	10/15/1913	Little Lost River
33-00079	1.6	04/01/1912	Little Lost River
33-00080	.8	05/01/1908	Spring Creek
33-00081	.8	05/01/1908	Spring Creek
33-00082	.8	05/01/1908	Spring Creek
33-02007	2.9	02/15/1909	Little Lost River
33-02008	<u>6.4</u>	06/12/1909	Spring Creek
	41.3		

Soil Root Zone Storage Right

<u>Water Right No.</u>	<u>Acre-Feet</u>	<u>Priority</u>	<u>Source</u>
33-02133	2,960	06/02/1949	Little Lost River Spring Creek

7. The late priority surface water rights listed in Finding 6 could only be delivered to Hawley during high water flows, however, and there was insufficient surface water to irrigate the Knollin Ranch. Hawley subsequently obtained two licenses to irrigate the Knollin and Bird Ranches with ground water, numbered 33-02057 and 33-02083. The ground water rights for the Knollin and Bird Ranches are described as follows:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02057	24.0	02/01/1950	8 wells # 1-8
33-02083	5.0	08/23/1957	8 wells #1-8

8. In addition, ground water rights were also perfected for the Frew Place, which Sage Willow acquired from David and Terry Hawley. The Frew Place water rights are listed below:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02086	4.1	01/12/1959	well # 13
33-07018	3.26	09/12/1972	well # 12

9. Finally, Hawley and some of his contemporary relatives obtained patents for two parcels of federal property pursuant to the Desert Land Entry Act. Two licenses to appropriate ground water were issued by the Department for these parcels. License no. 33-02091 was perfected for irrigation of the Homestead Place. License no. 33-02090 was perfected for irrigation of the North of Road Place. The following describes components of these rights:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02090	5.93	12/21/1959	well # 11
33-02091	4.36	01/22/1960	well on Bird Ranch

10. The places of use and points of diversion prior to Sage Willow's acquisition of the water rights described in the preceding paragraphs are depicted on the map labeled as applicant's exhibit no. 1 "a".

11. Sage Willow filed application for transfer nos. 4221, 4222, 4223, 4224, 4225, 4226 & 4227, proposing to change the place of use for all of the rights listed in the preceding paragraphs. The multiple applications for transfer were filed to define portions of the water rights that would be appurtenant to each of seven independent delivery systems. Application nos. 4221, 4222 and 4223 propose the irrigation of land primarily north of the original Knollin Ranch with pressurized circular pivots. Application nos. 4224, 4225, 4226 and 4227 propose gravity irrigation of other land. The proposed places of use are depicted on a map labeled as applicant's exhibit no. 1 "b". For further clarity, a map depicting the system (or place of use) described by each of the applications is attached. The original and proposed places of use described in the applications are not restated in this decision because of their size and complexity.

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 the 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 Knollin Ranch.

15. Vance Hawley, a son of Slim Hawley, grew up in the Little Lost Valley and helped farm the Knollin and Bird Ranches as a youth, although he did not reside on the Knollin Ranch. After attending college, Vance Hawley returned and assisted in farming the property from 1970 through 1978. During these eight (8) years, he did not manage the farm but resided on the Knollin Ranch. From 1978 through 1980, he leased the Knollin Ranch property. After the lease expired, he was acquainted with the operation of the farms until 1989, when the Knollin Ranch was sold to Sage Willow.

16. Vance Hawley was also aware of the operation of the Bird Ranch, the Homestead Place, the North of Road Place, and other surrounding lands.

17. Vance Hawley testified about the extent of beneficial use of water on the properties now owned by Sage Willow. He testified that the total number of acres irrigated on the Bird Ranch did not exceed 297 acres. He also testified that irrigation of individual parcels on the Knollin Ranch totaled 879 acres.

18. Vance Hawley testified that the Homestead Place, located just east of the Bird Ranch, was irrigated with water pursuant to license no. 33-02091 in the early 1960's until a patent of ownership was issued by the federal government. He testified that the land was converted back to early season dry range land and was never irrigated in the late 1960's, all of the 1970's, and the 1980's until Sage Willow bought the property.

19. Vance Hawley also stated that the North of Road Place, patented by his aunt and uncle and located north of the main east-west access road into the Knollin Ranch, was irrigated with water pursuant to license no. 33-02090 in the early 1960's until a patent of ownership was issued by the federal government. He testified that after the patent was issued, the property was converted back to early season dry rangeland. He testified that water had not been applied to the lands pursuant to license no. 33-02090 during the late 1960's, all of the 1970's, and the 1980's until the property was purchased by Sage Willow.

20. James Mays, a lifelong resident of the Little Lost River Valley, testified he was familiar with both the Homestead Place and the North of Road Place and had not observed any irrigation on the Homestead Place or North of Road Place, at least until Sage Willow acquired the parcels.

21. Vance Hawley drew the boundaries of the various parcels comprising the Sage Willow property as depicted on protestant's exhibit no. 3 and estimated the number of acres irrigated during his acquaintance with the property. The estimate includes lands irrigated with both surface water and ground water. He estimated that no more than 1,176 acres were irrigated within the boundaries of the Knollin Ranch and Bird Ranch.

22. The testimony of Vance Hawley is the most credible evidence regarding the traditional use of water on the entire Sage Willow land holdings before 1989.

23. Terry Scanlan (Scanlan), an engineer and geologist hired by Mays, consulted aerial photographs and estimated that approximately 230 acres were irrigated in the Frew Place. This estimate is consistent with the irrigated acreage estimates prepared by Dr. Charles E. Brockway, P.E. (Brockway), a consultant hired by Sage Willow.

24. Scanlan also estimated that 1,182 acres were irrigated in the Knollin Ranch and the Bird Ranch, six more acres than estimated by Vance Hawley. Adding the 230 acres irrigated in the Frew Place, Scanlan estimated the total acreage irrigated prior to 1989 was 1,412 acres. Because of the six acre discrepancy between Vance Hawley's estimate and Scanlan's estimate, the difference will be resolved in favor of Sage Willow. A total of 1,412 acres were irrigated prior to 1989.

25. In 1989, Sage Willow purchased the Knollin Ranch, the Bird Ranch, the Homestead Place, and the North of Road Place. Jerry Pancheri was hired as the manager of the ranch and was instructed to apply the water to the land as efficiently as possible and to recommend changes to the system to more efficiently use the water.

26. Pancheri testified about his attempts to use the water and identified land irrigated during the years he managed the farm. Pancheri identified on protestant's exhibit no. 21 the lands which were irrigated in various years. He approximated the areas irrigated in several individual parcels, and the parties summed his estimates in their briefs as set forth below:

Total Number of Acres Irrigated

<u>Year</u>	<u>Sage Willow's Estimate</u>	<u>Mays' Estimate</u>
1989	1,300	1,400
1990	1,560	1,740
1991	2,000	2,004
1992	2,130	2,100
1993	2,390	-----

27. During 1990 and 1991, Pancheri determined that several preexisting ponds located on the Knollin property should be repaired and filled with water. These ponds, when filled with water, contribute significant sub-water to the shallow aquifer and sub-irrigate some of the lower elevation pastures located on the Knollin Ranch.

28. Pancheri also determined that the lands within the Bird Ranch and the Homestead Place were the poorest agricultural lands of the Sage Willow holdings and recommended that the water rights appurtenant to the Bird Ranch and Homestead Place be transferred to other lands located north of the Knollin Ranch. These lands north of the Knollin Ranch were acquired by Jerry Pancheri, and subsequently by Sage Willow, through an exchange of lands with the Bureau of Land Management.

29. In October, 1990, Sage Willow, through its president Edmund Dumke, applied to transfer license no. 33-02091 (transfer no. 3785) from the Homestead Place to land located in the SE¼ of Section 1, T7N, R27E, and the SW¼ and SE¼ of Section 6, T7N, R28E, B. M. The transfer application was signed by Dumke as president of Sage Willow. Part 1 of the transfer application requests the applicant to "[d]escribe the effect on the land now irrigated if the place of use is changed pursuant to this transfer." Dumke responded that "[w]e will dry farm this old place of use." There was no response to question 10 in part 2 of the application which asks "To your knowledge, has any portion of this water right undergone a period of five (5) or more consecutive years of non-use?" By signing the application, Dumke asserted that "no one will be injured by such change and that the change does not constitute an enlargement in use of the original right."

30. Dumke testified at the hearing that he had no personal knowledge regarding license no. 33-02091. He did not personally know whether a well was located at the licensed point of diversion or if any irrigation had occurred pursuant to license no. 33-02091 on the licensed place of use. Dumke stated that he relied entirely on others to prepare the application.

MICROFILMED

JUL 23 2003

31. Harold Jones, an employee in the Department's Eastern Regional Office, testified that the Department relied on the representations made in the transfer application for a licensed right because no protests are filed. In reviewing the Sage Willow application for transfer no. 3785, the Department did not independently investigate the existence of a well and pump at the licensed point of diversion or diversion for beneficial use on the licensed place of use for license no. 33-02091.

32. Transfer no. 3785 was approved and allowed a change in the place of use for license no. 33-02091 from the Homestead Place to part of the North of Road Place. The transfer resulted in an overlap of license no. 33-02091 on the place of use for license no. 33-02090. One of the purposes of the pending transfers is to correct transfer no. 3785 by moving license no. 33-02091 to lands not already described as a place of use by license no. 33-02090.

33. In 1991, two new pivots (pivots 6 and 7) were installed on the lands in Sections 1 and 6, and irrigation commenced that same year. (See protestant's exhibit no. 13, 1991 Landsat Image, and testimony of Mr. Pancheri and Mr. Scanlan). Although the pivots were installed and operated in 1991, the record indicates transfer no. 3785, which authorized license no. 33-02091 to be used in Sections 1 and 6, was not approved until October of 1992.

34. Vance Hawley testified that lands owned by Hawley were flood irrigated, and many of the fields were only irrigated once during the season. When hay was harvested from these lands, only one half to one ton per acre of hay was harvested, compared to a full average harvest of approximately three tons per acre for the Little Lost River Valley.

35. Brockway was hired by Sage Willow in 1989 to conduct various studies regarding the Little Lost River Basin and its hydrologic and hydrogeologic characteristics, particularly with reference to the Sage Willow holdings. In preparation for the hearing, Brockway walked the Sage Willow property, noted existing ditches and the location of abandoned ditches thereon, and consulted aerial photography to determine the number of acres that could have been irrigated on the Sage Willow property. Brockway prepared applicant's exhibit no. 7 which lists the acreage owned by Sage Willow and estimates consumptive use prior to the Sage Willow purchase of the property. The consumptive use calculated represents consumption by crops irrigated by both sprinkler and flood applications and also includes consumption by bottom land and rangeland vegetation. Lands which showed some evidence of past irrigation, even though not irrigated at the time Sage Willow acquired the property, were assigned irrigation consumptive use values.

36. Brockway concluded that the consumptive use prior to the Sage Willow purchase was 10,192 acre-feet. He also testified that consumptive use increased approximately 760 acre-feet between 1989 and 1992, and will increase another 137 acre-feet if the applications for transfer are approved.

37. Brockway also testified that the additional 137 acre-feet consumptive use would be a depletion, reducing stream flows to the Little Lost River by 0.20 cfs, but that the effect on the aquifer levels would not be detectable.

38. Scanlan combined Vance Hawley's recollection of water use with information derived from aerial photography and determined the total number of acres traditionally irrigated in the Knollin, Bird and Frew properties. For purposes of comparison, in protestant's exhibit no. 15 Scanlan grouped lands by the same classifications as Brockway and applied the same consumptive use values to estimate a consumptive use prior to Sage Willow acquisition. Scanlan estimated a consumptive use of the 9,077 acre-feet. Based on allegations of nonuse on the Homestead Place (license no. 33-02091) and the North of Road Place (license no. 33-02090), Scanlan concluded the approval of these transfers would increase consumptive use by 1,504 acre-feet annually from the pre-1989 consumptive use values.

39. In protestant's exhibit no. 20, Scanlan disagreed with the consumptive values for crops irrigated with surface water used by Brockway in applicant's exhibit no. 7 and reduced the initial consumptive use values by 20 percent to account for the testimony of Vance Hawley regarding reduced crop harvest. He calculated a pre-1989 consumptive use of 8,273 acre-feet. He estimated consumptive use would increase by 1,809 acre-feet after the transfer is approved.

40. The assumptions by Scanlan are supported by direct evidence and testimony presented by Vance Hawley and are consistent with a careful review of aerial photography. These factors provide a more credible estimate of the acres historically irrigated and the historical total consumptive use.

41. Protestant's exhibit no. 18 proposes pro rata reductions in flow rates and acreage irrigated for each of the applications based on a ratio between the licensed places of use and the historical places of use as established by Vance Hawley. Despite detailed consumptive use calculations by two expert witnesses, Mays' proposal is based solely on irrigated acreage comparisons, not consumptive use comparisons.

42. Don Isham, a prior officer of the Canal Co., testified that to his knowledge, the later in time surface water rights alleged to be owned and proposed for transfer by Sage Willow have been delivered to the Canal Co. for decades. He testified that although the application for transfer that moved the water from the Knollin Ranch to the Canal Co. only included the early in time rights, the Canal Co. was entitled to the rights claimed by Sage Willow because of the long history of delivery.

43. The watermaster for the Little Lost River testified that in 1993, he delivered some of the surface water rights claimed by Sage Willow to Sage Willow.

CONCLUSIONS OF LAW

1. The parties agree about most of the facts pertaining to the traditional use prior to Sage Willow's acquisition of the property and the expanded use of Sage Willow following its acquisition. There is some disagreement regarding the consumptive use calculations of the expert witnesses and which consumptive use numbers are most accurate. Both parties admit, however, that Sage Willow's proposal will increase the consumptive use on the Sage Willow property.

2. The first issue to be resolved is whether all or portions of the original water rights were lost by abandonment or forfeiture. License nos. 33-02090 and 33-02091 were forfeited because of non-use for over 20 years. Forfeiture was established by clear and convincing evidence.

3. One of the most difficult issues is the status of transfer no. 3785. The application for transfer was incomplete and contained representations that were not correct. Dumke explicitly represented, by signing the affidavit, that the right had not been forfeited and that there would be no injury or enlargement as a result of the transfer. An integral portion of the application, asking whether the applicant knew of any continuous five year period of non-use, was left blank. The Department did not independently investigate the possibility of forfeiture. In addition, the applications for transfer now pending were filed to revise what was previously approved.

4. There is no evidence that Dumke or Sage Willow fraudulently misled the Department, or that the transfer is void because of fraud. Because the pending applications for transfer attempt to correct previously approved transfer no. 3785, and because there were misrepresentations and omissions of fact in the filing of application for transfer no. 3785, transfer no. 3785 should be voided. Furthermore, although there has been some development pursuant to transfer no. 3785, Sage Willow constructed two of the pivots prior to approval of transfer no. 3785.

5. Because of the reasons set forth above, the finding of forfeiture should supersede the prior approval of transfer no. 3785.

6. The combined testimony of Vance Hawley and Terry Scanlan regarding the total place of use for the remainder of the Bird Ranch, the Knollin Ranch, and the Frew Place, establishes a historically irrigated acreage of 1,412 acres during a period of at least two decades.

7. The total number of acres authorized for irrigation pursuant to license nos. 33-02086 and 33-07018 is 230 acres. The total number of acres authorized for irrigation pursuant to license nos. 33-02057 and 33-02083 is 1,182 acres. Combined surface water and ground water irrigation should not exceed 1,412 acres, except for sub-irrigation. The total number of acres that

can be irrigated by applying water (surface water and ground water) directly to the land is 1,412 acres. The right to irrigate any additional lands described by ground water and surface water rights in excess of 1,412 acres has been forfeited, except for benefits derived by subwater.

8. Applicants do not admit forfeiture, but emphasize the doctrine of resumption of use as a defense against forfeiture. Several Idaho court cases generally mention the resumption of use defense to forfeiture. Only two of the decisions find that there may have been a forfeiture and that resumption of use might resurrect the water right.

9. Wagoner v. Jeffrey, 66 Idaho 455, 162 P.2d 400 (1945) was a dispute between a water right holder who had perfected rights in wells located on federal property and another settler who subsequently obtained a patent to the property where the wells were located. More than five years of non-use elapsed. When the water right holder unsuccessfully attempted to resume his use, the subsequent settler, even though he had no water rights in the wells, attempted to block the resumption by alleging forfeiture. In Wagoner, there were no junior water right holders claiming a right to the water which was being diverted out of the wells. The resumption doctrine was applied because there was no intervening claim to the water.

10. In Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952), a water user attempted to transfer water rights diverted from the Big Lost River approximately 20 miles downstream. The protestants alleged the rights were forfeited. Unrefuted evidence established that the water right had not been applied to the original place of use for several decades, but the evidence also established that at least for a portion of that period, water was delivered to the proposed place of use and assessments for the delivery of the water had been paid. In its holding, the Idaho Supreme Court said:

Thus, bills were rendered and payments made by respondent for water delivered by the District. The District showed no water was delivered to [the old place of use], so the water must have been, and two of the exhibits show the water was, delivered to the [proposed place of use].

73 Idaho at 159.

11. The court seemed to be concluding that the water right was not forfeited because it was delivered to other lands. Nevertheless, the court subsequently stated, quoting Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944):

Although statutory abandonment of a water right has occurred, forfeiture is not effective if after five-year period original owner or appropriator resumes the use of the water prior to claim of right by a third party.

73 Idaho at 160.

12. The court explained the quotation with two statements, the first implying the right had been forfeited but resumed, and the second implying the right had never been forfeited:

No one claims this particular decreed water by adverse possession and clearly, so far as this proceeding is concerned, it was in part at least used by respondent on some of his Arco lands before it was claimed it had been forfeited.

The trial court was justified in holding that water had been so used by respondent that he had not abandoned or forfeited his water rights

73 Idaho at 160.

13. More importantly, the court did not consider or discuss injury to other water rights that might be caused by the resumption of use.

14. Other cases discuss the resumption defense, but decide that the right was not forfeited. Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944) (held not abandoned and was not a resumption case); Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937) (held burden of proof on the party alleging forfeiture not satisfied). Another case, Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982), held that the right was forfeited but proof was not offered regarding the resumption of use defense.

15. The law does not require that a claim of ownership to the specific water delivered by a specific water right must be filed prior to resumption of use to prevent the resumption. Language in Zezi that the use must be resumed prior to other appropriations and the discussion of movement up the priority ladder by junior right holders in Jenkins narrowly limits when a water right can be resumed after it is forfeited.

16. Recognition of the resumption of use defense would frustrate the doctrine of prior appropriation in streams where: (1) junior appropriators have established water rights and have relied on water not diverted by a senior user; or (2) in this case, where senior surface water users and other water right holders have relied on related ground water not diverted by Sage Willow's predecessor. While the prior appropriation doctrine is crafted to protect water users by delivering in order of priority, its requirement of beneficial use of water prevents a water right holder from

retaining unused water rights for a long period of time and then reasserting the right to the detriment of other right holders.

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 claim to the water. The resumption doctrine cannot restore portions of water rights forfeited by Sage Willow's predecessor in interest to the detriment of other water right holders.

18. Detailed consumptive use comparisons by both parties implicitly invite the Department to microscopically look at the application of water upon the place of use and restrict the future consumptive use based on an estimated consumptive use. Nevertheless, protestant's exhibit no. 18 proposes to reduce water use proposed by the applications for transfer based solely on historical acres irrigated, not based on consumptive use. The Department declines, in this case, to limit the total diversion based on increased consumptive use which may result from improved efficiency of water application. Total diversion volumes and consumptive uses values will be assigned according to Department standards. Flow rates will be reduced to a rate of 0.02 cfs per acre unless Sage Willow can demonstrate the need for additional diversion rate.

19. These applications for transfer can only be approved if the applicant identifies 1,412 acres to which water will be physically diverted and applied by some means other than subirrigation. Annual volume for physical diversion, delivery, and application should be limited to 4,942 acre feet. Annual consumptive volume will be limited to 3,530 acre feet. The diversion rate will be limited to 28.24 cfs.

20. A plan identifying 1,412 acres that will be irrigated together with the individual water rights that will be appurtenant to the acreage must be submitted to the Department. The Department will then allocate volumes and diversion rates to each right.

21. As part of the proposal, the applicant may continue to derive the benefits of subirrigation from ponds and return flows to the Little Lost River, provided the ponds or the return channels are not reconstructed to increase subirrigation beyond the acreage historically subirrigated. Water shall not be diverted from ground water for the sole purpose of filling ponds or subirrigating. Surface water can only be diverted for root zone storage (presumably subirrigation) pursuant to license no. 33-02133 when all prior surface water rights are being satisfied.

22. Water rights cannot be obtained by adverse possession if the rights are being delivered by a watermaster in a water district. Idaho Code § 42-607.

23. The Canal Co. is not entitled to ownership of water rights owned by Sage Willow.

ORDER

IT IS HEREBY ORDERED that transfer no. 3785 is VOIDED.

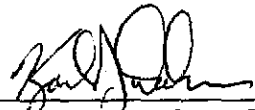
IT IS FURTHER ORDERED that license no. 33-02090 and license no. 33-02091 and portions of all other rights diverted and directly applied to lands in excess of 1,412 acres are FORFEITED.

IT IS FURTHER ORDERED that application for transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227 are **CONDITIONALLY APPROVED** provided the applicant does not irrigate more than 1,412 acres within the place of use proposed by the applications, and the applicant complies with the following:

1. A plan must be submitted to the Department of Water Resources within 56 days of the final disposition of this dispute or after any final appeal period has run identifying 1,412 acres that will be irrigated together with the individual water rights that will be appurtenant to the acreage. The plan must also be provided to the Protestants for review and comment. Comments from the Protestants must be submitted to the Department and to the Applicant one month following submittal of the plan. A hearing may be requested by either party within sixty (60) days of submittal of the plan.
2. Failure to submit the plan is cause for the Department to revoke its conditional approval of the application for transfer.

IT IS FURTHER ORDERED that the Department will issue another recommended decision if additional testimony is required following submittal of the plan.

DATED this 8th day of April, 1996.



KARL J. DREHER, Director

Attachment

MICROFILMED

CERTIFICATE OF MAILING

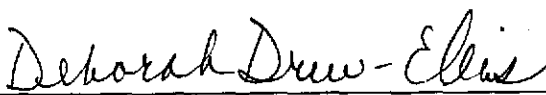
I HEREBY CERTIFY that on this 8th day of April, 1996, I mailed a true and correct copy, postage prepaid, of the foregoing **AMENDED FINAL ORDER** to the following:

Kent Foster
HOLDEN KIDWELL HAHN
& CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
Boise, ID 83701

J. Evan Robertson
Norman M. Semanko
ROSHOLT ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, ID 83303-1906



Deborah Drew-Ellis
Legal Secretary

WR5747NP

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHTS NUMBER INDEX

DATE: 03/19/96

PAGE: 1

WATER RIGHT
NUMBER

NAME

CFS

33-07018

SAGEWILLOW INC

3.26

RECEIVED

MAR 27 1996

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	)	
TRANSFER NOS. 4221, 4222, 4223, 4224,	)	FINAL ORDER
4225, 4226 AND 4227 IN THE NAME OF	)	
SAGE WILLOW, INC.	)	
_____	)	

INTRODUCTION

Sage Willow, Inc. (Sage Willow) filed seven applications for transfer with the Idaho Department of Water Resources (Department). The applications propose changing the place of use for several surface and ground water rights. The multiple applications were filed to define portions of various ground water and surface water rights that would be appurtenant to each of seven independent delivery systems. A map depicting the system described by each application is attached at the end of this decision. Some of the applications were protested by the Blaine County Canal Co. (the Canal Co.), James Mays, Mays Land and Livestock Co. (collectively referred to as "Mays") and Simplot Land and Development Co. Simplot Land and Development Co. subsequently withdrew its protest.

After expiration of the protest period Mays discovered they had not protested all of the applications for transfer filed by Sage Willow. Mays filed a motion to amend the protest to include protests opposing all of the applications for transfer and to add issues of forfeiture and enlargement to the issues raised by the original protests. The motion to amend was granted prior to the hearing.

On January 18, 1995, the Canal Co. filed a motion to amend its protests. The hearing officer initially denied the motion to amend from the Canal Co. because it was untimely. At the hearing, however, the hearing officer revoked the order denying the motion to amend and granted the motion to amend. The Canal Co. and Mays participated as full parties in all the proceedings. A hearing regarding the protest was conducted on January 31 and February 1, 1995.

A recommended order was issued on May 22, 1995. Counsel for Sage Willow timely filed a petition for reconsideration that the hearing officer granted. The order granting reconsideration limited reconsideration to two (2) issues:

[Handwritten signature]
MAR 27 1995

1. Whether use of water pursuant to water right no. 33-02091, although previously transferred/abandoned, should be recognized because of the approval of transfer no. 3785, which was approved in 1992.

2. Whether the number of acres authorized for irrigation pursuant to rights nos. 33-02086 and 33-07018 should have been reduced solely on the basis of Terry Scanlan's testimony.

Briefs were to be filed regarding the petition for reconsideration on or before July 14, 1995.

Sage Willow requested a transcript of the record, and after issuance of the order granting reconsideration, the parties agreed to delay briefing until the transcript was prepared. The parties both filed briefs on or about September 1, 1995.

An amended recommended order (ARO) was issued on November 7, 1995. Sage Willow filed a second petition for reconsideration which was denied.

Sage Willow filed exceptions to the amended recommended order, and Mays filed a brief in response to the exceptions. The exceptions will be discussed in the following analysis portion of the decision. Findings of fact, conclusions of law and the order will follow the analysis section.

ANALYSIS

Sage Willow filed exceptions to the amended recommended order as follows:

- (1) The ARO misinterprets the resumption of use doctrine and its application to any portion of the water rights that may have been unused for a period of five or more years, but have since been resumed;
- (2) The ARO improperly concludes that transfer number 3785 can, and should, be voided; and
- (3) The ARO improperly concludes that only 230 acres have historically been irrigated on the Frew Place, rather than 260.

Resumption of Use

Sage Willow alleges several elements must be satisfied before a resumption of use after forfeiture can be defeated:

1. A new water right must be established by appropriation that will prevent a resumption of use.

2. A new water right established by appropriation to prevent a resumption of use must be established after the five (5) year forfeiture period has run. Water rights perfected with dates of priority between the priority of the alleged forfeited right and the date when forfeiture occurred cannot prevent a resumption of use.

3. Use of water must be by adverse possession. There must be open and notorious use, and the notice must be directed toward the original owner.

4. A person wanting to appropriate the forfeited water cannot simply sit by and wait, holding a water right in the ladder of priority. He is required to do something affirmative once the right in question has been forfeited.

5. A forfeited water right can be resumed until it is declared forfeited by a competent authority.

There must be an appropriation of water with an intervening priority date that will be injured by the resumption to prevent a resumption of use. All of the other criteria proposed by Sage Willow are inconsistent with the prior appropriation doctrine.

If a new appropriation is required, a water user holding a water right with a date of priority between the priority of the alleged forfeited right and the date of forfeiture who wanted to improve his water supply would be required to file another application for appropriation. If the new appropriation assumes its place in the order of priority, water users with earlier in time priority water rights would receive the excess water. This result would require that a water user would be required to file for a new appropriation simply as a matter of form to receive water which he would have received pursuant to the priority system anyway. This is promoting form over substance.

Idaho Code § 42-222(2) states that when a water right is forfeited the water right reverts back to the state and is subject to appropriation. If the water reverts back to the state upon forfeiture, and is subject to appropriation, the original owner has no title to a water right that can be acquired through adverse possession. To allow a person to gain ownership of a water right after it has been forfeited is inconsistent with the doctrine of prior appropriation.

Sage Willow argues that the owner of an existing water right with a date of priority later than the alleged forfeited right cannot sit and wait to defeat a resumption of use, but must act affirmatively as described above. This theory would require a water right holder on a stream to continuously monitor the uses of water of all the users up and down a river, hoping to improve his

water supply. When continuous monitoring reveals a forfeited right, he must file an application for a new appropriation of water, in addition to somehow taking the water of another person openly and notoriously, even though he may be diverting that water several miles upstream or downstream from the point of diversion for the water right alleged to be forfeited. This kind of requirement is outside of the law. A water user who has forfeited his water rights should not be allowed to resume the right where junior users have come to rely on the water made available as a result of the forfeiture.

Finally, Sage Willow argues that a resumption of use cannot be defeated unless forfeiture is declared prior to the time the resumption occurs. Recognition of this theory would result in a race for declaration of forfeiture prior to any resumption.

Sage Willow analyzes the Idaho cases on resumption of use along with cases from other jurisdictions. Sage Willow argues convincingly that Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952) recognizes resumption of use for a right diverted from a fully appropriated stream long after the forfeiture period had expired. In Boyer, the protestants produced evidence that the water rights allegedly forfeited had not been used for several decades. The evidence also showed that use of water under the right had been resumed only a short time period prior to consideration of the application for transfer by the State Reclamation Department (predecessor to the Department of Water Resources). Sage Willow argues that the hearing officer misinterpreted the case and its finding by implying that the right may never have been forfeited because the water was used on a different place of use. Sage Willow argues that the right was forfeited, but resumed, even though there were intervening water rights.

The Boyer case leaves some questions about when a forfeited right can be resumed and whether some of the earlier requirements raised by Sage Willow, such as adverse possession, must be proven. Rather than argue about the interpretation of the language and whether the water right was forfeited and resumed or was never forfeited, the better analysis is that Boyer never addressed any issues of injury to other water rights because of the resumption of use. Boyer did discuss the injury to other water users that might occur as a result of Boyer not being required to pay assessments once the water right was moved out of the Big Lost Irrigation District canal system.

The issue of injury is central to the considerations of the Department in reviewing an application for transfer. There was uncontroverted evidence presented at the hearing that Sage Willow's resumption of use would enlarge the traditional use of water on the lands now owned by Sage Willow, would deplete stream flows in the Little Lost River, and would make further demands on the ground water resources of the basin. The Department will not ignore the injurious effects on other water users that will be caused by Sage Willow's diversion and use of water beyond the traditional use of water on the lands acquired by Sage Willow. The original holding regarding the resumption of use in the amended recommended order will not be changed.

Voiding of Transfer No. 3785

The ARO held that transfer no. 3785, previously approved by the Department in 1992, should be voided. The transfer approved moving the point of diversion and place of use for water right no. 33-02091. At the hearing on the applications for transfer now pending, evidence was presented to show that water right no. 33-02091 was forfeited prior to the approval of transfer no. 3785.

The ARO recognized administrative *res judicata*. The Department should not entertain duplicative "claims" or "issues" except under extraordinary circumstances. The purpose for *res judicata* before administrative agencies is similar to the purpose before the courts: (1) to prevent litigation of the same matter with inconsistent results; (2) to avoid repetitious litigation; and (3) to avoid the harassment of repetitive claims. The Department should exercise restraint in disturbing a prior decision. Nonetheless, the Department of Water Resources is charged not only with deciding what should be done where there are disputed proposals for use of water before the Department, but also with general oversight of the water resources of the state of Idaho. Because of its oversight responsibility, the Department should have wider latitude in setting aside a prior decision.

Sage Willow asserts that the ARO did not sufficiently analyze *res judicata*, and its component parts. The Idaho Supreme Court has adopted the Restatement (Second) Judgments (1982). *Res judicata* is divided into two component parts, claim preclusion and issue preclusion. Claim preclusion prevents a party from pursuing other remedies "with respect to all or any part of the transaction . . . out of which the action arose." Aldape v. Akins, 105 Idaho 254, 259, 668 P.2d 130 (1983). Issue preclusion, or collateral estoppel, "bars the relitigation of issues actually adjudicated and essential to the judgment in a prior litigation between the parties." Aldape at 256.

The most compelling reason for voiding transfer no. 3785 and reviewing water right no. 33-02091 against the test of forfeiture is set forth in Section 28 of the Restatement:

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:

- (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 interest 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 issues would arise in the context of a subsequent action, or (c) because the parties

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.

At the hearing for the now pending transfers, the evidence showed that there would be adverse impacts to the public interest and interests of water users not parties to the initial action if the approval of transfer no. 3785 is not reconsidered.

Sage Willow criticizes the Department for discussing some equitable reasons why transfer no. 3785 should be reconsidered. These reasons included a short time period since the approval of transfer no. 3785, the expenditure of money by Sage Willow prior to approval of transfer no. 3785, the attempt in the pending transfers to correct a misdescription of the place of use in the approval of transfer no. 3785, and the omissions regarding questions of forfeiture on the application for transfer form. Sage Willow alleges these facts should not be considered by the Department.

Sage Willow supplemented its submittal of legal authority on January 2, 1996. In the supplemental brief, Sage Willow quotes Keller v. Magic Water Co., 92 Idaho 276, 441 P.2d 725 (1968). The Keller court states that principles of equity should be applied in determining whether issues before the Department should be reconsidered. It raises three of those equitable issues: (1) the long period of time which had expired since the permit approval, (2) the substantial sums of money which had been expended by the permit holder in reliance on the approval, and (3) the issue of whether other water users were damaged by the omission of the financial information. Two of the three equitable issues raised by the Keller court, the injury issue and the expiration of time issue, are resolved in Mays' favor. Only the expenditure of money by Sage Willow is a consideration in its favor, and Sage Willow's expenditure occurred prior to the transfer approval. Furthermore, there are other equitable reasons briefly discussed above why this reconsideration does not impose an unreasonable hardship on Sage Willow. Issue preclusion does not prohibit the Department from voiding transfer no. 3785 and reconsidering the issue of forfeiture.

Whether the Department of Water Resources characterizes the issues before it as claim preclusion or issue preclusion, the result is the same. The Department should not be barred from reconsidering a prior decision which is inconsistent with the general statutory scheme of protecting other water users. It also should not be barred from reconsidering a prior decision where there are extraordinary reasons for the reconsideration.

Sage Willow also argues that the Department is prohibited from voiding or reconsidering transfer no. 3785 because of equitable estoppel. Both parties agree that equitable estoppel can apply to government agencies acting in their sovereign capacity under extraordinary

circumstances. In addition to applying only in extraordinary circumstances, the proponent of equitable estoppel must establish that the Department either concealed or falsely represented facts with actual or constructive knowledge of the truth. Sage Willow did not prove that the Department concealed or falsely represented the facts. Equitable estoppel does not apply to the Department in this case.

Finally, Idaho Code § 42-350 states:

If the director of the department of water resources finds, on the basis of available information *at any time after a license is issued*, that the licensee has ceased to put the water to a beneficial use for a period of five (5) continuous years . . . then the director of the department of water resources may issue . . . an order to show cause before the director of the department . . . why the director of the department should not revoke said license (Emphasis added).

While this statute directs a specific administrative process and does not discuss the effect of a transfer approval, it supports a holding that the director can review forfeiture issues, even after a transfer approval has been granted.

Forfeiture of a Portion of the Frew Place of Use

In the ARO, the hearing officer held that the place of use for water right nos. 33-02086 and 33-07018 should be limited to 230 acres because of the testimony of Terry Scanlan (Scanlan) and corroborating evidence by Charles Brockway (Brockway), the expert for Sage Willow. Sage Willow states that Brockway's testimony and exhibits do not corroborate Scanlan's testimony. Sage Willow recites facts regarding the purchase of the water rights and the land by Sage Willow which were not introduced into evidence at the hearing and were not available to the hearing officer in reaching his decision. The number of acres in the Frew Place, authorized by water right nos. 33-02086 and 33-07018, will be limited to 230 acres.

Based on the above analysis, the Director issues the following Findings of Fact, Conclusions of Law and Order.

RECEIVED
MAY 27 2003

FINDINGS OF FACT

1. In 1989, Sage Willow acquired a ranch, located near the confluence of the Little Lost River and Spring Creek, commonly known as the Knollin Ranch. At the same time, Sage Willow also acquired other parcels contiguous to or nearby the Knollin Ranch.

2. One of the other parcels is located approximately 1½ miles northwest of the Knollin Ranch. The parcel is divided into two pieces by the east 16th line of Sec. 35, T27N, R28E, B.M. The property located on the west side of the 16th line is commonly known as the Bird Ranch. The property located east of the 16th line is commonly known as the Homestead Place.

3. Another parcel is located on the north side of an east-west county road, which was the northern boundary of the original Knollin Ranch, and will herein be referred to as the "North of Road Place."

4. In 1993, Sage Willow acquired additional land contiguous to and northeast of the Knollin Ranch from David and Terry Hawley (the Frew Place).

5. The Knollin Ranch was originally owned by A.J. Knollin. Several surface water rights were appurtenant to the Knollin Ranch. Because of financial difficulties, A.J. Knollin conveyed his interest in the Knollin Ranch to the first mortgage holder in 1942. In the same year, the Canal Co. purchased the Knollin Ranch from the mortgage holder. During the late 1940's, the Canal Co. sold the ranch land to L.R. "Slim" Hawley (Hawley). The earliest priority water rights appurtenant to the Knollin Ranch were not conveyed to Hawley, however, but were retained by the Canal Co. and later transferred to downstream lands. The Canal Co. rights are some of the earliest water rights diverted from the Little Lost River, bearing priority dates of 1879 to 1891.

6. Several late priority surface water rights remained appurtenant to or were developed for use on the Knollin Ranch. These later rights are described below:

RECORDED
MAR 27 1993

Irrigation Rights

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-00069	3.2	06/01/1908	Little Lost River
33-00070	2.8	10/01/1906	Spring Creek
33-00071	3.2	03/15/1909	Spring Creek
33-00072	.8	05/01/1908	Little Lost River
33-00073	6.4	04/01/1912	Spring Creek
33-00074	1.6	08/06/1913	Little Lost River
33-00076	6.8	04/01/1913	Little Lost River
33-00078	3.2	10/15/1913	Little Lost River
33-00079	1.6	04/01/1912	Little Lost River
33-00080	.8	05/01/1908	Spring Creek
33-00081	.8	05/01/1908	Spring Creek
33-00082	.8	05/01/1908	Spring Creek
33-02007	2.9	02/15/1909	Little Lost River
33-02008	<u>6.4</u>	06/12/1909	Spring Creek
	41.3		

Soil Root Zone Storage Right

<u>Water Right No.</u>	<u>Acre-Feet</u>	<u>Priority</u>	<u>Source</u>
33-02133	2,960	06/02/1949	Little Lost River Spring Creek

7. The late priority surface water rights listed in Finding 6 could only be delivered to Hawley during high water flows, however, and there was insufficient surface water to irrigate the Knollin Ranch. Hawley subsequently obtained two licenses to irrigate the Knollin and Bird Ranches with ground water, numbered 33-02057 and 33-02083. The ground water rights for the Knollin and Bird Ranches are described as follows:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02057	24.0	02/01/1950	8 wells # 1-8
33-02083	5.0	08/23/1957	8 wells #1-8

MAR 27 1966

8. In addition, ground water rights were also perfected for the Frew Place, which Sage Willow acquired from David and Terry Hawley. The Frew Place water rights are listed below:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02086	4.1	01/12/1959	well # 13
33-07018	3.26	09/12/1972	well # 12

9. Finally, Hawley and some of his contemporary relatives obtained patents for two parcels of federal property pursuant to the Desert Land Entry Act. Two licenses to appropriate ground water were issued by the Department for these parcels. License no. 33-02091 was perfected for irrigation of the Homestead Place. License no. 33-02090 was perfected for irrigation of the North of Road Place. The following describes components of these rights:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02090	5.93	12/21/1959	well # 11
33-02091	4.36	01/22/1960	well on Bird Ranch

10. The places of use and points of diversion prior to Sage Willow's acquisition of the water rights described in the preceding paragraphs are depicted on the map labeled as applicant's exhibit no. 1"a".

11. Sage Willow filed application for transfer nos. 4221, 4222, 4223, 4224, 4225, 4226 & 4227, proposing to change the place of use for all of the rights listed in the preceding paragraphs. The multiple applications for transfer were filed to define portions of the water rights that would be appurtenant to each of seven independent delivery systems. Application nos. 4221, 4222 and 4223 propose the irrigation of land primarily north of the original Knollin Ranch with pressurized circular pivots. Application nos. 4224, 4225, 4226 and 4227 propose gravity irrigation of other land. The proposed places of use are depicted on a map labeled as applicant's exhibit no. 1"b". For further clarity, a map depicting the system (or place of use) described by each of the applications is attached. The original and proposed places of use described in the applications are not restated in this decision because of their size and complexity.

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 the 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 Knollin Ranch.

15. Vance Hawley, a son of Slim Hawley, grew up in the Little Lost Valley and helped farm the Knollin and Bird Ranches as a youth, although he did not reside on the Knollin Ranch. After attending college, Vance Hawley returned and assisted in farming the property from 1970 through 1978. During these eight (8) years, he did not manage the farm but resided on the Knollin Ranch. From 1978 through 1980, he leased the Knollin Ranch property. After the lease expired, he was acquainted with the operation of the farms until 1989, when the Knollin Ranch was sold to Sage Willow.

16. Vance Hawley was also aware of the operation of the Bird Ranch, the Homestead Place, the North of Road Place, and other surrounding lands.

17. Vance Hawley testified about the extent of beneficial use of water on the properties now owned by Sage Willow. He testified that the total number of acres irrigated on the Bird Ranch did not exceed 297 acres. He also testified that irrigation of individual parcels on the Knollin Ranch totaled 879 acres.

18. Vance Hawley testified that the Homestead Place, located just east of the Bird Ranch, was irrigated with water pursuant to license no. 33-02091 in the early 1960's until a patent of ownership was issued by the federal government. He testified that the land was converted back to early season dry range land and was never irrigated in the late 1960's, all of the 1970's, and the 1980's until Sage Willow bought the property.

19. Vance Hawley also stated that the North of Road Place, patented by his aunt and uncle and located north of the main east-west access road into the Knollin Ranch, was irrigated with water pursuant to license no. 33-02090 in the early 1960's until a patent of ownership was issued by the federal government. He testified that after the patent was issued, the property was converted back to early season dry rangeland. He testified that water had not been applied to the lands pursuant to license no. 33-02090 during the late 1960's, all of the 1970's, and the 1980's until the property was purchased by Sage Willow.

20. James Mays, a lifelong resident of the Little Lost River Valley, testified he was familiar with both the Homestead Place and the North of Road Place and had not observed any irrigation on the Homestead Place or North of Road Place, at least until Sage Willow acquired the parcels.

21. Vance Hawley drew the boundaries of the various parcels comprising the Sage Willow property as depicted on protestant's exhibit no. 3 and estimated the number of acres irrigated during his acquaintance with the property. The estimate includes lands irrigated with both surface water and ground water. He estimated that no more than 1,176 acres were irrigated within the boundaries of the Knollin Ranch and Bird Ranch.

22. The testimony of Vance Hawley is the most credible evidence regarding the traditional use of water on the entire Sage Willow land holdings before 1989.

23. Terry Scanlan (Scanlan), an engineer and geologist hired by Mays, consulted aerial photographs and estimated that approximately 230 acres were irrigated in the Frew Place. This estimate is consistent with the irrigated acreage estimates prepared by Dr. Charles E. Brockway, P.E. (Brockway), a consultant hired by Sage Willow.

24. Scanlan also estimated that 1,182 acres were irrigated in the Knollin Ranch and the Bird Ranch, six more acres than estimated by Vance Hawley. Adding the 230 acres irrigated in the Frew Place, Scanlan estimated the total acreage irrigated prior to 1989 was 1,412 acres. Because of the six acre discrepancy between Vance Hawley's estimate and Scanlan's estimate, the difference will be resolved in favor of Sage Willow. A total of 1,412 acres were irrigated prior to 1989.

25. In 1989, Sage Willow purchased the Knollin Ranch, the Bird Ranch, the Homestead Place, and the North of Road Place. Jerry Pancheri was hired as the manager of the ranch and was instructed to apply the water to the land as efficiently as possible and to recommend changes to the system to more efficiently use the water.

26. Pancheri testified about his attempts to use the water and identified land irrigated during the years he managed the farm. Pancheri identified on protestant's exhibit no. 21 the lands which were irrigated in various years. He approximated the areas irrigated in several individual parcels, and the parties summed his estimates in their briefs as set forth below:

Total Number of Acres Irrigated

<u>Year</u>	<u>Sage Willow's Estimate</u>	<u>Mays' Estimate</u>
1989	1,300	1,400
1990	1,560	1,740
1991	2,000	2,004
1992	2,130	2,100
1993	2,390	-----

27. During 1990 and 1991, Pancheri determined that several preexisting ponds located on the Knollin property should be repaired and filled with water. These ponds, when filled with water, contribute significant sub-water to the shallow aquifer and sub-irrigate some of the lower elevation pastures located on the Knollin Ranch.

28. Pancheri also determined that the lands within the Bird Ranch and the Homestead Place were the poorest agricultural lands of the Sage Willow holdings and recommended that the water rights appurtenant to the Bird Ranch and Homestead Place be transferred to other lands located north of the Knollin Ranch. These lands north of the Knollin Ranch were acquired by Jerry Pancheri, and subsequently by Sage Willow, through an exchange of lands with the Bureau of Land Management.

29. In October, 1990, Sage Willow, through its president Edmund Dumke, applied to transfer license no. 33-02091 (transfer no. 3785) from the Homestead Place to land located in the SE¼ of Section 1, T7N, R27E, and the SW¼ and SE¼ of Section 6, T7N, R28E, B. M. The transfer application was signed by Dumke as president of Sage Willow. Part 1 of the transfer application requests the applicant to "[d]escribe the effect on the land now irrigated if the place of use is changed pursuant to this transfer." Dumke responded that "[w]e will dry farm this old place of use." There was no response to question 10 in part 2 of the application which asks "To your knowledge, has any portion of this water right undergone a period of five (5) or more consecutive years of non-use?" By signing the application, Dumke asserted that "no one will be injured by such change and that the change does not constitute an enlargement in use of the original right."

30. Dumke testified at the hearing that he had no personal knowledge regarding license no. 33-02091. He did not personally know whether a well was located at the licensed point of diversion or if any irrigation had occurred pursuant to license no. 33-02091 on the licensed place of use. Dumke stated that he relied entirely on others to prepare the application.

31. Harold Jones, an employee in the Department's Eastern Regional Office, testified that the Department relied on the representations made in the transfer application for a licensed right because no protests are filed. In reviewing the Sage Willow application for transfer no. 3785, the Department did not independently investigate the existence of a well and pump at the licensed point of diversion or diversion for beneficial use on the licensed place of use for license no. 33-02091.

32. Transfer no. 3785 was approved and allowed a change in the place of use for license no. 33-02091 from the Homestead Place to part of the North of Road Place. The transfer resulted in an overlap of license no. 33-02091 on the place of use for license no. 33-02090. One of the purposes of the pending transfers is to correct transfer no. 3785 by moving license no. 33-02091 to lands not already described as a place of use by license no. 33-02090.

33. In 1991, two new pivots (pivots 6 and 7) were installed on the lands in Sections 1 and 6, and irrigation commenced that same year. (See protestant's exhibit no. 13, 1991 Landsat Image, and testimony of Mr. Pancheri and Mr. Scanlan). Although the pivots were installed and operated in 1991, the record indicates transfer no. 3785, which authorized license no. 33-02091 to be used in Sections 1 and 6, was not approved until October of 1992.

34. Vance Hawley testified that lands owned by Hawley were flood irrigated, and many of the fields were only irrigated once during the season. When hay was harvested from these lands, only one half to one ton per acre of hay was harvested, compared to a full average harvest of approximately three tons per acre for the Little Lost River Valley.

35. Brockway was hired by Sage Willow in 1989 to conduct various studies regarding the Little Lost River Basin and its hydrologic and hydrogeologic characteristics, particularly with reference to the Sage Willow holdings. In preparation for the hearing, Brockway walked the Sage Willow property, noted existing ditches and the location of abandoned ditches thereon, and consulted aerial photography to determine the number of acres that could have been irrigated on the Sage Willow property. Brockway prepared applicant's exhibit no. 7 which lists the acreage owned by Sage Willow and estimates consumptive use prior to the Sage Willow purchase of the property. The consumptive use calculated represents consumption by crops irrigated by both sprinkler and flood applications and also includes consumption by bottom land and rangeland vegetation. Lands which showed some evidence of past irrigation, even though not irrigated at the time Sage Willow acquired the property, were assigned irrigation consumptive use values.

36. Brockway concluded that the consumptive use prior to the Sage Willow purchase was 10,192 acre-feet. He also testified that consumptive use increased approximately 760 acre-feet between 1989 and 1992, and will increase another 137 acre-feet if the applications for transfer are approved.

37. Brockway also testified that the additional 137 acre-feet consumptive use would be a depletion, reducing stream flows to the Little Lost River by 0.20 cfs, but that the effect on the aquifer levels would not be detectable.

38. Scanlan combined Vance Hawley's recollection of water use with information derived from aerial photography and determined the total number of acres traditionally irrigated in the Knollin, Bird and Frew properties. For purposes of comparison, in protestant's exhibit no. 15 Scanlan grouped lands by the same classifications as Brockway and applied the same consumptive use values to estimate a consumptive use prior to Sage Willow acquisition. Scanlan estimated a consumptive use of the 9,077 acre-feet. Based on allegations of nonuse on the Homestead Place (license no. 33-02091) and the North of Road Place (license no. 33-02090), Scanlan concluded the approval of these transfers would increase consumptive use by 1,504 acre-feet annually from the pre-1989 consumptive use values.

39. In protestant's exhibit no. 20, Scanlan disagreed with the consumptive values for crops irrigated with surface water used by Brockway in applicant's exhibit no. 7 and reduced the initial consumptive use values by 20 percent to account for the testimony of Vance Hawley regarding reduced crop harvest. He calculated a pre-1989 consumptive use of 8,273 acre-feet. He estimated consumptive use would increase by 1,809 acre-feet after the transfer is approved.

40. The assumptions by Scanlan are supported by direct evidence and testimony presented by Vance Hawley and are consistent with a careful review of aerial photography. These factors provide a more credible estimate of the acres historically irrigated and the historical total consumptive use.

41. Protestant's exhibit no. 18 proposes pro rata reductions in flow rates and acreage irrigated for each of the applications based on a ratio between the licensed places of use and the historical places of use as established by Vance Hawley. Despite detailed consumptive use calculations by two expert witnesses, Mays' proposal is based solely on irrigated acreage comparisons, not consumptive use comparisons.

42. Don Isham, a prior officer of the Canal Co., testified that to his knowledge, the later in time surface water rights alleged to be owned and proposed for transfer by Sage Willow have been delivered to the Canal Co. for decades. He testified that although the application for transfer that moved the water from the Knollin Ranch to the Canal Co. only included the early in time rights, the Canal Co. was entitled to the rights claimed by Sage Willow because of the long history of delivery.

43. The watermaster for the Little Lost River testified that in 1993, he delivered some of the surface water rights claimed by Sage Willow to Sage Willow.

CONCLUSIONS OF LAW

1. The parties agree about most of the facts pertaining to the traditional use prior to Sage Willow's acquisition of the property and the expanded use of Sage Willow following its acquisition. There is some disagreement regarding the consumptive use calculations of the expert witnesses and which consumptive use numbers are most accurate. Both parties admit, however, that Sage Willow's proposal will increase the consumptive use on the Sage Willow property.

2. The first issue to be resolved is whether all or portions of the original water rights were lost by abandonment or forfeiture. License nos. 33-02090 and 33-02091 were forfeited because of non-use for over 20 years. Forfeiture was established by clear and convincing evidence.

3. One of the most difficult issues is the status of transfer no. 3785. The application for transfer was incomplete and contained representations that were not correct. Dumke explicitly represented, by signing the affidavit, that the right had not been forfeited and that there would be no injury or enlargement as a result of the transfer. An integral portion of the application, asking whether the applicant knew of any continuous five year period of non-use, was left blank. The Department did not independently investigate the possibility of forfeiture. In addition, the applications for transfer now pending were filed to revise what was previously approved.

4. There is no evidence that Dumke or Sage Willow fraudulently misled the Department, or that the transfer is void because of fraud. Because the pending applications for transfer attempt to correct previously approved transfer no. 3785, and because there were misrepresentations and omissions of fact in the filing of application for transfer no. 3785, transfer no. 3785 should be voided. Furthermore, although there has been some development pursuant to transfer no. 3785, Sage Willow constructed two of the pivots prior to approval of transfer no. 3785.

5. Because of the reasons set forth above, the finding of forfeiture should supersede the prior approval of transfer no. 3785.

6. The combined testimony of Vance Hawley and Terry Scanlan regarding the total place of use for the remainder of the Bird Ranch, the Knollin Ranch, and the Frew Place, establishes a historically irrigated acreage of 1,412 acres during a period of at least two decades.

7. The total number of acres authorized for irrigation pursuant to license nos. 33-02086 and 33-07018 is 230 acres. The total number of acres authorized for irrigation pursuant to license nos. 33-02057 and 33-02083 is 1,182 acres. Combined surface water and ground water irrigation should not exceed 1,412 acres, except for sub-irrigation. The total number of acres that

can be irrigated by applying water (surface water and ground water) directly to the land is 1,412 acres. The right to irrigate any additional lands described by ground water and surface water rights in excess of 1,412 acres has been forfeited, except for benefits derived by subwater.

8. Applicants do not admit forfeiture, but emphasize the doctrine of resumption of use as a defense against forfeiture. Several Idaho court cases generally mention the resumption of use defense to forfeiture. Only two of the decisions find that there may have been a forfeiture and that resumption of use might resurrect the water right.

9. Wagoner v. Jeffrey, 66 Idaho 455, 162 P.2d 400 (1945) was a dispute between a water right holder who had perfected rights in wells located on federal property and another settler who subsequently obtained a patent to the property where the wells were located. More than five years of non-use elapsed. When the water right holder unsuccessfully attempted to resume his use, the subsequent settler, even though he had no water rights in the wells, attempted to block the resumption by alleging forfeiture. In Wagoner, there were no junior water right holders claiming a right to the water which was being diverted out of the wells. The resumption doctrine was applied because there was no intervening claim to the water.

10. In Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952), a water user attempted to transfer water rights diverted from the Big Lost River approximately 20 miles downstream. The protestants alleged the rights were forfeited. Unrefuted evidence established that the water right had not been applied to the original place of use for several decades, but the evidence also established that at least for a portion of that period, water was delivered to the proposed place of use and assessments for the delivery of the water had been paid. In its holding, the Idaho Supreme Court said:

Thus, bills were rendered and payments made by respondent for water delivered by the District. The District showed no water was delivered to [the old place of use], so the water must have been, and two of the exhibits show the water was, delivered to the [proposed place of use].

73 Idaho at 159.

11. The court seemed to be concluding that the water right was not forfeited because it was delivered to other lands. Nevertheless, the court subsequently stated, quoting Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944):

Although statutory abandonment of a water right has occurred, forfeiture is not effective if after five-year period original owner or appropriator resumes the use of the water prior to claim of right by a third party.

73 Idaho at 160.

12. The court explained the quotation with two statements, the first implying the right had been forfeited but resumed, and the second implying the right had never been forfeited:

No one claims this particular decreed water by adverse possession and clearly, so far as this proceeding is concerned, it was in part at least used by respondent on some of his Arco lands before it was claimed it had been forfeited.

The trial court was justified in holding that water had been so used by respondent that he had not abandoned or forfeited his water rights

73 Idaho at 160.

13. More importantly, the court did not consider or discuss injury to other water rights that might be caused by the resumption of use.

14. Other cases discuss the resumption defense, but decide that the right was not forfeited. Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944) (held not abandoned and was not a resumption case); Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937) (held burden of proof on the party alleging forfeiture not satisfied). Another case, Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982), held that the right was forfeited but proof was not offered regarding the resumption of use defense.

15. The law does not require that a claim of ownership to the specific water delivered by a specific water right must be filed prior to resumption of use to prevent the resumption. Language in Zezi that the use must be resumed prior to other appropriations and the discussion of movement up the priority ladder by junior right holders in Jenkins narrowly limits when a water right can be resumed after it is forfeited.

16. Recognition of the resumption of use defense would frustrate the doctrine of prior appropriation in streams where: (1) junior appropriators have established water rights and have relied on water not diverted by a senior user; or (2) in this case, where senior surface water users and other water right holders have relied on related ground water not diverted by Sage Willow's predecessor. While the prior appropriation doctrine is crafted to protect water users by delivering in order of priority, its requirement of beneficial use of water prevents a water right holder from

retaining unused water rights for a long period of time and then reasserting the right to the detriment of other right holders.

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 claim to the water. The resumption doctrine cannot restore portions of water rights forfeited by Sage Willow's predecessor in interest to the detriment of other water right holders.

18. Detailed consumptive use comparisons by both parties implicitly invite the Department to microscopically look at the application of water upon the place of use and restrict the future consumptive use based on an estimated consumptive use. Nevertheless, protestant's exhibit no. 18 proposes to reduce water use proposed by the applications for transfer based solely on historical acres irrigated, not based on consumptive use. The Department declines, in this case, to limit the total diversion based on increased consumptive use which may result from improved efficiency of water application. Total diversion volumes and consumptive uses values will be assigned according to Department standards. Flow rates will be reduced to a rate of 0.02 cfs per acre unless Sage Willow can demonstrate the need for additional diversion rate.

19. These applications for transfer can only be approved if the applicant identifies 1,412 acres to which water will be physically diverted and applied by some means other than subirrigation. Annual volume for physical diversion, delivery, and application should be limited to 4,942 acre feet. Annual consumptive volume will be limited to 3,530 acre feet. The diversion rate will be limited to 28.24 cfs.

20. A plan identifying 1,412 acres that will be irrigated together with the individual water rights that will be appurtenant to the acreage must be submitted to the Department. The Department will then allocate volumes and diversion rates to each right.

21. As part of the proposal, the applicant may continue to derive the benefits of subirrigation from ponds and return flows to the Little Lost River, provided the ponds or the return channels are not reconstructed to increase subirrigation beyond the acreage historically subirrigated. Water shall not be diverted from ground water for the sole purpose of filling ponds or subirrigating. Surface water can only be diverted for root zone storage (presumably subirrigation) pursuant to license no. 33-02133 when all prior surface water rights are being satisfied.

22. Water rights cannot be obtained by adverse possession if the rights are being delivered by a watermaster in a water district. Idaho Code § 42-607.

23. The Canal Co. is not entitled to ownership of water rights owned by Sage Willow.

ORDER

IT IS HEREBY ORDERED that transfer no. 3785 is VOIDED.

IT IS FURTHER ORDERED that license no. 33-02090 and license no. 33-02091 and portions of all other rights diverted and directly applied to lands in excess of 1,412 acres are FORFEITED.

IT IS FURTHER ORDERED that application for transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227 are **CONDITIONALLY APPROVED** provided the applicant does not irrigate more than 1,412 acres within the place of use proposed by the applications, and the applicant complies with the following:

1. A plan must be submitted to the Department of Water Resources within 56 days of the final disposition of this dispute or after any final appeal period has run identifying 1,412 acres that will be irrigated together with the individual water rights that will be appurtenant to the acreage. The plan must also be provided to the Protestants for review and comment. Comments from the Protestants must be submitted to the Department and to the Applicant one month following submittal of the plan. A hearing may be requested by either party within sixty (60) days of submittal of the plan.
2. Failure to submit the plan is cause for the Department to revoke its conditional approval of the application for transfer.

IT IS FURTHER ORDERED that the Department will issue another recommended decision if additional testimony is required following submittal of the plan.

DATED this 12 day of March, 1996.



KARL J. DREHER, Director

Attachment

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of March 1996, I mailed a true and correct copy, postage prepaid, of the foregoing **FINAL ORDER** to the following:

Kent Foster
HOLDEN KIDWELL HAHN
& CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
Boise, ID 83701

J. Evan Robertson
Norman M. Semanko
ROSHOLT ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, ID 83303-1906


Deborah Drew-Ellis
Legal Secretary

Page 1 of 10STATE OF IDAHO
DEPARTMENT OF WATER RESOURCESTransfer No. 4227APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1RECEIVED
SEP 20 1993

Department of Water Resources

Name of applicant Sagewillow, Inc. Phone (208) 523-0620Post Office address c/o Holden, Kidwell, Hahn & Crano, P.O. Box 50130, Idaho Falls ID 83405

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☐ Add diversion point(s) ☒ Change place of use
☐ Change nature of use ☐ Change period of use ☐ Other _____
2. Describe the reason for the proposed changes To provide for more efficient use of applicant's water rights.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of Use
<u>33-02086B</u>	<u>01/12/1959</u>	<u>2.73 cfs</u>	<u>Irrigation</u>	<u>04/01</u> to <u>11/01</u>
<u>33-02091B</u>	<u>01/22/1960</u>	<u>01 cfs</u>	<u>Irrigation</u>	<u>04/01</u> to <u>11/01</u>
<u>33-07018B</u>	<u>09/12/1972</u>	<u>3.26 cfs</u>	<u>Irrigation</u>	<u>04/01</u> to <u>11/01</u>

NF
0050122. Total amount of water being transferred 6.0 cubic feet per second and/or _____ acre-feet per annum.3. Source of water ground water tributary to _____

4. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
	NW	NW	SW	32	8N	28E	Butte	Well No. 13

5. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
7N	28E	5						15	25	35	30	15		25			15		160
		6		20															20

MAR 27 1996

PART 1

1. General Information

a. Description of diversion system Well with electric pump discharges into open ditch

To place of use for flood irrigation

b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? Yes ☒ No ☐ If yes, provide a notarized statement from the holder of the lien, deed of trust, mortgage or contract agreeing to the proposed changes.

c. Describe the affect on the land now irrigated if the place of use is changed pursuant to this transfer:

Portions of the land now irrigated with this right will be irrigated with other water rights under a sprinkler system; portions of the land will no longer be irrigated, and portions will be irrigated with this right as in the past.

d. Remarks:

This is to certify that I have examined Application for Transfer of Water Rights No. 33-02086B, -02091B, -07018 and said application is hereby conditionally approved, subject to the following limitations and conditions: Pursuant to Final Order.

Witness my hand this 12th day of March 1996

Karl J. Breher, Director

MAR 27 1996

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS)
FOR TRANSFER NOS. 4221, 4222,)
4223, 4224, 4225, 4226, AND)
4227, IN THE NAME OF)
SAGE WILLOW, INC.)
_____)

ORDER DENYING PETITION
FOR RECONSIDERATION

The hearing officer has considered the issues raised in the applicant's petition for reconsideration of the amended recommended order, and finds that they were raised in the initial petition for reconsideration. The issues can be raised again before the Director as exceptions.

ORDER

IT IS HEREBY ORDERED that the applicants petition for reconsideration of the amended order is DENIED.

IT IS FURTHER ORDERED that any exceptions must be filed with the Director within twenty-one (21) days of the date of this order.

Dated this 5th day of December, 1995.



Gary Spackman
Hearing Officer


MAR 27 1996

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of December, 1995, I mailed a true and correct copy, postage prepaid, of the foregoing **ORDER DENYING PETITION FOR RECONSIDERATION** to the following:

Kent Foster
HOLDEN KIDWELL HAHN
& CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
Boise, ID 83701

J. Evan Robertson
Norman M. Semanko
ROSHOLT ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, ID 83303-1906


JULIE L. YARBROUGH
Senior Secretary

MAP 8 7 1995

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	)	
TRANSFER NOS. 4221, 4222, 4223, 4224,	)	AMENDED RECOMMENDED ORDER
4225, 4226 AND 4227 IN THE NAME OF	)	
SAGE WILLOW, INC.	)	
_____	)	

INTRODUCTION

Sage Willow, Inc. (Sage Willow) filed seven applications for transfer with the Idaho Department of Water Resources (Department). Some of the applications were protested by the Blaine County Canal Co. (the Canal Co.), James Mays, Mays Land and Livestock Co. (collectively referred to as "Mays") and Simplot Land and Development. Simplot Land and Development Co. subsequently withdrew its protest.

After expiration of the protest period Mays discovered they had not protested all of the applications for transfer filed by Sage Willow. Mays filed a motion to amend the protest to include protests opposing all of the applications for transfer, and to add issues of forfeiture and enlargement to the issues raised by the original protests. The motion to amend was granted prior to the hearing.

On January 18, 1995, the Canal Co. filed a motion to amend its protests. The hearing officer initially denied the motion to amend from the Canal Co. because it was untimely. At the hearing, however, the hearing officer revoked the order denying the motion to amend, and granted the motion to amend. The Canal Co. and Mays participated as full parties in all the proceedings. A hearing regarding the protest was conducted on January 31 and February 1, 1995.

A Recommended Order was issued on May 22, 1995. Council for Sage Willow timely filed a motion for reconsideration which the hearing officer granted. The order granting reconsideration limited reconsideration to two (2) issues:

1. Whether use of water pursuant to water right no. 33-02091, although previously transferred/abandoned, should be recognized because of the approval of transfer no. 3785, which was approved in 1992?

RECEIVED
MAR 27 1996

2. Whether the number of acres authorized for irrigation pursuant to rights nos. 33-02086 and 33-07018 should have been reduced solely on the basis of Terry Scanlan's testimony?

Briefs were to be filed regarding the petition for reconsideration on or before July 14, 1995.

Sage Willow requested a transcript of the record, and after issuance of the order granting reconsideration, the parties agreed to delay briefing until the transcript was prepared. The parties both filed briefs on or about September 1, 1995.

The issues allowed for reconsideration will be discussed in the following Analysis section, and the FINDINGS OF FACT, CONCLUSIONS OF LAW and RECOMMENDED ORDER follow the Analysis.

ANALYSIS

Approval of Transfer No. 3785

The order granting reconsideration stated:

Sage Willow should be able to rely on the Department's decision in proceeding with the project. Perhaps there should be some application of res judicata with respect to administrative matters. Or perhaps the resumption of use doctrine should be evoked if the Department approved the transfer, and the water user resumed the use prior to an objection."

Sage Willow argued that the Department's review of a prior transfer is a collateral attack, instead of an issue of res judicata. Because similar factual and legal issues are before the same jurisdictional body (the Department), and the issue of forfeiture could have been decided in the previous proceeding, the circumstances appear more closely related to res judicata. I will refer to the issue as res judicata throughout this decision.

Elements that trigger res judicata are: (1) a prior proceeding resulting in a final judgement on the merits, (2) between the same parties or their privies, (3) on the same claim. The "same claim" element broadly encompasses any claim that arose out of the same set of facts, or as more commonly stated, the same transaction or occurrence as the original claim. Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983); Restatement (Second) of Judgments § 24 (1982). An administrative approval of an application for transfer, even if it is not contested, should be considered a final judgment on the merits. Finally, the same claims are being asserted before the Department that were raised, or could have been raised in the prior proceeding.

MAR 27 1996

In University of Tennessee v. Elliott, 478 U.S. 788 (1986) the court explained:

Where an administrative forum has the essential procedural characteristic of a court, . . . its determinations should be accorded the same finality that is accorded the judgment of the court. The importance in bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.

478 U.S. at 798.

Section 83 of the Restatement (Second) of Judgments states that res judicata generally applies to an agency decision only if the decision was the result of an adjudication. For an adjudication to occur, the following essential elements must be present:

1. Adequate notice to parties who are to be bound by the proceeding;
2. The right of parties to present and rebut evidence and advance legal arguments;
3. An application of law to specific parties regarding a specific transaction;
4. A final agency decision;
5. Additional procedural elements that may be necessary to provide a sufficient means to conclusively determine the matter in question.

The approval of a transfer invokes res judicata because the procedures required for an application for transfer entail all the essential elements of an adjudication. Notice of the proposal is published for prospective parties to review. An applicant has the right to contest the Department's decision. If protests are filed, a contested hearing is granted to the parties. Furthermore, principles of res judicata apply not only to issues which were raised, but issues which could have been raised but were not raised.

Res judicata is subject to a public interest exception. Under this exception, res judicata should not be applied where the "benefits of finality are outweighed by adverse impact on public interest." Dana's Housekeeping, Inc. v. Department of Labor & Industr., 886 P.2d 1147, 154 (Ct. App. Wash. 1995); Second Restatement § 28(5)(a). See also Tipler v. E.I. duPont de Nemours & Co. 443 F.2d 125, 128 (6th Cir. 1971) (preclusion doctrines "are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice.). As a general rule, administrative res judicata should not be woodenly applied. Martin v. Donovan, 731 F.2d 1415, 1416 (9th Cir. 1984).

In addition, Idaho Code § 42-350 states:

If the director of the department of water resources finds, on the basis of available information *at any time after a license is issued*, that the licensee has ceased to put the water to a beneficial use for a period of five (5) continuous years . . . then the director of the department of water resources may issue . . . an order to show cause before the director of the department . . . why the director of the department should

MAR 27 1996

not revoke said license . . . (Emphasis added).

While this statute directs a specific administrative process, and does not discuss the effect of a transfer approval, it supports a holding that the director can review forfeiture issues, even after a transfer approval has been granted.

The cases cited suggest some equitable balancing. There are reasons in this case why res judicata should not apply. Sage Willow did not rely on a decision of the Department in purchasing its irrigation equipment. It was purchased and installed prior to any approval by the Department. The approved transfer moved water onto land that was already identified as a place of use by another water right. Despite the characterization by Sage Willow that it was simply attempting to transfer what the Department had already approved, the net effect of the latest application for transfer is to correct an overlap which was erroneously caused by error identifying the place of use in the first transfer. The issue of forfeiture was avoided in the first proceeding, and the applicant did not respond to the question of forfeiture on the original application. While the Department should have identified this defect, the Department's own error should not be the focal point of whether a clear forfeiture/abandonment should be ignored because of the approved transfer. Despite Sage Willow's statement in its brief supporting reconsideration that the transfer had been approved for many years, the last transfer was approved in 1992.

The Department's review must extend beyond the prior approval and any hardship it might cause Sage Willow. Blind adherence to a previous approval without considering its impact on other water users is not in the public interest. The adverse impact on public interest outweighs the benefits of finality particularly in light of the clear and uncontraverted evidence of forfeiture, and would contravene an overriding public policy of protecting other water users. As a result, the recommended decision will continue to hold that license nos. 33-02090 and 33-02091 are forfeited.

Estoppel cannot be applied to the Department of Water Resources in this case. Consideration of an application for transfer is part of the sovereign responsibility of the Department, and is not a proprietary action. Furthermore, the resumption of use doctrine should not be applied as a crutch to justify continued use by Sage Willow. The decision hinges solely on whether res judicata prohibits the Department from determining if license no. 33-02091 was forfeited. In this case res judicata does not bar reconsideration.

Irrigated Acreage in the Frew Place

The order granting reconsideration recognized that Vance Hawley did not add corroborating testimony to the 230 acre place of use estimate proposed by Terry Scanlan for the Frew Place. The clear and convincing evidence standard is the evidentiary standard by which the Department should review forfeiture issues. The Department should review the historical use of the water to determine the extent of beneficial use for purposes of forfeiture. Despite Sage Willow's argument that a place of use of 260 acres should be recognized, applicant's exhibit no. 7, prepared by C.E. Brockway, a consultant retained by Sage Willow, agrees with the estimates of a 230 acre place of use.

MAR 27 1996

Applicant's exhibit 1"a" is a map depicting the places of use for license nos. 33-02086 and 33-07018. The total number of acres authorized for irrigation by these overlapping licenses appurtenant to the Frew Place is 261 acres. The second column in the table below lists the places of use described by the water rights. The third column lists Brockway's estimate of irrigated acreage for the Frew Place that corresponds to the water right place of use. The fourth column adds additional bottomland acres not irrigated, but perhaps deriving some benefit from irrigation water.

FREW PLACE OF USE SUMMARY

Description	Water Right Place of Use	Brockway's Irrigated Place of Use	Brockway's Irrigated Pof U & Bottomland
T7N R28E Sec. 5	NENW - 35 ac. NWNW - 38 ac. SWNW - 33 ac. <u>SEnw - 36 ac.</u> 142 acres	NW¼ - 115 ac. 115 acres	NW¼ - 120 ac. 120 acres
T7N R28E Sec. 5	NESW - 32 ac. <u>(SESW - 40 ac.)*</u> 32 acres	SW¼ - 85 ac. 45 acres**	100 ac. 45acres**
T8N R28E Sec. 32	NWSW - 31ac. SWSW - 39 ac. <u>SESW - 17 ac.</u> 87 acres	SW¼ - 65 acres 65 acres	65 ac. 65 acres
Total	261 acres	225 acres	230 acres

* This 40 acre parcel was not described as a place of use for license nos. 33-02086 & 33-07018 but was described as a place of use by license no. 33-02133 and is not part of the Frew place. It is included in the table only to show where the 85 acres estimated by Brockway to be irrigated are located.

** License nos. 33-02086 & 33-07018 describe 32 acres as the place of use for the NE¼SW¼ of Section 5, T07N, R28E. Brockway found a total of 85 acres irrigated in the SW¼ of Section 5. Assuming that only 40 acres are irrigated in the SE¼SW¼ of Section 5, the remaining 45 acres are liberally attributed to the NE¼SW¼ of Section 5.

Sage Willow cannot argue that the Department should recognize 260 acres of irrigation in the Frew Place when its own expert does not identify, even in a liberal interpretation, more than 230 actual irrigated acres. This decision will recognize 230 acres irrigated in the Frew Place.

Abandonment

Sage Willow argued that the finding of abandonment is not supported by the evidence. After reading the testimony of Vance Hawley, I find that his statements about the use of water on the Homestead Place and the North of Road Place were much less convincing than I remembered. When asked why water was not used on the Homestead Place after issuance of a patent, Vance Hawley stated that he would "venture a guess" about why water was not used following issuance of the patent from the federal government. A ventured guess is not sufficient evidence of intent to abandon. The evidence clearly establishes that water authorized for diversion pursuant to license nos. 33-02090 and 33-02091 was not beneficially used for more than twenty years, but it does not clearly establish that license nos. 33-02090 and 33-02091 were abandoned.

The hearing officer recommends the following amended Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. In 1989, Sage Willow, Inc. (Sage Willow) acquired a ranch, located near the confluence of the Little Lost River and Spring Creek, commonly known as the Knollin Ranch. At the same time Sage Willow also acquired other parcels contiguous to or nearby the Knollin Ranch.
2. One parcel is located approximately 1½ miles northwest of the Knollin place. The parcel is divided into two pieces by the east 16th line of Sec. 35, T27N, R28E, B.M. The property located on the west side of the 16th line is commonly known as the Bird Ranch. The property located east of the 16th line is commonly known as the Homestead Place.
3. Another parcel is located on the north side of an east-west county road, which was the northern boundary of the original Knollin Ranch, and will hereafter be referred to as the "North of Road Place."
4. In 1993, Sage Willow acquired additional land contiguous to and northeast of the Knollin Ranch from David and Terry Hawley (the Frew Place).
5. The Knollin Ranch was originally owned by A.J. Knollin. Several surface water rights were appurtenant to the Knollin Ranch. Because of financial difficulties, A.J. Knollin conveyed his interest in the Knollin Ranch to the first mortgage holder in 1942. In the same year, the Canal Co. purchased the Knollin Ranch from the mortgage holder. During the late 1940's, the Canal Co. sold the ranch land to L.R. "Slim" Hawley (Hawley). The earliest priority water rights appurtenant to the Knollin Ranch were not conveyed to Hawley, however, but were retained by the Canal Co., and later transferred to downstream lands. The

MAR 27 1996

Canal Co. rights are some of the earliest water rights diverted from the Little Lost River, bearing priority dates of 1879 to 1891.

6. Several late priority surface water rights remained appurtenant to or were developed for use on the Knollin Ranch. The rights are described below:

Irrigation Rights

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-00069	3.2	06/01/1908	Little Lost River
33-00070	2.8	10/01/1906	Spring Creek
33-00071	3.2	03/15/1909	Spring Creek
33-00072	.8	05/01/1908	Little Lost River
33-00073	6.4	04/01/1912	Spring Creek
33-00074	1.6	08/06/1913	Little Lost River
33-00076	6.8	04/01/1913	Little Lost River
33-00078	3.2	10/15/1913	Little Lost River
33-00079	1.6	04/01/1912	Little Lost River
33-00080	.8	05/01/1908	Spring Creek
33-00081	.8	05/01/1908	Spring Creek
33-00082	.8	05/01/1908	Spring Creek
33-02007	2.9	02/15/1909	Little Lost River
33-02008	<u>6.4</u>	06/12/1909	Spring Creek
	41.3		

Soil Root Zone Storage Right.

<u>Water Right No.</u>	<u>Acre Feet</u>	<u>Priority</u>	<u>Source</u>
33-02133	2,960	06/02/1949	Little Lost River Spring Creek

7. The surface water rights could only be delivered to Hawley during high water flows, however, and there was insufficient surface water to irrigate the Knollin Ranch. Hawley obtained two licenses to irrigate the Knollin and Bird Ranches with ground water, numbered 33-02057 and 33-02083.

The ground water rights for the Knollin and Bird Ranches are described as follows:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02057	24.0	02/01/1950	8 wells # 1-8
33-02083	5.0	08/23/1957	8 wells #1-8

8. In addition, ground water rights were also perfected for the Frew Place, which Sage Willow acquired from David and Terry Hawley. The Frew Place rights are listed below:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02086	4.1	01/12/1959	well # 13
33-07018	3.26	09/12/1972	well # 12

9. Finally, Hawley and some of his contemporary relatives obtained patents for two parcels of federal property pursuant to the Desert Land Entry Act. Two licenses to appropriate ground water were issued by the Department for these parcels. License no. 33-02091 was perfected for irrigation of the Homestead Place. License no. 33-02090 was perfected for irrigation of the North of Road Place. The following describes components of these rights:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02090	5.93	12/21/1959	well # 11
33-02091	4.36	01/22/1960	well on Bird Ranch

10. The places of use and points of diversion prior to Sage Willow's acquisition of the water rights described in the preceding paragraphs are depicted on the map labeled as applicant's exhibit no. 1"a."

11. Sage Willow filed application for transfer nos. 4221, 4222, 4223, 4224, 4225, 4226 & 4227, proposing to change the place of use for all of the rights listed above. The multiple applications for transfer were filed to define portions of the water rights that would be appurtenant to each of seven independent delivery systems. Application nos. 4221, 4222 and 4223 propose the irrigation of land primarily north of the original Knollin Ranch with pressurized circular pivots. Application nos. 4224, 4225, 4226 and 4227 propose gravity irrigation of other land. The proposed places of use are depicted on a map labeled as applicant's exhibit no. 1"b." For further clarity, a map depicting the system (or place of use) described by each of the applications is attached. The original and proposed places of use described in the applications are not restated in this decision because of their size and complexity.

12. A geologic formation near the confluence of the Little Lost River and Spring Creek retards

the southward flow of ground water in the underlying aquifer, causing the ground water and surface water to merge in the southern half of the 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 merger of the ground water and surface water continues downstream several miles to the Canal Co. diversion.

13. The Little Lost River and the aquifer underlying the Little Lost River Basin below 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 aquifer 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 Knollin Ranch.

15. Vance Hawley, a son of Slim Hawley, grew up in the Little Lost Valley, and helped farm the Knollin and Bird Ranches as a youth, although he did not reside on the Knollin Ranch. After attending college, Vance Hawley returned and assisted in farming the property from 1970 through 1978. During these eight (8) years, he did not manage the farm, but resided on the Knollin Ranch. From 1978 through 1980 he leased the Knollin Ranch property. After the lease expired, he was acquainted with the operation of the farms until 1989, when the Knollin Ranch was sold to Sage Willow.

16. Vance Hawley was also aware of the operation of the Bird Ranch, the Homestead Place, the North of Road Ranch, and other surrounding lands.

17. Vance Hawley testified about the extent of beneficial use of water on the properties now owned by Sage Willow. He testified that the total number of acres irrigated on the Bird Ranch did not exceed 297 acres. He also testified that irrigation of individual parcels on the Knollin Ranch totaled 879 acres.

18. Vance Hawley testified that the Homestead Place, located just east of the Bird Ranch, was irrigated with water pursuant to license no. 33-02091 in the early 1960's until a patent of ownership was issued by the federal government. He testified that the land was converted back to early season dry range land and was never irrigated in the late 1960's, all of the 1970's and the 1980's until Sage Willow bought the property.

19. Vance Hawley also stated that the North of Road Place, patented by his aunt and uncle, located north of the main east-west access road into the Knollin Ranch, was irrigated with water pursuant to license no. 33-02090 in the early 1960's until a patent of ownership was issued by the federal government. He testified that after the patent was issued the property was converted back to early season dry rangeland. He testified that water had not been applied to the lands pursuant to license no. 33-02090 during the late 1960's, all of the 1970's, and the 1980's until the property was purchased by Sage Willow.

20. James Mays, a lifelong resident of the Little Lost River Valley, testified he was familiar with both the Homestead Place and the North of Road Place, and had not observed any irrigation on the

Homestead Place or North of Road Place, at least until Sage Willow acquired the parcels.

21. Vance Hawley drew the boundaries of and estimated the number of acres irrigated during his acquaintance with the property. This land is depicted on protestant's exhibit no. 3. The estimate includes lands irrigated with both surface water and ground water. He estimated that no more than 1176 acres were irrigated within the boundaries of the Knollin Ranch and Bird Ranch.

22. The testimony of Vance Hawley is the most credible evidence regarding the traditional use of water on the entire Sage Willow land holdings until 1989.

23. Terry Scanlan (Scanlan), an engineer and geologist hired by Mays, consulted aerial photographs, and estimated that approximately 230 acres were irrigated in the Frew Place. This estimate is supported by the irrigated acreage estimates prepared by Dr. Charles E. Brockway, P.E. (Brockway), a consultant hired by Sage Willow.

24. Scanlan also estimated that 1182 acres were irrigated in the Knollin Place and the Bird Place, six more acres than estimated by Vance Hawley. Adding the 230 acres irrigated in the Frew Place, Scanlan estimated the total acreage irrigated prior to 1989 was 1412 acres. Because of the six acre discrepancy between Vance Hawley's estimate and Scanlan's estimate, the difference will be resolved in favor of Sage Willow. A total of 1412 acres were irrigated prior to 1989.

25. In 1989, Sage Willow purchased the Knollin Ranch, the Bird Ranch, the Homestead Place and the North of Road Place. Jerry Pancheri was hired as the manager of the ranch, and was instructed to apply the water to the land as efficiently as possible and to recommend changes to the system to more efficiently use the water.

26. Pancheri testified about his attempts to use the water and identified land irrigated during the years he managed the farm. Pancheri identified on protestant's exhibit no. 21 the lands which were irrigated in various years. He approximated the areas irrigated in several individual parcels, and the parties summed his estimates in their briefs, as set forth below:

<u>Year</u>	<u>Total Number of Acres Irrigated Sage Willow's Estimate</u>	<u>Mays' Estimate</u>
1989	1300	1400
1990	1560	1740
1991	2000	2004
1992	2130	2100
1993	2390	-----

27. During 1990 and 1991, Pancheri determined that several preexisting ponds located on the Knollin property should be repaired and filled with water. These ponds, when filled with water, contribute significant sub-water to the shallow aquifer and sub-irrigate some of the lower elevation pastures located

on the Knollin Ranch.

28. Pancheri also determined that the lands within the Bird Ranch and the Homestead Place were the poorest agricultural lands of the Sage Willow holdings and recommended that the water rights appurtenant to the Bird and Homestead Place be transferred to other lands located north of the Knollin Ranch. These lands north of the Knollin Ranch were acquired by Jerry Pancheri, and subsequently by Sage Willow, through an exchange of lands with the Bureau of Land Management.

29. In October, 1990, Sage Willow, through its president, Edmund Dumke, applied to transfer license no. 33-02091 (transfer no. 3785) from the Homestead Place to land located in the SE¼ of Section 1, T7N, R27E, and the SW¼ and SE¼ of Section 6, T7N, R28E. The transfer application was signed by Dumke as president of Sage Willow. Part 1 of the transfer application requests the applicant to "[d]escribe the effect on the land now irrigated if the place of use is changed pursuant to this transfer." Dumke responded that "[w]e will dry farm this old place of use." There was no response to question 10 in part 2 of the application which asks "To your knowledge, has any portion of this water right undergone a period of five (5) or more consecutive years of non-use?" By signing the application, Dumke asserted that "no one will be injured by such change and that the change does not constitute an enlargement in use of the original right."

30. Dumke testified at the hearing that he had no personal knowledge regarding license no. 33-02091. He did not personally know whether a well was located at the licensed point of diversion or if any irrigation had occurred pursuant to license no. 33-02091 on the licensed place of use. Dumke stated that he relied entirely on others to prepare the application.

31. Harold Jones, an employee in the Department's Eastern Regional Office, testified that the Department's current policy is to rely on the representations made in the transfer application for a licensed right if no protests are filed. In reviewing the Sage Willow application for transfer no. 3785, the Department did not independently investigate the existence of a well and pump at the licensed point of diversion, or diversion for beneficial use on the licensed place of use for license no. 33-02091.

32. Transfer no. 3785 approved a change in the place of use for license no. 33-02091 from the Homestead Place to part of the North of Road Place. The transfer resulted in an overlap of license no. 33-02091 on the place of use for license no. 33-02090. One of the purposes of the pending transfers is to correct transfer no. 3785 by moving license no. 33-02091 to lands not already described as a place of use by license no. 33-02090.

33. In 1991, two new pivots (pivots 6 and 7) were installed on the lands in Sections 1 and 6, and irrigation commenced that same year. (See protestant's exhibit no. 13, 1991 Landsat Image and testimony of Mr. Pancheri and Mr. Scanlan.) Although the pivots were installed and operated in 1991, the record indicates transfer no. 3785, which authorized license no. 33-02091 to be used in Sections 1 and 6, was not approved until October of 1992.

34. Vance Hawley testified that lands owned by Hawley were flood irrigated, and many of the fields were only irrigated once during the season. When hay was harvested from these lands, only one half

to one ton per acre of hay was harvested, compared to a full average harvest of approximately three tons per acre for the Little Lost River Valley.

35. Dr. Charles Brockway, P.E., was hired by Sage Willow in 1989 to conduct various studies regarding the Little Lost River Drainage and its hydrologic and hydrogeologic characteristics, particularly with reference to the Sage Willow holdings. In preparation for the hearing, Brockway walked the Sage Willow property, noted existing ditches and the location of abandoned ditches thereon, and consulted aerial photography to determine the number of acres that could have been irrigated on the Sage Willow property. Brockway prepared applicant's exhibit no. 7 which lists the acreage owned by Sage Willow and estimates consumptive use prior to the Sage Willow purchase of the property. The consumptive use calculated represents consumption by crops irrigated by both sprinkler and flood applications, and also includes consumption by bottom land and rangeland vegetation. Lands which showed some evidence of past irrigation, even though not irrigated at the time Sage Willow acquired the property, were assigned irrigation consumptive use values.

36. Brockway concluded that the consumptive use prior to the Sage Willow purchase was 10,192 acre feet. He also testified that consumptive use increased approximately 760 acre feet between 1989 and 1992, and will increase another 137 acre feet if the applications for transfer are approved.

37. Brockway also testified that the additional 137 acre foot depletion would reduce stream flows to the Little Lost River by 0.20 cfs, and the effect on the aquifer levels would not be detectable.

38. Scanlan combined Vance Hawley's recollection of water use with information derived from aerial photography, and determined the total number of acres traditionally irrigated in the Knollin, Bird and Frew properties. For purposes of comparison, in protestant's exhibit no. 15 Scanlan grouped lands by the same classifications as Brockway, and applied the same consumptive use values to estimated a consumptive use prior to Sage Willow acquisition. Scanlan estimated a consumptive use of the 9,077 acre feet. Based upon allegations of non use on the Homestead Place (license no. 33-02091), and the North of Road Place (license no. 33-02090), Scanlan concluded the approval of these transfers would increase consumptive use by 1504 acre feet annually from the pre-1989 consumptive use values.

39. In protestant's exhibit no. 20, Scanlan disagreed with the consumptive values for crops irrigated with surface water used by Brockway in applicant's exhibit no. 7, and reduced the initial consumptive use values by 20 percent to account for the testimony of Vance Hawley regarding reduced crop harvest. He calculated a pre-1989 consumptive use of 8,273 acre feet. He estimated consumptive use would increase by 1,809 acre feet after the transfer is approved.

40. The assumptions by Scanlan are supported by direct evidence and testimony presented by Vance Hawley and are coupled with a careful review of aerial photography. These factors provide a more credible estimate of the acres historically irrigated and the historical total consumptive use.

41. Protestant's exhibit no. 18 proposes prorata reductions in flow rates and acreage irrigated for each of the applications based on a ratio between the licensed places of use and the historical places of use as established by Vance Hawley. Despite detailed consumptive use calculations by two expert

MAR 27 1996

witnesses, Mays' proposal is based solely on irrigated acreage comparisons, not consumptive use comparisons.

42. Don Isham, a prior officer of the Canal Co. testified that, to his knowledge, the later in time surface water rights, alleged to be owned and proposed for transfer by Sage Willow, have been delivered to the Canal Co. for decades. He testified that, although the application for transfer that moved the water from the Knollin Ranch to the Canal Co. only included the early in time rights, the Canal Co. was entitled to the rights claimed by Sage Willow because of the long history of delivery.

43. The watermaster for the Little Lost River testified that in 1993, he delivered some of the surface water rights claimed by Sage Willow to Sage Willow.

CONCLUSIONS OF LAW

1. The parties agree about most of the facts pertaining to the traditional use prior to Sage Willow's acquisition of the property, and the expanded use of Sage Willow following its acquisition. There is some disagreement regarding the consumptive use calculations of the expert witnesses and which consumptive use numbers are most accurate. Both parties admit, however, that Sage Willow's proposal will increase the consumptive use on the Sage Willow property.

2. The first issue to be resolved is whether all or portions of the original water rights were lost by abandonment or forfeiture. License nos. 33-02090 and 33-02091 were forfeited because of non-use for over 20 years. Forfeiture was established by clear and convincing evidence.

3. One of the most difficult issues raised is the status of transfer no. 3785. The application for transfer was incomplete and contained representations that were not correct. Dumke explicitly represented, by signing the affidavit, that the right had not been forfeited, and that there would be no injury or enlargement as a result of the application. An integral portion of the application, asking whether the applicant knew of any continuous, five year period of non-use, was left blank. The Department did not independently investigate the possibility of forfeiture. In addition, the applications for transfer now pending were filed to revise what was previously approved.

4. There is no evidence that Dumke or Sage Willow fraudulently misled the Department, or that the transfer is void because of fraud. Because the pending applications for transfer attempt to correct previously approved transfer no. 3785, and because there were misrepresentations and omissions of fact in the filing of application for transfer no. 3785, transfer no. 3785 is voided, and the Department is not bound by the previous approval. Furthermore, although there has been some development pursuant to transfer no. 3785, Sage Willow constructed two of the pivots prior to approval of the transfer 3785.

5. Because of the reasons set forth above, the finding of forfeiture supersedes the prior approval of transfer no. 3785.

6. The combined testimony of Vance Hawley and Terry Scanlan regarding the total place of

use for the remainder of the Bird Ranch, the Knollin Ranch, and the Frew Place establishes a historically irrigated acreage of 1,412 acres during a period of at least two decades.

7. The total number of acres authorized for irrigation pursuant to license nos. 33-02086 and 33-07018 is 230 acres. The total number of acres authorized for irrigation pursuant to license nos. 33-02057 and 33-02083 is 1,182 acres. Combined surface water and ground water irrigation should not exceed 1,412 acres, except for sub-irrigation. The total number of acres which can be irrigated by applying water (surface water and ground water) directly to the land is 1,412 acres. The right to irrigate any additional lands described by ground water and surface water rights in excess of 1,412 acres has been forfeited, except for benefits derived by subwater which will be discussed later.

8. Applicants do not admit forfeiture, but emphasize the doctrine of resumption of use as a defense against forfeiture. Several Idaho court cases generally mention the resumption of use defense to forfeiture. Only two of the decisions find that there may have been a forfeiture, and that resumption of use might resurrect the water right.

9. Wagoner v. Jeffrey, 66 Idaho 455, 162 P.2d 400 (1945) was a dispute between a water right holder who had perfected rights in wells located on federal property, and another settler who subsequently obtained a patent to the property where the wells were located. More than five years of non use elapsed. When the water right holder unsuccessfully attempted to resume his use, the subsequent settler, even though he had no water rights in the wells, attempted to block the resumption by alleging forfeiture. In Wagoner, there was no junior water right holder claiming a right to the water which was being diverted out of the wells. The resumption doctrine was applied because there was no intervening claim to the water.

10. In Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952), a water user attempted to transfer water rights diverted from the Big Lost River approximately 20 miles downstream. The protestants alleged the rights were forfeited. Unrefuted evidence established that the water right had not been applied to the original place of use for several decades, but the evidence also established that, at least for a portion of that period, water was delivered to the proposed place of use, and assessments for the delivery of the water had been paid. In its holding, the Idaho Supreme Court said:

Thus, bills were rendered and payments made by respondent for water delivered by the District. The District showed no water was deliver to [the old place of use], so the water must have been, and two of the exhibits show the water was, delivered to the [proposed place of use].

73 Idaho at 159.

11. The court seemed to be concluding that the water right was not forfeited because it was delivered to other lands. Nevertheless, the court subsequently stated, quoting Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944):

Although statutory abandonment of a water right has occurred, forfeiture is not effective if

MAR 27 1996

after five-year period original owner or appropriator resumes the use of the water prior to claim of right by a third party.

73 Idaho at 160.

12. The court explained the quotation with two inconsistent statements, the first sounding as if the right had been forfeited but resumed, and the second sounding as if the right had never been forfeited:

No one claims this particular decreed water by adverse possession and clearly, so far as this proceeding is concerned, it was in part at least used by respondent on some of his Arco lands before it was claimed it had been forfeited.

The trial court was justified in holding that water had been so used by respondent that he had not abandoned or forfeited his water rights . . .

73 Idaho at 160.

13. Other cases discuss the resumption defense, but decide that the right was not forfeited. Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944) (held not abandoned, and was not a resumption case); Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937) (held burden of proof on the party alleging forfeiture not satisfied). Another case, Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982), held that the right was forfeited, but proof was not offered regarding the resumption of use defense.

14. The law does not require that a claim of ownership to the specific water delivered by a specific water right must be filed prior to resumption of use to prevent the resumption. Language in Zezi that the use must be resumed prior to other appropriations, and the discussion of movement up the priority ladder by junior right holders in Jenkins narrowly limits when a water right can be resumed after it is forfeited.

15. Recognition of the resumption of use defense would frustrate the doctrine of prior appropriation in streams where (1) junior appropriators have established water rights and have relied on water not diverted by a senior user, or (2) in this case, where senior surface water users and other water right holders have relied on related ground water not diverted by Sage Willow's predecessor. While the prior appropriation doctrine is crafted to protect water users, by delivering in order of priority, its requirement of beneficial use of water prevents a water right holder from retaining unused water rights for a long period of time, and then reasserting the right to the detriment of other right holders.

16. 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 establishment of a water right is sufficient claim to the water. The resumption doctrine cannot restore portions of water rights forfeited by Sage Willow's predecessor in interest to the detriment of other water right holders.

17. Detailed consumptive use comparisons by both parties implicitly invite the Department to

microscopically look at the application of water upon the place of use and restrict the future consumptive use based on an estimated consumptive use. Although consumptive use was not defined by the initial water rights which were licensed or decreed, each water right is implicitly limited by the consumptive use inherent to the beneficial use authorized. Within the limitation of the maximum consumptive use value, the water right holder should be able to plant more or less consumptive crops depending on his needs. If there is a pattern of rotation within the farming operation, a portion of a right should not be lost because a water right holder's crops did not consume the maximum consumptive use value.

18. If the Department evaluated the consumptive use microscopically, the Department would be required to:

- a. Determine the traditional acres irrigated;
- b. Determine how much water was traditionally consumed by crops grown on those acres;
- c. (i) evaluate how much more efficient the proposed method of irrigation is or,
(ii) evaluate how much more water will be consumed by the anticipated crop use;
- d. (i) further reduce the acres irrigated to prevent increased consumption, or
(ii) further reduce the volume and flow diverted to prevent increased consumption.

19. Because the protestant proposes restrictions based on historical acres irrigated, not based on consumptive use, the Department declines, in this case, to limit the total diversion based on increased consumptive use which may result from improved efficiency of water application. Total diversion volumes and consumptive uses values will be assigned according to Department standards. Flow rates will be reduced to a rate of 0.02 cfs per acre unless Sage Willow can demonstrate the need for additional volume or diversion rate.

20. These applications for transfer can only be approved if the applicant identifies 1,412 acres to which water will be physically diverted and applied by some means other than subirrigation. Annual volume for physical diversion, delivery and application should be limited to 4,942 acre feet. Annual consumptive volume will be limited to 3,530 acre feet. The diversion rate will be limited to 28.24 cfs.

21. A proposal identifying 1412 acres, and the individual rights that will be appurtenant to the lands, must be submitted to the Department. The Department will allocate volumes and diversion rates to each right.

22. As part of the proposal, the applicant may continue to derive the benefits of subirrigation from ponds and return flows to the Little Lost River, provided the ponds or the return channels are not reconstructed to increase the subirrigation beyond the acreage traditionally subirrigated. Water shall not be diverted from ground water for the sole purpose of filling ponds or subirrigating. Surface water can only be diverted for root zone storage (presumably subirrigation) pursuant to license no. 33-02133 when all prior surface water rights are being satisfied.

23. Water rights cannot be obtained by adverse possession if the rights are being delivered by a watermaster in a water district. Idaho Code § 42-607.

24. The Canal Co. is not entitled to ownership of water rights alleged to be owned by Sage Willow.

ORDER

IT IS HEREBY ORDERED that transfer no. 3785 is VOIDED.

IT IS FURTHER ORDERED that license no. 33-02090 and license no. 33-02091 and portions of all other rights diverted and directly applied to lands in excess of 1412 acres are FORFEITED.

IT IS FURTHER ORDERED that application for transfer nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227 are **CONDITIONALLY APPROVED** provided the applicant not irrigate more than 1,412 acres within the place of use proposed by the applications, and the applicant complies with the following:

1. A proposal must be submitted to the Department of Water Resources within 56 days of the final disposition of this dispute or after any final appeal period has run. The plan must be submitted to the protestants for review and comment. Comments must be submitted to the Department and to the applicant one month following submittal of the plan. A hearing may be requested by either party within sixty (60) days of submittal of the plan.
2. Failure to submit the plan is cause for the department to revoke its conditional approval of the application for transfer.

IT IS FURTHER ORDERED that the Department will issue another recommended decision if additional testimony is required following submittal of the plan.

DATED this 7th day of November, 1995.



GARY SPACKMAN, Hearing Officer

MAR 27 1996

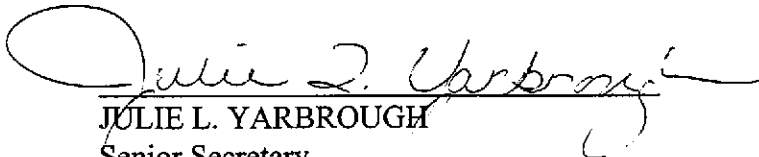
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of November, 1995, I mailed a true and correct copy, postage prepaid, of the foregoing **AMENDED RECOMMENDED ORDER** to the following:

Sage Willow, Inc.
HOLDEN KIDWELL HAHN
& CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
Boise, ID 83701


JULIE L. YARBROUGH
Senior Secretary

MAR 27 1996

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NOS. 4221, 4222,)
4223, 4224, 4225, 4226, AND)
4227 IN THE NAME OF)
SAGE WILLOW, INC.)
_____)

ORDER GRANTING PETITION
FOR RECONSIDERATION

On June 5, 1995, Sage Willow, Inc. filed a petition for reconsideration and a supporting brief. Rule 720.a. of the Department's Rules of Procedure states that the hearing officer must dispose of any petition for reconsideration within 21 days of its receipt or the petition will be considered denied by operation of law. This order responds to the petition for reconsideration.

Counsel for Sage Willow raises legal issues which I struggled with while preparing the recommended decision. I will discuss the issues in the following analysis section.

ANALYSIS

Resumption Use

Sage Willow's analysis of the Idaho cases which discuss resumption of use in greater detail is not convincing. Although resumption of use is mentioned in several cases, the legal theory is not used as a basis for a decision in most of them. Nevertheless, it is worth discussing how resumption of use fits into the doctrine of prior appropriation and hydrologic reality.

The recommended decision does not attempt to abrogate the resumption defense. It narrowly limits its application. If the resumption defense is liberally applied as proposed by Sage Willow,

MAR 27 1996

it will conflict with prior appropriation doctrine, it will conflict with sound hydrologic reasoning, and it will all but prevent a prior appropriator from ever contesting a resumption of use.

Where many waterusers divert water from a stream, a single junior appropriator cannot monitor all of the senior uses of water, and file specific claims to forfeited water when a five year forfeiture period has passed. Furthermore, if the water is delivered by a watermaster in a water district, Idaho law prevents ownership by adverse possession. Difficulty of monitoring is aggravated when the relationship between ground water and surface water is recognized. Not only would the junior user be required to monitor the use of surface water by senior water right holders, but would also be required to monitor all uses of ground water in the basin. Holding a water right ought to be enough.

The Department of Water Resources has been criticized in recent years for ignoring the relationship between surface water flows and tributary ground water, and for not developing regulations for the conjunctive management of related water resources. It has also been criticized for liberally issuing ground water permits without thought of the effect on other waterusers. If each isolated permit were reviewed without consideration of all other permits an expert might conclude the impact is minimal, and lawyers could argue there is no actual injury. But when the cumulative effect of all permits is considered the injury could be substantial.

Recent legal action and legislative enactments have prompted

MAR 27 1996

the Department to initiate a broad water measurement program, and to promulgate rules and regulations to deliver water rights to both surface water and ground water users who are being injured by ground water withdrawals. This may result in curtailment of some ground water diversions.

Sage Willow proposes that because there are no specific claims to the Sage Willow ground water rights, the Department should ignore the certain hydrologic relationships and ignore the cumulative effect that Sage Willow's proposed resumption, and all other resumptions (if the resumption defense is liberally applied), would have on other water users.

I recognize that no one has filed a petition for delivery call and asked for conjunctive management. The Department should not ignore hydrologic reality in approving a resumption of use, only to cause a greater delivery problem later when the rights may be conjunctively managed. The Department would be inconsistent if it recognized the resumption of use as proposed by Sage Willow. Sage Willow does not persuade me that the conclusions of law in the recommended decision regarding the resumption of use should be reconsidered.

Voiding of Transfer No. 3785

It is clear that water right no. 33-02091 was forfeited/abandoned. Failure to respond to the forfeiture question on the application for transfer form, combined with testimony at the hearing reveals that the forfeiture issue was not addressed by the applicant. The forfeiture issue was also not explored by the Department prior to approval.

MAR 27 1996

On the other hand, the application was properly published, giving interested parties notice regarding the proposed change. Furthermore, the transfer was approved by the Department although the conditions imply that some issues, including forfeiture, might be reviewed by the adjudication court.

I am troubled by Sage Willow's implicit allegations that because the Department assisted in the preparation of the application, that perhaps the Department should be estopped from raising the forfeiture issue. The applicant goes so far as to state that "[w]e are puzzled as to why IDWR, which has access to the records, transferred right no. 33-02091 to land, most of which was already covered by right no. 33-02090." Much of Sage Willow's discussion attempts to absolve the applicant of any responsibility for ensuring the correctness of the application, to blame the Department for its inadequacies. It is sad that the Department may need to withdraw from assisting the public to insulate itself from accusations that it was responsible for an applicant's decisions. The applicant should bear the responsibility of properly completing an application, and when signing a document, know what is being represented.

Nonetheless, the Department approved transfer no. 3785, and Sage Willow should be able to rely on the Department's decision in proceeding with the project. Perhaps there should be some application of res judicata with respect to administrative matters. Or perhaps the resumption of use doctrine should be invoked if the Department approved the transfer, and the wateruser resumed the use prior to an objection.

RECEIVED
27 1996

I debated whether I should issue a decision regarding this issue, immediately or whether I should grant the petition for reconsideration, and notify the parties. After reviewing Rule 720.a., I conclude that if the hearing officer is willing to reconsider a decision, both parties should be apprised of the decision, and an opportunity should be given to brief the issues. I note that late on June 22, 1995, I received a brief from James Mays, and Mays Land & Livestock, which I have not fully reviewed. This issue along with one other issue will be reconsidered. A briefing schedule will follow in the order portion.

The Frew Place

I followed the findings and recommendations of Terry Scanlin regarding the place of use rather than the findings of Dr. Charles Brockway because: (1) Scanlin was attempting to define historical use, and Brockway analyzed what could be physically irrigated; and (2) Scanlin's place of use estimates were supported by Vance Hawley's testimony of historical use. Because the decision was based on an analysis of historical use, not what could be physically irrigated, and because of Hawley's supporting testimony, Scanlin's numbers were more credible. My finding of credibility does not imply that Dr. Brockway is dishonest. On the contrary, I've always found Brockway to be honest and forth right. The decision simply judges that historical use, not what can be physically irrigated, is the basis of my review.

Sage Willow rightfully points out, however, that Hawley did not testify about irrigation of the Frew place, and, without the supporting evidence, the estimate by Scanlin may not rise to the

MAR 27 1996

level of clear and convincing evidence justifying a reduction in acreage. This issue may also be addressed by the parties.

ORDER

IT IS HEREBY ORDERED that Sage Willow's petition for reconsideration is GRANTED with respect to the issue of whether use of water pursuant to right no. 33-2091 should be authorized because of the approval of transfer no. 3785, and whether the number of acres authorized for irrigation pursuant to rights nos. 33-02086 and 33-07018 (Frew place) was correct.

IT IS FURTHER ORDERED that any briefs, in addition to those already filed, must be filed on or prior to July 14, 1995.

Dated this 23rd day of June, 1995.



Gary Spackman
Hearing Officer


MAR 27 1996

I hereby do certify that on this 53rd day of June, 1995, I mailed a true and correct copy of the foregoing ORDER GRANTING PETITION FOR RECONSIDERATION to the following.



Kris Rhodes
Secretary

Kent Foster
PO Box 50130
330 Shoup Ave. 3rd floor
Idaho Falls ID 83405

Michael C. Creamer
Givens Pursely & Huntley
PO Box 2720
Boise ID 83701

Blaine County Canal Co
C/O Wade T Williams
HC 65 Box 1032
Howe ID 83244

Eastern Region


MAY 27 1996

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NOS. 4221, 4222, 4223, 4224,)
4225, 4226 AND 4227 IN THE NAME OF)
SAGE WILLOW, INC.)
_____)

RECOMMENDED ORDER

Sage Willow, Inc. (Sage Willow) filed seven applications for transfer with the Idaho Department of Water Resources (Department). Some of the applications were protested by the Blaine County Canal Co. (the Canal Co.), James Mays, Mays Land and Livestock Co. (collectively referred to as "Mays") and Simplot Land and Development. Simplot Land and Development Co. subsequently withdrew its protest.

After expiration of the protest period Mays discovered they had not protested all of the applications for transfer filed by Sage Willow. Mays filed a motion to amend the protest to include protests opposing all of the transfers, and to add issues of forfeiture and enlargement to the issues raised by the original protests. The motion to amend was granted prior to the hearing.

On January 18, 1995, the Canal Co. filed a motion to amend its protests. The hearing officer initially denied the motion to amend from the Canal Co. because it was untimely. At the hearing, however, the hearing officer revoked the order denying the motion to amend, and granted the motion to amend. The Canal Co. and Mays participated as full parties in all the proceedings. Evidence having been presented at a hearing conducted on January 31 and February 1, 1995, the hearing officer recommends the following FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER:

FINDINGS OF FACT

1. In 1989, Sage Willow, Inc. (Sage Willow) acquired a ranch, located near of the confluence of the Little Lost River and Spring Creek, commonly known as the Knollin Ranch. At the same time Sage Willow also acquired other parcels contiguous to or nearby the Knollin Ranch.

2. One parcel is located approximately 1½ miles northwest of Knollin place. The parcel is divided into two pieces by the east 16th line of Sec. 35, Twn. 27N, Rge. 28E, B.M. The property

MAR 27 1996

located on the west side of the 16th line is commonly known as the Bird Ranch. The property located east of the 16th line is commonly known as the Homestead Place.

3. Another parcel is located on the north side of an east-west county road, which was the northern boundary of the original Knollin Ranch, and will hereafter be referred to as the "North of Road Place."

4. In 1993, Sage Willow acquired additional land contiguous to and northeast of the Knollin Ranch from David and Terry Hawley (the Frew Place).

5. The Knollin Ranch was originally owned by A.J. Knollin. Because of financial difficulties, A.J. Knollin quitclaimed his interest in the Knollin Ranch to the first mortgage holder in 1942. In the same year, the Canal Co. purchased the Knollin Ranch from the mortgage holder. During the late 1940's, the Canal Co. sold the ranch land to L.R. "Slim" Hawley (Hawley). The earliest priority water rights appurtenant to the Knollin Ranch were not conveyed to Hawley, however, but were retained by the Canal Co., and later transferred to downstream lands. The Canal Co. rights are some of the earliest water rights diverted from the Little Lost River, bearing priority dates of 1879 to 1891.

6. Several late priority surface water rights were retained or developed on the Knollin Ranch. The rights are described below:

<u>Water Right No.</u>	<u>CFS</u>	<u>Irrigation Rights</u>	<u>Priority</u>	<u>Source</u>
33-00069	3.2		06/01/1908	Little Lost River
33-00070	2.8		10/01/1906	Spring Creek
33-00071	3.2		03/15/1909	Spring Creek
33-00072	.8		05/01/1908	Little Lost River
33-00073	6.4		04/01/1912	Spring Creek
33-00074	1.6		08/06/1913	Little Lost River
33-00076	6.8		04/01/1913	Little Lost River
33-00078	3.2		10/15/1913	Little Lost River
33-00079	1.6		04/01/1912	Little Lost River
33-00080	.8		05/01/1908	Spring Creek
33-00081	.8		05/01/1908	Spring Creek
33-00082	.8		05/01/1908	Spring Creek
33-02007	2.9		02/15/1909	Little Lost River
33-02008	<u>6.4</u>		06/12/1909	Spring Creek
	41.3			

MAR 27 1996

Soil Root Zone Storage Right.

<u>Water Right No.</u>	<u>Acre Feet</u>	<u>Priority</u>	<u>Source</u>
33-02133	2,960	06/02/1949	Little Lost River Spring Creek

6. The surface water rights could only be delivered to Hawley during high water flows, however, and there was insufficient water supply to irrigate the Knollin Ranch. Hawley obtained two licenses to irrigate the Knollin and Bird Ranches with ground water, numbered 33-02057 and 33-02083. The ground water rights for the Knollin and Bird Ranches are described as follows:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02057	24.0	02/01/1950	8 wells # 1-8
33-02083	5.0	08/23/1957	8 wells #1-8

7. In addition, ground water rights were also perfected for the Frew Place, which Sage Willow acquired from David and Terry Hawley. The Frew Place rights are listed below:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02086	4.1	01/12/1959	well # 13
33-07018	3.26	09/12/1972	well # 12

8. Finally, Hawley and some of his contemporary relatives obtained patents for two parcels of federal property pursuant to the Desert Land Entry Act. Two licenses to appropriate ground water were issued by the Department for these parcels. License no. 33-02091 was perfected for irrigation of the Homestead Place. License no. 33-02090 was perfected for irrigation of the North of Road Place. The following describes components of these rights:

<u>Water Right No.</u>	<u>CFS</u>	<u>Priority</u>	<u>Source</u>
33-02090	5.93	12/21/1959	well # 11
33-02091	4.36	01/22/1960	well on Bird Ranch

RECORDED

MAR 27 1996

9. The places of use and points of diversion prior to Sage Willow's acquisition for rights described in the preceding paragraphs are depicted on the map labeled as Applicant's Exhibit No. 1"a."

10. Sage Willow filed applications for transfer nos. 4221, 4222, 4223, 4224, 4225, 4226 & 4227, proposing to change the place of use for all of the rights listed above. The multiple transfers were filed to define portions of the water rights that would be appurtenant to each of seven independent delivery systems. Applications nos. 4221, 4222 and 4223 propose the irrigation of land primarily north of the original Knollin Ranch with pressurized circular pivots. Applications nos. 4224, 4225, 4226 and 4227 propose gravity irrigation of other land. The proposed places of use are depicted on a map labeled as Applicant's Exhibit Nos. 1"b." For further clarity, a map depicting the system (or place of use) described by each of the applications is attached. The original and proposed places of use are not numerically described by this decision because of their size and complexity.

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

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

13. The Hawley wells were drilled into the shallow aquifer 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 Knollin Ranch.

14. Vance Hawley, a son of Slim Hawley, grew up in the Little Lost Valley, and helped farm the Knollin and Bird Ranches as a youth, although he did not reside on the Knollin Ranch. After attending college, Vance Hawley returned and assisted in farming the property from 1970 through 1978. During these eight (8) years, he did not manage the farm, but resided on the Knollin Ranch. From 1978 through 1980 he leased the Knollin Ranch property. After the lease expired, he was acquainted with the operation of the farms until 1989, when the Knollin Ranch was sold to Sage Willow.

15. Vance Hawley was also aware of the operation of the Bird Ranch, the Homestead Place, the North of Road Ranch, and other surrounding lands.

17-18824-1079

MAR 27 1996

16. Vance Hawley testified about the extent of beneficial use of water on the properties now owned by Sage Willow. He testified that the total number of acres irrigated on the Bird Ranch did not exceed 297 acres. He also testified that irrigation of individual parcels on the Knollin Ranch totaled 879 acres.

17. Vance Hawley testified that the Homestead Place, located just east of the Bird Ranch, was irrigated with water pursuant to water right no. 33-02091 in the early 1960's only for the purpose of gaining a patent for federal ground. He testified that the land was converted back to early season dry range land and was never irrigated in the late 1960's, all of the 1970's and the 1980's until Sage Willow bought the property.

18. Vance Hawley also stated that the North of Road Place, patented by his aunt and uncle, located north of the main east-west access road into the Knollin Ranch, was irrigated with water pursuant to water right no. 33-02090 only for the purpose of gaining a patent for federal ground, that was converted back to early season dry rangeland. He testified that water had not been applied to the lands pursuant to license no. 33-02090 during the late 1960's, all of the 1970's, and the 1980's until the property was purchased by Sage Willow..

19. James Mays, a lifelong resident of the Little Lost Valley, testified he was familiar with both the Homestead Place and the North of Road Place, and had not observed any irrigation on the Homestead Place or North of Road Place, at least until Sage Willow acquired the parcels.

20. Vance Hawley drew the boundaries of and estimated the number of acres irrigated during his acquaintance with the property. This land is depicted on Protestants Exhibit No. 3. The estimate includes lands irrigated with both surface water and ground water. He estimated that no more than 1176 acres were irrigated within the boundaries of the Knollin Ranch and Bird Ranch.

21. The testimony of Vance Hawley is the most accurate and credible evidence regarding the traditional use of water on the entire Sage Willow land holdings until 1989.

22. Terry Scanlin, an engineer and geologist hired by Mays, consulted aerial photographs, and estimated that approximately 230 acres were irrigated in the Frew Place. According to the testimony of Vance Hawley, James May and Terry Scanlin, the total acreage irrigated prior to 1989 was 1412 acres.

23. In 1989, Sage Willow purchased the Knollin Ranch, the Bird Ranch, the Homestead Place and the North of Road Place. Jerry Pancheri was hired as the manager of the ranch, and was instructed to apply the water to the land as efficiently as possible and to recommend changes to the system to more efficiently use the water.

24. Pancheri testified about his attempts to use the water and identified land irrigated during the years he managed the farm. Pancheri identified on Protestants Exhibit No. 21 the lands which were irrigated in various years. He approximated the areas irrigated in several individual

RECORDED
MAR 27 1996

parcels, and the parties summed his estimates in their briefs, as set forth below:

<u>Year</u>	<u>Total Number of Acres Irrigated</u>	
	<u>Applicant's Estimate</u>	<u>Protestant's Estimate</u>
1989	1300	1400
1990	1560	1740
1991	2000	2004
1992	2130	2100
1993	2390	-----

25. During 1990 and 1991, Pancheri determined that several preexisting ponds located on the Knollin property should be repaired and filled with water. These ponds, when filled with water, contributed significant sub-water to the shallow aquifer and sub-irrigated some of the lower elevation pastures located on the Knollin Ranch.

26. Pancheri also determined that the lands within the Bird Ranch and the Homestead Place were the poorest agricultural lands of the Sagewillow holdings and recommended that the water rights appurtenant to the Bird and Homestead Place be transferred to other lands located north of the Knollin Ranch. These lands north of the Knollin Ranch were acquired by Jerry Pancheri, and subsequently by Sage Willow, through an exchange of lands with the Bureau of Land Management.

27. In October, 1990, Sage Willow, through its president, Edmund Dumke, applied to transfer license no. 33-02091 (transfer no. 3785) from the Homestead Place to land located in the SE¼ of Section 1, T7N, R27E, and the SW¼ and SE¼ of Section 6, T7N, R28E. The transfer application was signed by Dumke as president of Sage Willow. Part 1 of the transfer application requests the applicant to "[d]escribe the affect on the land now irrigated if the place of use is changed pursuant to this transfer." Dumke responded that "[w]e will dry farm this old place of use." There was no response to Question 10 in Part 2 of the application which asks "To your knowledge, has any portion of this water right undergone a period of five (5) or more consecutive years of non-use?" By signing the application, Dumke asserted that "no one will be injured by such change and that the change does not constitute an enlargement in use of the original right."

28. Dumke testified at the hearing that he had no personal knowledge regarding license no. 33-02091. He did not personally know whether a well was located at the licensed point of diversion or if any irrigation had occurred pursuant to license no. 33-02091 on the licensed place of use. Dumke stated that he relied entirely on others to prepare the application.

29. Harold Jones, an employee in the Department's Eastern Regional Office, testified that the Department's current policy is to rely on the representations made in the transfer application for a licensed right if no protests are filed. In reviewing the Sage Willow application, the Department

MAR 27 1996

did not independently investigate the existence of a well and pump at the licensed point of diversion, or diversion for beneficial use on the licensed place of use for license no. 33-02091.

30. Transfer no. 3785 approved a change in the place of use for license no. 33-02091 from the Homestead Place to part of the North of Road Place. The transfer resulted in an overlap of license no. 33-02091 on the place of use for license no. 33-02090. One of the purposes of the pending transfers is to correct transfer no. 3785 by moving license no. 33-02091 to lands not already described as a place of use by license no. 33-02090.

31. In 1991, two new pivots (pivots 6 and 7) were installed on the lands in Sections 1 and 6, and irrigation commenced that same year. (See Protestants Exhibit No.13, 1991 Landsat Image and testimony of Mr. Pancheri and Mr. Scanlin.) Although the pivots were installed and operated in 1991, the record indicates that approval of transfer no. 3785, which authorized license no. 33-02091 to be used in Sections 1 and 6 was not obtained until October of 1992.

32. Vance Hawley testified that lands owned by Hawley were flood irrigated, and many of the fields were only irrigated once during the season. When hay was harvested from these lands, only one half to one ton per acre of hay was harvested, compared to a full average harvest of approximately three tons per acre for the Little Lost River Valley.

33. Dr. Charles Brockway, P.E., was hired by Sage Willow in 1989 to conduct various studies regarding the Little Lost River Drainage and its hydrologic and hydrogeologic characteristics, particularly with reference to the Sage Willow holdings. In preparation for the hearing, Brockway walked the Sage Willow property, noted existing ditches and the location of abandoned ditches thereon, and consulted aerial photography to determine the number of acres that could have been irrigated on the Sage Willow property. Brockway prepared a spreadsheet showing the acreage owned by Sage Willow and estimated consumptive use prior to the Sage Willow purchase of the property.

34. Brockway concluded that the consumptive use prior to the Sage Willow purchase was 10,192 acre feet. He also testified that consumptive use increased approximately 760 acre feet between 1989 and 1992, and will increase another 137 acre feet if the applications for transfer are approved.

35. Brockway also testified that the additional 137 acre foot depletion would only reduce stream flows to the Little Lost River by 0.20 cfs, and the effect on the aquifer levels would not be detectable.

36. Terry Scanlin used testimony by Vance Hawley regarding the total number of acres traditionally irrigated in the Knollin, Bird and Homestead properties, consulted aerial photography, and estimated a consumptive use prior to Sage Willow acquisition of the 9,077 acre feet. Based upon allegations of non use on the Home Place, and those lands to which license no. 33-02090 was appurtenant, Scanlin concluded the approval of these transfers would increase consumptive use by

MAR 27 1996

1504 acre feet annually from the pre 1989 consumptive use values.

37. Furthermore, in Exhibit No. 20, Scanlin disagreed with the high end consumptive values for crops irrigated with surface water used by Brockway, and reduced the initial consumptive use values by 20 percent to account for the testimony of Vance Hawley regarding reduced crop harvest. He calculated a pre-1989 consumptive use of 8,273 acre feet. He estimated consumptive use would increase by 1,809 acre feet after the transfer is approved.

38. The assumptions by Scanlin are supported by direct evidence and testimony presented by Vance Hawley and are coupled with a careful review of aerial photography. These factors provide a more credible estimate of the acres irrigated and the total consumptive use.

39. Protestant's Exhibit No. 18 proposes prorata reductions in flow rates and acreage irrigated for each of the applications based on a ratio between the licensed places of use and the historical places of use as established by Vance Hawley. Despite detailed consumptive use calculations by two expert witnesses, Mays' proposal is based solely on irrigated acreage comparisons, not consumptive use comparisons.

40. Don Isham, a prior officer of the Canal Co. testified that, to his knowledge, the later in time surface water rights, alleged to be owned and proposed for transfer by Sage Willow, have been delivered to the Canal Co. for decades. He testified that, although the application for transfer that moved the water from the Knollin Ranch to the Canal Co. only included the early in time rights, the Canal Co. was entitled to the rights claimed by Sage Willow because of the long history of delivery.

41. The watermaster for the Little Lost River testified that in 1993, he delivered some of the surface water rights claimed by Sage Willow to Sage Willow.

CONCLUSIONS OF LAW

1. The parties agree about most of the facts pertaining to the traditional use prior to Sage Willow acquiring the property, and the expanded use of Sage Willow following its acquisition. There is some disagreement regarding the consumptive use calculations of the expert witnesses and which consumptive use numbers are most accurate. Both parties admit, however, that Sage Willow's proposal will increase the consumptive use on the Sage Willow property.

2. The first issue to be resolved is whether all or portions of the original water rights were lost by abandonment or forfeiture. Water Right Nos. 33-02090 and 33-02091 were forfeited because of non-use for over 20 years. Forfeiture was established by clear and convincing evidence.

3. Furthermore, Vance Hawley unrefutedly testified that the lands described as a place of use for water rights 33-02090 and 33-02091 were not irrigated, and intentionally reverted back to dry grazing land following the issuance of the patents from the federal government. His testimony

MAR 27 1996

establishes the requisite intent for abandonment of the water rights, not requiring a five-year forfeiture period. I conclude, alternatively, that water rights 33-02090 and 33-02091 were abandoned.

4. One of the most difficult issues raised in this matter is the status of transfer no. 3785. The application for transfer was incomplete and contained representations that were not correct. Dumke explicitly represented, by signing the affidavit, that the right had not been forfeited, and that there would be no injury or enlargement as a result of the application. An integral portion of the application, asking whether the applicant knew of any continuous, five year period of non-use, was left blank. The Department did not independently investigate the possibility of forfeiture. In addition, the applications for transfer now pending were filed to revise what was previously approved.

5. There is no evidence that Dumke or Sagewillow fraudulently misled the Department, or that the transfer is void because of fraud. Because the pending applications for transfer attempt to correct previously approved transfer no. 3785, and because there were misrepresentations and omissions of fact in the filing of application for transfer no. 3785, transfer no. 3785 is voided, and the Department is not bound by the previous approval. Furthermore, although there has been some development pursuant to transfer no. 3785, Sage Willow constructed two of the pivots prior to approval of the transfer 3785. Finally, this approval will recognize sufficient water rights to legalize the use of water by the pivots which were constructed.

6. Because of the reasons set forth above, the finding of forfeiture and abandonment supersedes the prior approval of transfer no. 3785.

7. The combined testimony of Vance Hawley and Terry Scanlin regarding the total place of use for the remainder of the Bird Ranch, the Knollin Ranch, and the Frew Place establishes a historically irrigated acreage of 1,412 acres during a period of at least two decades.

8. The total number of acres authorized for irrigation pursuant to water right nos. 33-02086 and 33-07018 is 230 acres. The total number of acres authorized for irrigation pursuant to water right nos. 33-02057 and 33-02083 is 1,176 acres. Combined surface water and ground water irrigation should not exceed 1,412 acres, except for sub-irrigation. The total number of acres which can be irrigated by applying water (surface water and ground water) directly to the land is 1,412 acres. The right to irrigate any additional lands described by ground water and surface water rights in excess of 1,412 acres has been forfeited, except for benefits derived by subwater which will be discussed later.

9. Applicants do not admit forfeiture or abandonment, but emphasize the doctrine of resumption of use as a defense against forfeiture. Several Idaho court cases generally mention the resumption of use defense to forfeiture. Only two of the decisions find that there may have been a forfeiture, and that resumption of use might resurrect the water right.

MAR 27 1996

10. Wagoner v. Jeffrey, 66 Idaho 455, 162 P.2d 400 (1945) was a dispute between a water right holder who had perfected rights in wells located on federal property, and another settler who subsequently obtained a patent to the property where the wells were located. More than five years of nonuse elapsed. When the water right holder unsuccessfully attempted to resume his use, the subsequent settler, even though he had no water rights in the wells, attempted to block the resumption by alleging forfeiture. In Wagoner, there was no junior water right holder claiming a right to the water which was being diverted out of the wells. The resumption doctrine was applied because there was no intervening claim to the water.

11. In Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952), a water user attempted to transfer water rights diverted from the Big Lost River approximately 20 miles downstream. The protestants alleged the rights were forfeited. Unrefuted evidence established that the water right had not been applied to the original place of use for several decades, but the evidence also established that, at least for a portion of that period, water was delivered to the proposed place of use, and assessments for the delivery of the water had been paid. In its holding, the Idaho Supreme Court said:

Thus, bills were rendered and payments made by respondent for water delivered by the District. The District showed no water was delivered to [the old place of use], so the water must have been, and two of the exhibits show the water was, delivered to the [proposed place of use].

73 Idaho at 159.

12. The court seemed to be concluding that the water right was not forfeited because it was delivered to other lands. Nevertheless, the court subsequently stated, quoting Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944):

"Although statutory abandonment of a water right has occurred, forfeiture is not effective if after five-year period original owner or appropriator resumes the use of the water prior to claim of right by a third party."

73 Idaho at 160.

13. The court explained the quotation with two inconsistent statements, the first sounding as if the right had been forfeited but resumed, and the second sounding as if the right had never been forfeited:

No one claims this particular decreed water by adverse possession and clearly, so far as this proceeding is concerned, it was in part at least used by respondent on some of his Arco lands before it was claimed it had been forfeited.

RECEIVED
JUL 27 1996

The trial court was justified in holding that water had been so used by respondent that he had not abandoned or forfeited his water rights . . .

73 Idaho at 160.

14. Other cases discussed the resumption defense, but decided that the right was not forfeited, Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944) (held not abandoned, and was not a resumption case); Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937) (held burden of proof on the party alleging forfeiture not satisfied). Another case, Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982), held that the right was forfeited, but proof was not offered regarding the resumption of use defense.

15. The law does not require that a claim of ownership to the specific water delivered by a specific water right must be filed prior to resumption of use to prevent the resumption. Language in Zezi that the use must be resumed prior to other appropriations, and the discussion of movement up the priority ladder by junior right holders in Jenkins narrowly limits when a water right can be resumed after it is forfeited.

16. Recognition of the resumption of use defense would frustrate the doctrine of prior appropriation in streams where (1) junior appropriators have established water rights and have relied on water not diverted by a senior user, or (2) in this case, where senior surface water users and other water right holders have relied on related ground water not diverted by Sage Willow's predecessor. While the prior appropriation doctrine is crafted to protect water users, by delivering in order of priority, its requirement of beneficial use of water prevents a water right holder from retaining unused water rights for a long period of time, and then reasserting the right to the detriment of other right holders.

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 establishment of a water right is sufficient claim to the water. The resumption doctrine cannot restore portions of water rights forfeited by Sage Willow's predecessor in interest to the detriment of other water right holders.

18. Detailed consumptive use comparisons by both parties implicitly invite the Department to microscopically look at the application of water upon the place of use and restrict the future consumptive use based on an estimated consumptive use. Although consumptive use was not defined by the initial water rights which were licensed or decreed, there is a maximum consumption which the use of a water right should not exceed. Within the limitation of the maximum consumptive use value, the water right holder should be able to plant more or less consumptive crops depending on his needs. Furthermore, there ought to be some incentive for increasing the efficiency of application. Finally, if there is a pattern of rotation within the farming operation, a portion of a right should not be lost because a water right holder's crops did not consume the maximum consumptive use value.

MAR 27 1998

19. If the Department evaluated the consumptive use microscopically, the Department would be required to:

- a. Determine the traditional acres irrigated;
- b. Determine how much water was traditionally consumed by crops grown on those acres;
- c. (i) evaluate how much more efficiently the proposed method of irrigation is or,
(ii) evaluate how much more water will be consumed by the anticipated crop use;
- d. (i) further reduce the acres irrigated to prevent increased consumption, or
(ii) further reduce the volume and flow diverted to prevent increased consumption.

20. Because the protestant proposes restrictions based on historical acres irrigated, not based on consumptive use, the Department declines, in this case, to limit the total diversion based on increased consumptive use which may result from improved efficiency of water application. Total diversion volumes and consumptive uses values will be assigned according to Department standards. Flow rates will be reduced to a rate of 0.02 cfs per acre unless Sage Willow can demonstrate the need for addition volume or diversion rate.

21. These applications for transfer can only be approved if the applicant identifies 1,412 acres to which water will be physically diverted and applied by some means other than subirrigation. Annual volume for physical diversion, delivery and application should be limited to 4,942 acre feet. Annual consumptive volume should be limited to 3,530 acre feet. The diversion rate should be limited to 28.24 cfs.

22. A proposal identifying 1412 acres, and the individual rights that will be appurtenant to the lands, must be submitted to the Department. The Department will allocate volumes and diversion rates to each right.

23. As part of the proposal, the applicant may continue to derive the benefits of subirrigation from ponds and return flows to the Little Lost River, provided the ponds or the return channels are not reconstructed to increase the subirrigation beyond the acreage traditionally subirrigated. Water shall not be diverted from groundwater for the sole purpose of filling ponds or subirrigating. Surface water can only be diverted for root zone storage (presumably subirrigation) pursuant to license 33-02133 when all prior surface water rights are being satisfied.

24. Water rights cannot be obtained by adverse possession if the rights are being delivered by a watermaster in a water district. Idaho Code § 42-607.

25. The Canal Co. is not entitled to ownership of water rights alleged to be owned by Sage Willow.

MAR 27 1996

ORDER

IT IS HEREBY ORDERED that Transfer No. 3785 is VOIDED.

IT IS FURTHER ORDERED that License no. 33-02090 and license no. 33-02091 and portions of all other rights diverted and directly applied to lands in excess of 1412 acres are FORFEITED. Alternatively, License no. 33-02090 and license no 33-02091 are ABANDONED.

IT IS FURTHER ORDERED that Applications for Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227 are **CONDITIONALLY APPROVED** provided the applicant not irrigate more than 1,412 acres within the place of use proposed by the applications, and the applicant complies with the following:

1. A proposal must be submitted to the Department of Water Resources on or before November 1, 1995. The plan must be submitted to the protestants for review and comment. Comments must be submitted to the Department and to the applicant one month following submittal of the plan. A hearing may be requested by either party within sixty (60) days of submittal of the plan.
2. Failure to submit the plan is cause for the department to deny the application for transfer.

IT IS FURTHER ORDERED that the Department will issue another recommended decision if additional testimony is required. If not, the Department will issue a final decision after the proposal is submitted.

DATED this 22nd day of May, 1995.



GARY SPACKMAN, Hearing Officer

MAR 27 1995

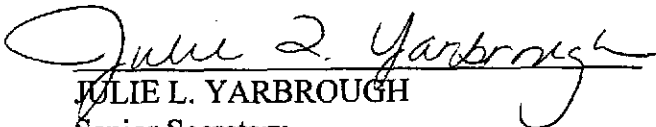
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of May, 1995, I mailed a true and correct copy, postage prepaid, of the foregoing **RECOMMENDED ORDER** to the following:

Sage Willow, Inc.
HOLDEN KIDWELL HAHN
& CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
Boise, ID 83701


JULIE L. YARBROUGH
Senior Secretary

RECOMMENDED ORDER - Pg 14

MAR 27 1996

MAR 27 1995

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NOS. 4221,)
4223, 4224, 4225, 4226 &)
4227 IN THE NAME OF)
SAGEWILLOW, INC.)
_____)

ORDER DENYING
PETITION TO
AMEND PROTEST

On January 18, 1995, the Blaine County Canal Company petitioned the Department to amend its protest against the Sagewillow transfer. The petition sought to add issues regarding the expansion of water and land and of forfeiture.

Blaine County Canal Company has participated as a protestant from the outset. It received copies of correspondence from the parties, and was notified of conferences conducted by the Department. As late as the prehearing conference conducted in November 1994, at which the petition for amendment filed by Mays was discussed, Blaine County Canal Company was apprised of additional issues that might be raised at the hearing. Nonetheless, the Canal Company did not move to amend its protest until less than two weeks prior to the hearing.

The Department should liberally allow the amendment of pleading, but the amendment should not be allowed when the petition is filed so close in time to the hearing that the applicant does not have reasonable time to explore the allegations of a party seeking the amendment. Furthermore, Blaine County Canal Company was not surprised by these issues, and has alleged no basis for the late filing of their petition.

IT IS HEREBY ORDERED that the petition to amend protest filed by Blaine County Canal Company is DENIED.

Dated this 27th day of January, 1995.



Gary Spackman

MAR 27 1996

I hereby certify that on this 27th day of January, 1995, I mailed a true and correct copy, postage prepaid, of this order denying petition to amend protest to the following:

Sagewillow, Inc.
C/O Holden, Kidwell, Hahn & Crapo
PO Box 50130
Idaho Falls, ID 83405

Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

Michael C. Creamer
Givens, Pursley & Huntley
PO Box 2720
Boise, ID 83701

Kris Rhodes
Kris Rhodes

622 8 71898

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NOS. 4221,)
4223, 4224, 4225, 4226 &)
4227 IN THE NAME OF)
SAGEWILLOW, INC.)
_____)

ORDER AMENDING
PREHEARING SCHEDULE

By motion to amend prehearing schedule, the protestants refer to a schedule for exchange of exhibits of which the hearing officer was unaware. The original deadline for the exchange of exhibits was January 16, 1995. The protestants request until January 27, 1995, to prepare and serve exhibits on all parties.

Having shown good cause for the additional delay:

IT IS HEREBY ORDERED that exhibits shall be exchanged by the various parties on or before January 27, 1995.

Dated this 23rd day of January, 1995.



Gary Spackman

MAR 27 1996

I hereby certify that on this 23rd day of January, 1995, I mailed a true and correct copy, postage prepaid, of this amended order to the following:

Sagewillow, Inc.
C/O Holden, Kidwell, Hahn & Crapo
PO Box 50130
Idaho Falls, ID 83405

Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

Michael C. Creamer
Givens, Pursley & Huntley
PO Box 2720
Boise, ID 83701

Kris Rhodes
Kris Rhodes

MAR 8 7 1995

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NOS. 4221,)
4223, 4224, 4225, 4226, &)
4227 IN THE NAME OF)
SAGEWILLOW, INC.)

ORDER GRANTING PETITION
TO
AMEND PROTEST

On December 3, 1993, James Mays and Mays Land & Livestock (Mays) protested applications for transfer filed by Sagewillow Inc. (Sagewillow). In the text of the protest, Mays identified three applications for numbered transfer, 4224, 4225 and 4226. These applications for transfer were the application numbers given to Mays' counsel when he inquired of the Department regarding the Sagewillow applications.

Mays objected to the application for transfer on the basis of material injury, expansion, increase in consumptive use, and alleged the transfers, if approved, would not be consistent with conservation of water resources in the state of Idaho.

On March 21, 1994, Mays petitioned the Department to amend his protest. The motion asked that the original protest be extended to apply to four additional applications for transfer, numbered 4221, 4222, 4223 and 4227, which were not identified as Sagewillow applications during the initial inquiry. The motion to amend the protest does not set forth additional grounds for protest. It implies that the original protest criteria will be extended and applied to the other applications for transfer if the petition is approved.

The Department did not rule immediately on the motion to amend the protest.

A letter dated March 17, 1994, written by Mike Creamer, counsel for Mays, to Ron Carlson of the Department, described in detail several legal issues which would probably be raised at the hearing, including the issue of forfeiture. The letter was carbon copied to Kent Foster, counsel for Sagewillow. Furthermore, in a letter written by Kent Foster to Harold Jones of the Department, dated March 21, 1994, Foster recognizes that forfeiture was raised as an issue by Mays.

The parties carefully briefed the issues, and I will not recite in detail from the memorandums.

The Department has a responsibility to review all of the criteria under Idaho Code § 42-222, whether the application is

MAR 27 1996

protested or not. The Department is interested in all facts which relate to issues affecting the application for transfer, and should liberally accept information that pertains to these issues. The Department must also grant the applicant a chance to present its case, and fairly respond to information which the Department receives, or which will be presented at a hearing.

Rule 305 of the Rules of Procedure states that pleadings should be liberally construed, and that the pleadings may be amended. The philosophy of liberality should apply to motions to amend. Furthermore, a defect in a pleading caused partially by the Department not providing all the information requested should be correctable.

As an analogous comparison, the Department may grant intervenor status to a petitioner if the petition is filed at least 14 days prior to the date of the formal hearing or prehearing conference. Even if a protestant is prohibited from amending its protest to broaden the scope of the protest, intervention could easily be granted, and the protestant could assume a role of a full party regarding all of the applications.

I find Mays properly filed a motion to amend its protest, and the facts and the Department rules support approval of the amendment. Furthermore, the protest, the motion to amend and subsequent correspondence identified detailed factual and legal issues that might be raised at the hearing.

IT IS HEREBY ORDERED that Mays' motion to amend the protest GRANTED.

IT IS FURTHER ORDERED that copies of exhibits should be marked and distributed to the parties prior to the hearing. The applicant should use alpha characters to mark its exhibits; the protestants should use numbers with its name preceding the number (i.e. Mays # 1, or Canal Co. #1).

IT IS FURTHER ORDERED that if the applicant feels the lateness of this order grants insufficient time to develop its case, or feels it has been surprised by any of Mays' allegations, or is uncertain regarding the basis of Mays' protest, I will entertain a motion to continue the hearing, and extend discovery to allow Sagewillow to prepare and present its case.

IT IS FURTHER ORDERED that the hearing scheduled for January 31 and February 1, 1995, shall be held as scheduled, unless a petition is received from the applicants at least five days prior to the hearing date.

Dated this 11th day of January, 1995.


Gary Spackman

MAR 27 1995

I hereby certify that on this 12th day of January, 1995, I mailed a true and correct copy, postage prepaid, of this order to the following:

Sagewillow, Inc.
C/O Holden, Kidwell, Hahn & Crapo
PO Box 50130
Idaho Falls, ID 83405

Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

Michael C. Creamer
Givens, Pursley & Huntley
PO Box 2720
Boise, ID 83701

Kris Rhodes
Kris Rhodes

RECEIVED
JAN 17 1995

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

License of Water Right No. 33-7018 Priority September 12, 1972 Amount 3.26 cfs

THIS IS TO CERTIFY, that WILLIAM FREW
of Howe, Idaho, has complied with the terms and conditions of Permit
No. 33-7018 issued pursuant to Application for Permit dated August 18, 1972,
and has submitted proof to the Department of Water Resources on October 26, 1977,
that he has applied water to a beneficial use; an examination by the Department indicates that the works have a
capacity for the diversion of 7.04 cfs of water from a groundwater source,
tributary to _____, and that the permit holder has applied to a beneficial use and
established a right to use water as follows:

Beneficial Use	Period of Use	Rate of Diversion	Annual Volume
Irrigation	from <u>April 1</u> to <u>November 1</u>	at <u>3.26</u> cfs and	<u>489</u> acre feet
	from _____ to _____	at _____ cfs and	_____
	from _____ to _____	at _____ cfs and	_____

(both dates inclusive)

Subject, however, to the condition that no more than 3.26 cfs of water be diverted at any one time, and
that the amount of water so diverted and to which such right is entitled and confirmed is for the purpose
aforementioned and is limited to the amount which can actually be beneficially used and shall not exceed
489 acre feet per year, said waters to be diverted within the SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 32, Twp. 8N,
Rge. 28E, B.M. in the County of Butte

Description and location of place of use:

Twp.	Range	Sec.	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				Totals
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
7N	28E	5					30	38	21	35	39								163

Total number of acres irrigated 163

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

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

Witness the seal and signature of the Director, affixed at Boise, Idaho, this 16 day of

May, 19 80

Director

LICENSING AMENDMENT
STATE OF IDAHO

Ident. No. 33-7018

RECEIVED

APR 28 1980

APPLICATION FOR AMENDMENT OF A PERMIT Department of Water Resources

To change the point of diversion and/or the place of use.

Comes now William Frew Phone 767-3386
of (address) Howe, Idaho 83244, and represents to the
Director of the Idaho Department of Water Resources:

That he is the owner and holder of Permit to appropriate the Public Waters of the State of Idaho
No. 33-7018, and requests that the permit and permit map be changed as follows:

1. Point of diversion: SW 1/4 SW 1/4, Section 32, Township 8N, Range 28E, B.M.,
County of Butte. Other points of diversion: _____

2. Period and nature of use: (irrigation, domestic, stockwatering, industrial, etc.)

Amount 3.26 for Irrigation purposes from 4-1 to 11-1 (both dates inclusive)
(cfs or acre feet per annum)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre feet per annum)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre feet per annum)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre feet per annum)

3. Place of use or land to be irrigated:

TWP	RGE	SEC	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
7N	28E	5					30	38	21	35	39								163

Total number of acres to be irrigated = 163

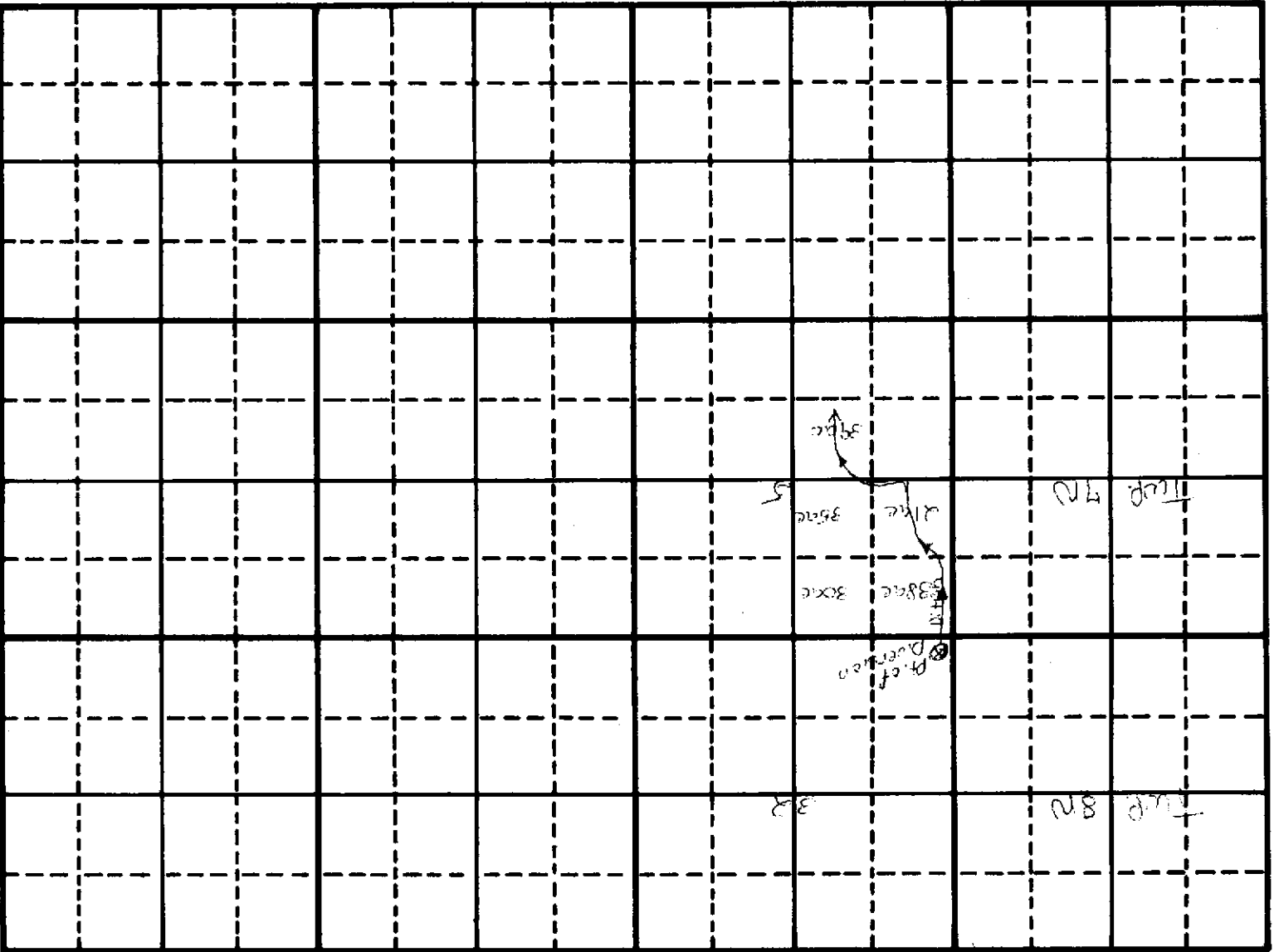
4. a. Who owns the property at the point of diversion? Wm Frew
b. Who owns the land to be irrigated or the place of use? Wm Frew
c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing: _____

UNRECORDED

Complete the following map by showing land and point of diversion as proposed by this amendment.

Show 40-acre subdivisions, townships, ranges and ditches.

RGE. 28E



That no one will be injured by such change, and that such change will be made at permit holder's own risk.

Signed at Bozeman, Montana, this 20 day of April, 19 80.

(Signature)

FOR DEPARTMENT USE ONLY

Preliminary check by [Signature] Fee = \$20.00

Publication prepared by [Signature] Date 5/5/80

Published in N/A

Publication dates N/A

ACTION OF THE DEPARTMENT OF WATER RESOURCES

I, C. STEPHEN ALLRED

, of the Department of Water Resources hereby

APPROVE the above referenced Amendment for Permit No. 33-7018.

Witness my hand this 16 day of May, 19 80

[Signature]

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 33-7018)
IN THE NAME OF WILLIAM FREW)
_____)

ORDER OF REINSTATEMENT

WHEREAS, on August 18, 1972, William Frew filed with the Department of Water Resources (formerly the Department of Water Administration) an application for permit to appropriate 4.00 cubic feet per second of groundwater to be diverted within the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 5, Twp. 7N, Rge. 28E, B.M., Butte County, to be used for irrigation and stockwater purposes; and,

WHEREAS, on October 18, 1972, the Department approved said application and issued Permit No. 33-7018 with the condition that proof of construction of works and application of water to beneficial use be submitted to the Department on or before October 1, 1977; and,

WHEREAS, on July 29, 1977, the Department notified the permit holder by certified mail that proof of beneficial use was due and instructed the permit holder as to the steps to be taken to make said proof; and,

WHEREAS, on October 11, 1977, the Department notified the permit holder that Permit No. 33-7018 had lapsed for failure to submit proof of beneficial use of water; and,

WHEREAS, on October 26, 1977, the Department received the required proof of beneficial use of water; and,

WHEREAS, Section 42-218a of the Idaho Code provides that a permit may be reinstated upon a showing of reasonable cause within 60 days from the date of the notice of lapsing; and,

WHEREAS, the permit holder has provided a reasonable showing as to why said permit should be reinstated;

IT IS, THEREFORE, HEREBY ORDERED that Permit No. 33-7018 be REINSTATED and the priority advanced to September 12, 1972.

Dated this 14 day of November, 1977.


BOBBY D. FLEENOR
Chief, Operations Bureau

Identification No. 33 7018
Application No. _____

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION
APPLICATION FOR PERMIT

APPROVED

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

1. Name of applicant WILLIAM FREW
post office address Howe, Idaho
2. Source of water supply Ground Water which is a tributary of ---
3. a. Location of point of diversion is SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 5 Township 7N
Range 28E B.M.* Butte County; additional points of diversion if any: ---

b. If water is not consumed, it will be discharged into _____ at a point in _____ $\frac{1}{4}$
of _____ $\frac{1}{4}$ of Section _____ Township _____ Range _____ B.M. _____
4. Water will be used for the following purposes:
Amount 4.0 for irrig. purpose from Apr. 1 to Nov. 1 (both dates inclusive)
(cfs or acre-feet per annum)
Amount 0.05 for stockwater purpose from Jan. 1 to Dec. 31 (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
5. Total quantity to be appropriated:
a. 4.0 cubic feet per second ~~and xxx~~
b. _____ acre feet per annum.
6. Proposed diverting works:
a. Description of ditches, flumes, pumps, headgates, etc. well, pump, electric motor &
ditches

b. Height of storage dam _____ feet, active reservoir capacity _____ acre feet; total reservoir
capacity _____ acre feet, materials used in storage dam: _____
Period of year during which storage will occur _____ to _____ inclusive.
(Mo. Day) (Mo. Day)
c. Proposed well diameter is 16 inches; proposed depth of well is 200 feet.
7. a. Time required for the completion of the works and application of the water to the proposed beneficial use
is 5 years.
b. Estimated construction cost is \$ 10,000.
8. Description of proposed uses:
a. If water is **not** for irrigation:
(1) Give the place of use of water: SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 5 Township 7N
Range 28E B.M.
(2) Amount of power to be generated: _____ hp under _____ feet of head.
(3) List number of each kind of livestock to be watered 200 head of dairy cows

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

33 7018

Total number of acres to be irrigated 320

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

License 33-2086 for 4.1 c.f.s.

9. a. Who owns the property at the point of diversion. _____ Applicant

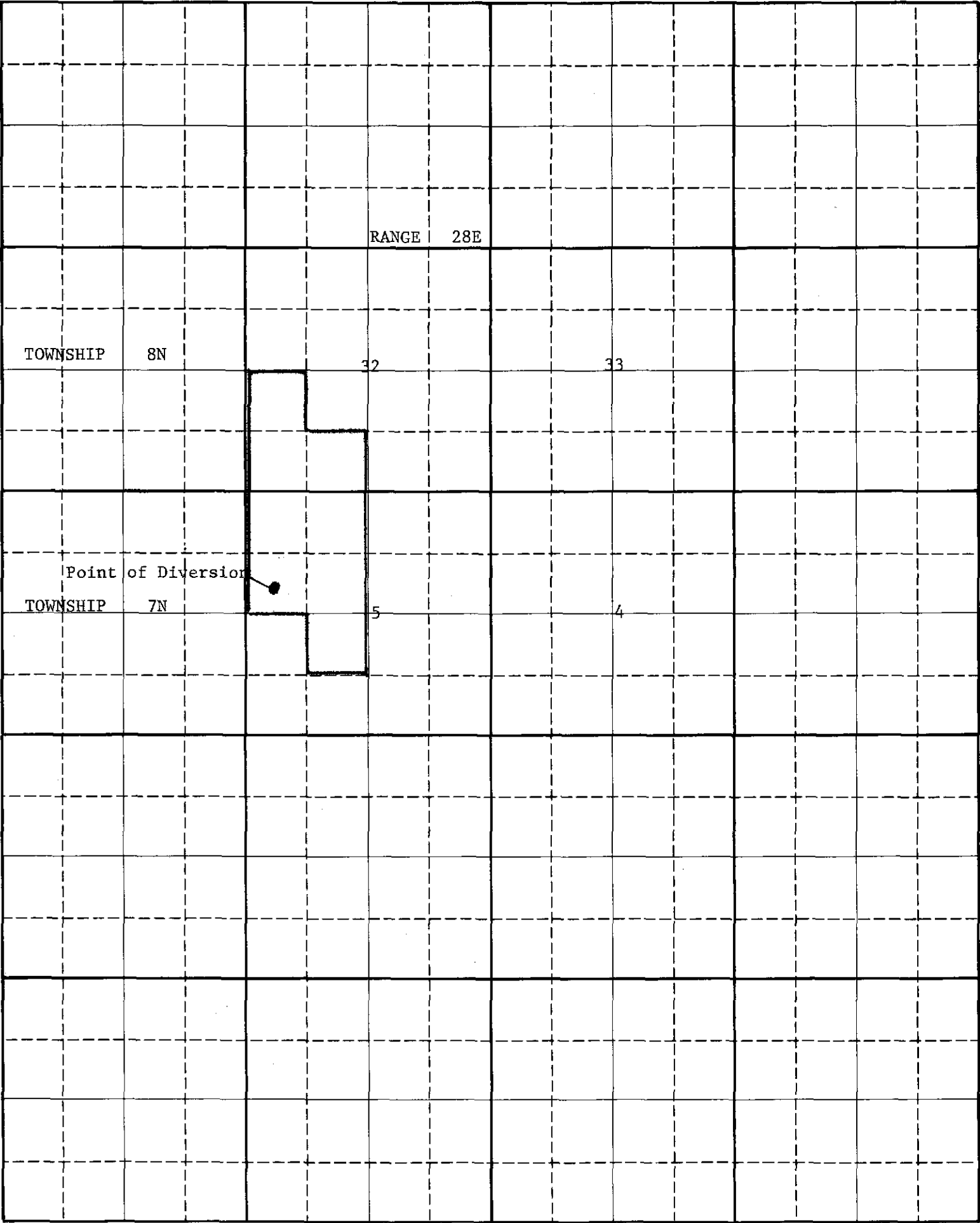
b. Who owns the land to be irrigated or place of use

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

applicant to make this filing-

10. Remarks Applicant believes that a diversion rate in excess of 1"/acre is required to surface irrigate this land.

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



Scale: 2 inches equal 1 mile

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

William Frew
(Applicant)

Received by Mr. [Signature] Date 8-18-72 Time 11:40 AM
Preliminary check by Mr. [Signature] Fee \$ 55.00 # 79366
Received by Mr. [Signature] Date 8-18-72
Publication prepared by Mr. [Signature] Date 8-25-72
Published in Des Moines Register
Publication dates 8-31 + 9-0-72
Publication approved NCY Date 9/27/72
Priority reduced to 8-18-72 Reason _____
Protests filed by: _____
Copies of protests forwarded by _____
Hearing held by _____ Date _____
Recommended for approval denial by NCY [Signature]

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER ADMINISTRATION

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 33-7018, and said application is hereby APPROVED.

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

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before October 1, 1977.
- c. Other: A measuring device of a type approved by this Department shall be permanently installed and maintained as part of the diverting works.
Permit Holder must show that more than 1/50 cfs of water per irrigated acre has been beneficially used at such time as proof of beneficial use is submitted.

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

Witness my hand this 18 day of October 19 72.

[Signature]
Director

Identification No. _____

Application No. _____

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION
APPLICATION FOR PERMIT

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

1. Name of applicant WILLIAM FREW
 post office address Howe, Idaho
2. Source of water supply Ground Water which is a tributary of ---
3. a. Location of point of diversion is SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 5 Township 7N
Range 28E B.M. Butte County; additional points of diversion if any: --
- b. If water is not consumed, it will be discharged into _____ at a point in _____ $\frac{1}{4}$
 of _____ $\frac{1}{4}$ of Section _____ Township _____ Range _____ B.M. _____
4. Water will be used for the following purposes:
 Amount 4.0 for irrig. purpose from Apr. 1 to Nov. 1 (both dates inclusive)
(cfs or acre-feet per annum)
 Amount 0.05 for stockwater purpose from Jan. 1 to Dec. 31 (both dates inclusive)
(cfs or acre-feet per annum)
 Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
5. Total quantity to be appropriated:
 a. 4.0 cubic feet per second ~~and/or~~
 b. _____ acre feet per annum.
6. Proposed diverting works:
 a. Description of ditches, flumes, pumps, headgates, etc. well, pump, electric motor & ditches
- b. Height of storage dam _____ feet, active reservoir capacity _____ acre feet; total reservoir capacity _____ acre feet, materials used in storage dam: _____
 Period of year during which storage will occur _____ to _____ inclusive.
(Mo. Day) (Mo. Day)
- c. Proposed well diameter is 16 inches; proposed depth of well is 200 feet.
7. a. Time required for the completion of the works and application of the water to the proposed beneficial use is 5 years.
 b. Estimated construction cost is \$ 10,000.
8. Description of proposed uses:
 a. If water is **not** for irrigation:
 (1) Give the place of use of water: SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 5 Township 7N
Range 28E B.M. Butte
 (2) Amount of power to be generated: _____ hp under _____ feet of head.
 (3) List number of each kind of livestock to be watered 200 head of dairy cows.
 (4) Name of municipality to be served _____, or number of families to be supplied with domestic water _____.
 (5) If water is to be used for other purposes describe: _____

Total number of acres to be irrigated.

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

For 4.1 c.f.s.

9. a. Who owns the property at the point of diversion. Applicant
- b. Who owns the land to be irrigated or place of use. Applicant
- c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing.

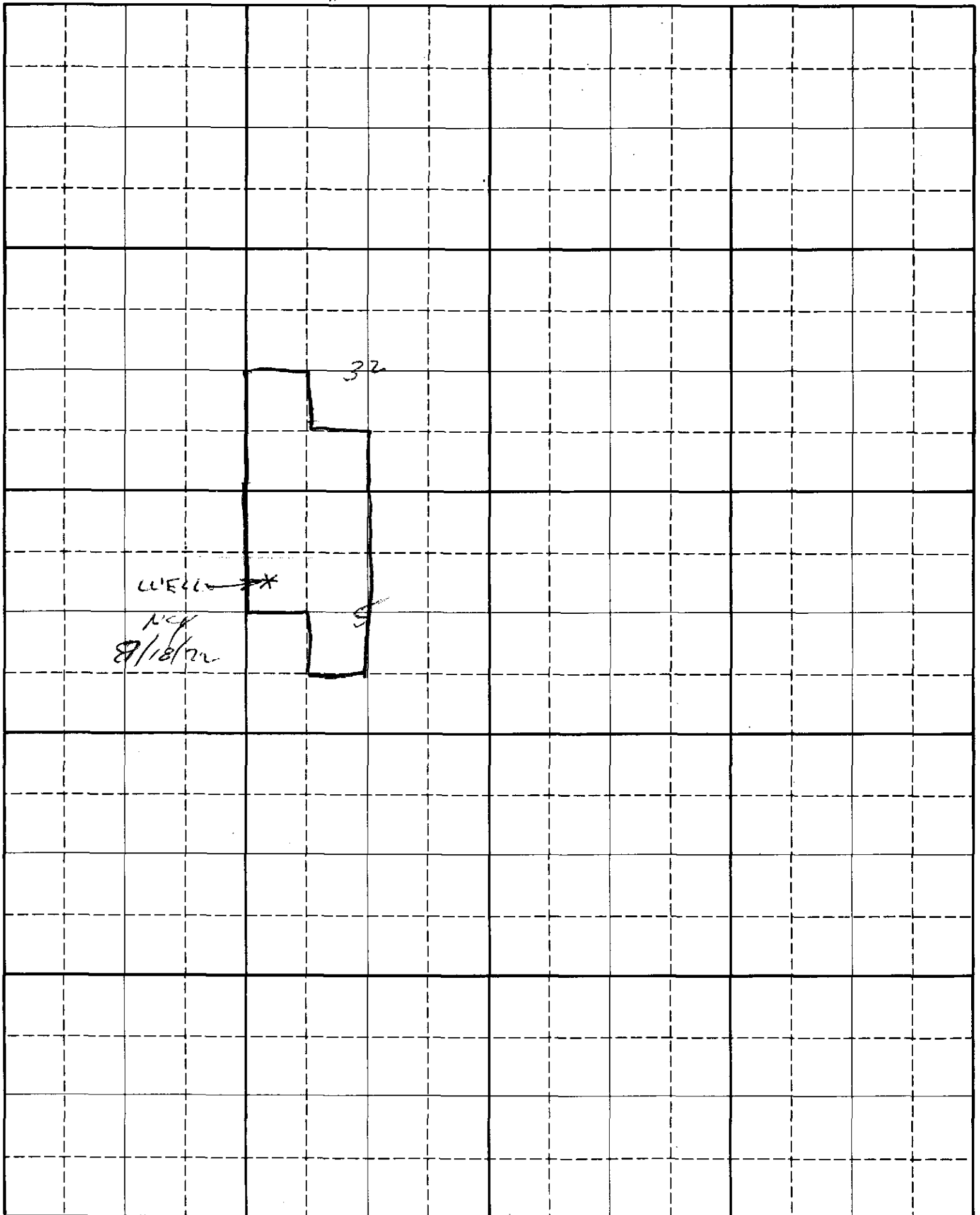
applicant to make this filing-

10. Remarks	Applicant believes that a diversion rate in excess of 1"/acre is required to surface irrigate this land.
-------------	--

to surface irrigate this land.

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

R. 28 E.



Scale: 2 inches equal 1 mile

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

William J. H.
(Applicant)

33 7018

Received by Ba Date 8-18-72 Time 11:40 am
Preliminary check by NCU Fee \$ 55.00
Receipted by Ja Date 8-18-72 # 7366
Publication prepared by _____ Date _____
Published in _____
Publication dates _____
Publication approved _____ Date _____
Priority reduced to _____ Reason _____

Protests filed by: _____

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

33 705

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER ADMINISTRATION

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

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

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

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

Witness my hand this _____ day of _____ 19____.

Director

Affidavit of Publication

33-7018

U.S. District Court
Eastern District Office

I, Le Ella Cammack, of the Arco Advertiser, a weekly newspaper of general circulation, published weekly at Arco, Idaho, since March, 1909, do solemnly swear that a copy of this notice, per clipping attached, was published weekly in the regular and entire issue of said newspaper, and not in any supplement thereof,

for 2 consecutive weeks, commencing with

the issue dated August 31, 1972

and ending with the issue dated Sept. 7, 1972

Le Ella Cammack

Subscribed and sworn to before me this

26th day of September, 1972

Neanna Paulsen
Notary Public

Residence: Arco, Idaho.

My commission expires 7-27, 1974

NOTICE OF APPLICATION FOR WATER PERMIT

Notice is hereby given that William Frew, Howe, Idaho has on 8/18/72 submitted Application No. 33-7018 for a permit to appropriate 4.0 cubic feet per second of water from a ground-water source by means of well and pump within the SW $\frac{1}{4}$ -NW $\frac{1}{4}$, Sec. 5 T. 7N, R. 28E, B.M., Butte County; to be used from Jan. 1 to Dec. 31 for stockwatering purposes for 200 head of dairy cows, within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M., and from Apr. 1 to Nov. 1 for the irrigation of 320 acres within the W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 32, T. 8N, R. 28E; NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, 240 South Holmes, Idaho Falls, Idaho, 83401 on or before September 18, 1972.

R. KEITH HIGGINSON
Director

Published in the Arco Advertiser, Arco, Idaho on August 31 and September 7, 1972.

DEPARTMENT OF WATER ADMINISTRATION
- STAFF ANALYSIS -

Item	Initial	Date	
(1)	<u>Ncy</u>	<u>9/27/72</u>	Application No. <u>33-7018</u> Name <u>William Freew</u>
(2)	<u>N</u>	<u>"</u>	Check: ☒ Signature ☒ Point of Diversion ☒ Quantity of Water and Period of Use <u>Excursive @ when added</u> ☒ Description of Diverting Works <u>64.1 cfs of 1/2" #33-2086</u> ☒ Time required for C/W and application of water to B/U <u>see SES letter of</u> ☒ Place of Use <u>justification for 1.25"/A.</u> ☒ Map ☒ Fee
(3)	<u>"</u>	<u>"</u>	Send copies to: ☒ Idaho State Health Department ☒ Idaho Fish and Game Department ☒ Bureau of Land Management
(4)	<u>"</u>	<u>"</u>	☐ Request Special Use Permit from U.S.F.S. ☒ Request Easement from B.L.M.
(5)	<u>"</u>	<u>"</u>	In form for advertising <u>Yes</u>
(6)	<u>"</u>	<u>"</u>	Affidavit of Publication received <u>9/27/72</u>
(7)	<u>"</u>	<u>"</u>	Final date for protests <u>9/18/72</u> Protests received: yes <u>no</u> <u>X</u>
(8)	<u>"</u>	<u>"</u>	Date and Place of hearing <u>N.A.</u> Decision reached at hearing _____
(9)	<u>"</u>	<u>"</u>	Located within Water District No. <u>N.A.</u>
(10)	<u>"</u>	<u>"</u>	Critical groundwater area: yes _____ no <u>X</u>
(11)	<u>"</u>	<u>"</u>	Groundwater levels: ☐ Decline (comment) _____ ☒ Stable (comment) <u>Only limited develop this far north</u> ☐ Increasing (comment) _____
(12)	<u>"</u>	<u>"</u>	Comments: <u>I tried to get applicant to transfer</u> <u>part of Lic. # 33-2086 to the new well since</u> <u>the original well has only about 1/2 of</u> <u>the lic. production. He would not as he</u> <u>believes he needs more than 1"/acre</u>
(13)	<u>"</u>	<u>"</u>	Action recommended: ☒ Approve Priority <u>8/18/72</u> ☐ Deny Reason for Reduction _____ <u>See attached sheet for conditions of approval</u> No conditions for approval
(14)	<u>"</u>	<u>"</u>	District <u>Eastern</u> By <u>Norman C. Young</u> Date <u>9/27/72</u> Title <u>Dist Engr</u>

Lic # 33-2086 covers exactly same land list, but
maybe for a different acreage:

Q = 6.4 cfs @ 1"/acre

Q = 8.0 cfs @ 1 1/4"/acre as req. by SES

Q = 33-2086 = 9.1 + Q_{new} = 4.0 Q_T = 8.1 cfs less 0.05 for stock

Acceptable
33 7018

RECOMMENDEDCONDITIONS OF APPROVAL

☒ A measuring device of a type approved by this Department shall be permanently installed and maintained as part of the diverting works.

☐ Measuring devices of a type approved by this Department shall be permanently installed and maintained at the point of diversion and the point of effluent discharge.

☐ Use of water under this permit is supplemental to all existing water rights with the same purpose and place of use.

☐ Maximum rate of diversion shall not exceed _____ c.f.s.

☐ Settling ponds shall be installed which are capable of reducing the silt load in the return water to such a level that the quality of the waters of _____ Creek will not be impaired for other beneficial uses.

☐ Return water shall be treated to insure that the effluent meets (interstate) (intrastate) stream water quality standards.

☐ Use of water under this permit is subject to control by the watermaster of State Water District No. _____, _____ River.

☐ The proposed well shall not be drilled within _____ feet of another well.

☐ The issuance of this permit in no way grants any right-of-way or easement across the land of another person.

☐ The permit shall not be assigned or sold without first securing the written approval of the Department of Water Administration.

☐ This permit cannot be assigned, mortgaged, or conveyed without complying with Section 42-208, Idaho Code.

☒ Other: Permit Holder must show proof that more than 1/50th of water per irrigated acre has been beneficially used + such time as proof of beneficial use is submitted.

DEPARTMENT OF WATER ADMINISTRATION
- STAFF ANALYSIS -

Item Initial Date

(1) NY 8/7/72 Application No. _____ Name FREW

(2) _____ Check:

☒ Signature
☒ Point of Diversion Does not make any sense
☒ Quantity of Water and Period of Use 200 A.K. should be
☒ Description of Diverting Works left off
☒ Time required for C/W and application of water to B/U
☒ Place of Use
☒ Map 15 do not agree
☒ Fee

(3) _____ Send copies to:

N.A.
Idaho State Health Department
Idaho Fish and Game Department
Bureau of Land Management

(4) _____ N.A. Request Special Use Permit from U.S.F.S.
Request Easement from B.L.M.

(5) _____ In form for advertising No Do not accept

(6) _____ Affidavit of Publication received _____

(7) _____ Final date for protests _____
Protests received: yes _____ no _____

(8) _____ Date and Place of hearing _____
Decision reached at hearing _____

(9) _____ Located within Water District No. _____

(10) _____ Critical groundwater area: yes _____ no _____

(11) _____ Groundwater levels:
Decline (comment) _____
Stable (comment) _____
Increasing (comment) _____

(12) _____ Comments: _____

(13) _____ Action recommended:

Approve _____ Priority _____

Deny _____ Reason for Reduction _____

SEE ATTACHED SHEET FOR CONDITIONS OF APPROVAL

33 7018

(14) _____ District _____ By _____

Date _____ Title _____

MEMORANDUM

TO: FILE 33-07018

FROM: PAM SKAGGS *PS*

RE: TRANSFER # 4227

DATE: 11-05-93

=====

Original Transfer Application, Form and correspondence regarding the above referenced Transfer is located within file # 33-02086.

RECORDED

MAR 27 1996



State of Idaho

DEPARTMENT OF WATER RESOURCES

STATE OFFICE, 373 W. Franklin Street, Boise, Idaho

JOHN V. EVANS

Governor

C. STEPHEN ALLRED

Director

Mailing address:

Statehouse

Boise, Idaho 83720

(208) 384-2215

May 22, 1980

William Frew
Howe,
Idaho 83244

Dear Mr. Frew,

RE: License No. 33-7018

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

Also enclosed is a copy of the approved Application for Amendment along with Receipt No. 16007 in the amount of \$ 20.00 .

Sincerely,

JAN GROVER
Water Rights Supervisor

JG/kw
Enclosure

MICROFILMED

April 21, 1980

William Frew
Howe,
Idaho 83244

Dear Mr. Frew,

RE: Permit No. 33-7018

On March 11, 1980, we forwarded an amendment to you to be completed to amend this permit to correspond with the findings of the field examiner so that we could issue this license.

As of this date, we have not received this amendment. If we do not receive this amendment within fifteen (15) days, we will assume you no longer have any interest in this permit and cancellation proceedings will begin.

If you have any questions, please contact us.

Sincerely,

JAN GROVER
Water Rights Supervisor

JG:mr

MICROFILMED



State of Idaho

DEPARTMENT OF WATER RESOURCES

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

JOHN V. EVANS

Governor

C. STEPHEN ALLRED

Director

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

March 11, 1980

William Frew
Howe,
Idaho 83244

Dear Mr. Frew,
A representative of this Department made an examination of the works covered by your Permit No. 33-7018 on June 1, 1978, and has found the following:

Amount of water that can be recognized as beneficially used under Idaho law: 3.26 cfs Source: groundwater

The maximum quantity diverted shall not exceed 489 acre feet per year.

Point of diversion: SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 32, Twp. 8N, Rge. 28E, B.M.

Beneficial use: Irrigation of 163 acres within the NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, Twp. 7N, Rge. 28E, B.M.

Priority date established: September 12, 1972.

In order for the Department to issue the above license, it will be necessary for you to amend the permit to correspond with the findings of the field examiner. We are enclosing a partially completed amendment form for your use in this matter.

Please sign the amendment application and return it to this office along with a \$20.00 filing fee within 30 days in order that we might issue your license as set forth above. If you do not concur with these findings or have any questions, please contact us within the 30-day period.

Sincerely,

JAN GROVER
Water Rights Supervisor

JG:j
Enclosure

MICROFILMED

November 14, 1977

Re: Permit No. 33-7018

William Frew
Howe, Idaho
83244

Dear Mr. Frew:

Enclosed is an Order of Reinstatement; please note that the priority has been advanced to September 12, 1972 on this permit.

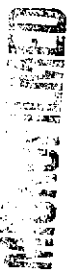
We acknowledge receipt of the affidavit submitted as proof of beneficial use for the above referenced permit.

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

If you have any questions regarding the field examination, please contact our Regional Office in Idaho Falls.

Sincerely,

JANICE RENK
Water Rights



RECEIVED

OCT 26 1977

Department of Water Resources
Eastern District Office

Identification No. _____

Permit No. _____

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

PROOF OF APPLICATION OF WATER TO BENEFICIAL USE

1. a) Name of Permit Holder William Frew
b) Post Office Address Howe, Idaho
2. Permit Number 33-7018
3. Date of Priority that you are prepared to establish 9-12-77
4. a) Source from which water was appropriated ground water
b) Location of the point of diversion: SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 5
Township 7N, Range 28E Boise Meridian, Other points of diversion: _____
5. a) The amount of water and use to which the water has been applied:
Amount 4.0 for irrigation purposes from Apr. 1 to Nov. 1 incl.
(cfs and/or acre-feet per annum) (Month-Day) (Month-Day)
Amount 0.05 for stockwater purposes from Jan. 1 to Dec. 31 incl.
(cfs and/or acre-feet per annum) (Month-Day) (Month-Day)
Amount _____ for _____ purposes from _____ to _____ incl.
(cfs and/or acre-feet per annum) (Month-Day) (Month-Day)
b) Total amount appropriated 4.0 cfs and/or acre-feet per annum
c) Describe how and by whom measurement of rate of flow or amount of storage was made and the qualifications of the person making the measurement: Ag-Service Orifice measurement
6. If the means of diversion and conveyance are owned by someone other than the Permit Holder:
a) Give the name or description of the canal, ditch or other works by which the water is conducted to the place of use: N.A.
b) Describe the agreement or understanding by which you take water from the works: N.A.
7. a) Briefly describe the works for diverting and conveying the water to the place of use, (if from a subterranean source, give the pump size, motor size, size of well casing, depth of well; if from surface water, give brief description of diversion structure and/or canal or ditch) well 16" x 200', 16" x 188' casing, 10" pump, 50 hp motor
b) Describe the type and size of measuring device which you have installed at your point of diversion: 8" Orifice, 10" discharge pipe
c) Give well driller's name and address and the date the well was completed: Jack Cushman
Sept. 1972
8. If for other than irrigation, describe the beneficial use to which you have applied the water and the place of use: stockwater for 140 head range cows

Exam typed 2/1/77 by J

9. Irrigation uses: describe the lands irrigated by giving the acreages irrigated within each 40 acre subdivision: _____

T	R	SEC.	NE¼				NW¼				SW¼				SE¼				TOTAL
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
7N	28E	5					40	40	40	40	40								200
8N	28E	32										40	40	40					120

Total number of acres irrigated 320

10. Remarks: _____

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

10/26/77
(Date)

William Frew
(Signature)

State of Idaho)
County of Benewille) ss.

On this 26th day of October, 19 77, personally appeared before me the signer(s) of the above instrument, who duly acknowledged to me that he (she) (they) executed the same.

William Frew

Notary Public residing at Idaho Falls, Idaho

My commission expires 6/15/81

**DEPARTMENT OF WATER RESOURCES
FIELD REPORT**

RECEIVED

DEC 2 1977

1. Name of permit holder William Frew
 Post office address Howe, ID Phone Department of Water Resources Eastern District Office
 Person to contact _____ Phone _____

2. Source of water supply: Groundwater ☒ Surface water ☐ _____
 (name spring, stream, etc.)
 Tributary to _____

3. Water will be used for the following purposes:

Amount 4.0 c.f.s. for Irrig.
 _____ AF/Annum (nature of use)

Period of Use: from Apr. 1 to Nov. 1
 (mo.-day) inclusive (mo.-day)

Amount 0.05 c.f.s. for Stockwater (200 head of dairy cows)
 _____ AF/Annum (nature of use)

Period of Use: from Jan. 1 to Dec. 31
 (mo.-day) inclusive (mo.-day)

Amount _____ c.f.s. for _____
 _____ AF/Annum (nature of use)

Period of Use: from _____ to _____
 (mo.-day) inclusive (mo.-day)

Other uses: _____

Permit No. 33-7018
 Examination for W. Frew

4. Total amount to be appropriated:

Max Rate of Diversion 4.0 cubic feet per second and annual volume _____ AF/Annum.

5. Location of Point(s) of Diversion:

Township 7N N/S, Range 28E E/W, B.M., Section 5, Subdivision SW 1/4 1/4 NW 1/4 1/4, Butte
 County

Township _____ N/S, Range _____ E/W, B.M., Section _____, Subdivision _____ 1/4 _____ 1/4, _____
 County

Township _____ N/S, Range _____ E/W, B.M., Section _____, Subdivision _____ 1/4 _____ 1/4, _____
 County

Other Points of Diversions: _____

Description of diverting works: 16" x 200' well, 16" x 180' casing, 10" pump, 50 hp mtor.

Measuring device required: yes ☒ no ☐

6. Lands to be irrigated or place of use.

TWP.	RANGE	SEC.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
7N	28E	5					40	40	40	40	40								200
8N	28E	32									40	40	40						120

NOT RECORDED

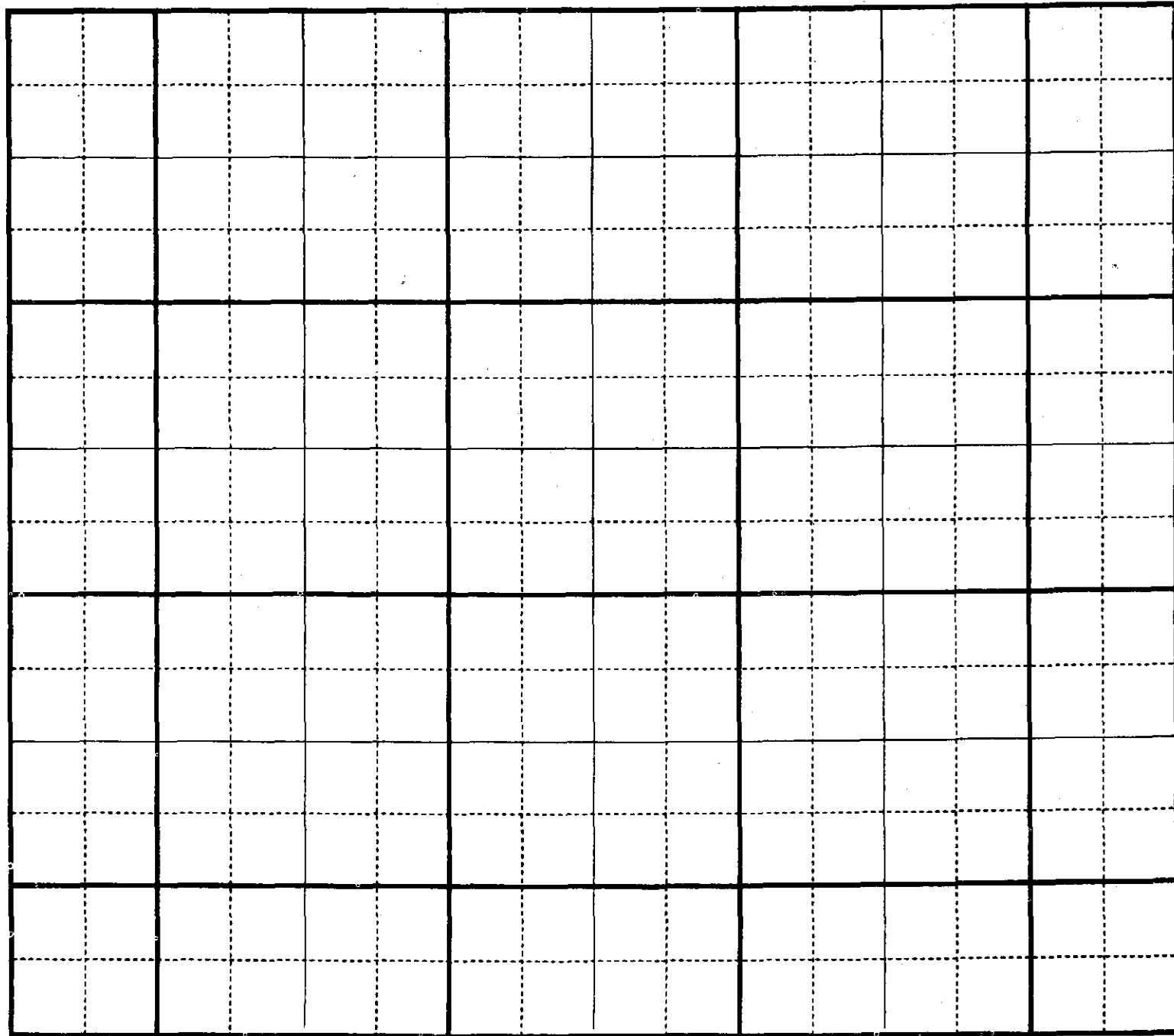
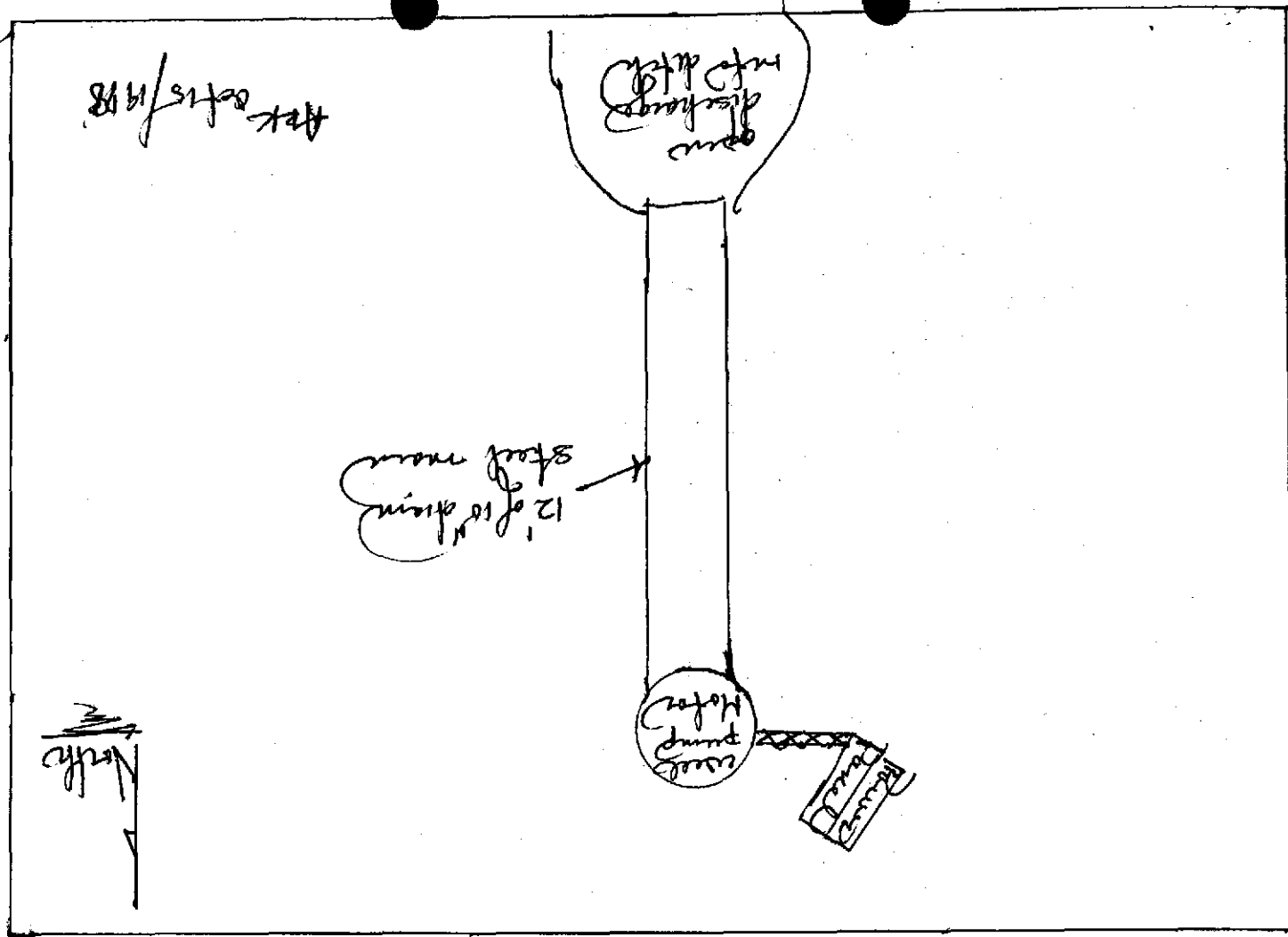


Diagram of System



DATE OF EXAM June 1, 1978

ACREAGE
Found 163
Recommended 163

Irrigation Requirement 3.0 Ac Ft/Ac

USE
Irrigation Q = 3.26 c.f.s. V = 489 AF/Ann. from April 1 to Nov 1
Domestic Q = _____ c.f.s. V = _____ AF/Ann. from _____ to _____
Livestock Q = _____ c.f.s. V = _____ AF/Ann. from _____ to _____

Is water co-mingled? yes _____ no X

Name source: n/a
twp. _____ N/S, Rge _____ E/W, B.M., Sec. _____, Sub. _____ 1/4 _____ 1/4 _____ County _____

Exchange? yes _____ no X

Name source exchanged with: n/a
twp. _____ N/S, Rge _____ E/W, B.M., Sec. _____, Sub. _____ 1/4 _____ 1/4 _____ County _____

Point of injection: n/a
twp. _____ N/S, Rge _____ E/W, B.M., Sec. _____, Sub. _____ 1/4 _____ 1/4 _____ County _____

Point of exchange: n/a
twp. _____ N/S, Rge _____ E/W, B.M., Sec. _____, Sub. _____ 1/4 _____ 1/4 _____ County _____

Total Q measured 7.04 cfs Method of measurement Dept Spouting Meters

Total Q recommended 3.26 Meter No. _____ Type Hershey Condition good

Total V recommended 489 AF/season In Line Meter

Recommended Amendments:

☒ P.D. Should be amended to subsec 32 T8N Rge 28E. B.M. Butter county
Place of Use _____
Other _____
None _____

MEASUREMENT CALCULATION:

measured 1,000 gal in 19 sec
$$\frac{1,000 \text{ gal}}{19 \text{ sec}} = \frac{x \text{ gal}}{60 \text{ sec}} = 3157.9 \text{ gpm} = 7.04 \text{ cfs}$$

$$V = 163 \times 3 = 489 \text{ AF/yr} < 3.26 \times 1.4835 \times 215 \text{ days} = 1390.24 \text{ AF/yr}$$

SYSTEM DESCRIPTION:

Groundwater is diverted by a 50 H.P. General Electric triad.
Induction motor (3 ph) mtr - 5K6 248X14A, S/n - FHJ-628450
& by a verti - line vertical turbine pump, mtr 14 RL, S/n 18-2110
16" diam 200' deep well used to 180', Groundwater is open discharged
into a network of ditches for flood irrigation of 163 ac of land.

REMARKS:

System shown & described by William Frew.

NO CONFLICTING RIGHTS

No stockwater works of diversion present.

Examiner's Signature Anthony R. Kozlowski Date Oct 15, 1978

Checked by Rodney L. Parker Date 1/19/79

Approved by _____ Date _____



STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

Cecil D. Andrus
Governor

R. Keith Higginson
Director

Statehouse
Boise, Idaho 83720
(208) 384-2215

October 11, 1977

William Frew
Howe, Idaho
83244

Dear Mr. Frew:

You are hereby notified that under the provisions of Section 42-218a of the Idaho Code, Permit No. 33-7018 has lapsed since you have not notified us that you have completed the project by the date required on your permit. You were provided forms for that purpose in our notice to you dated July 29, 1977.

Your permit cannot be reinstated unless you submit the proof of beneficial use affidavit, enclosed, or show other reasonable cause why the permit should be reinstated within 60 days from the date of this lapse notice.

A handwritten signature in cursive script, reading "C. Stephen Allred", is written over the printed name and title of the Director.

C. STEPHEN ALLRED
Director

CSA:jfr

Encl.

July 29, 1977

CERTIFIED MAIL

138784

Re: Permit No. 33-7018

William Frew
Howe, Idaho
83244

Dear Mr. Frew:

One of the conditions of approval of your water Permit No. 33-7018 (see last page of your approved permit) was that evidence of the extent of development be submitted as proof of application of water to beneficial use to this office on or before October 1, 1977. Enclosed is an affidavit form which must be used to submit the required proof of beneficial use.

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

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



C. STEPHEN ALLRED
Director

CSA:jfr

Enc: Proof affidavit

MICROFILMED

October 20, 1972

Re: 33-7018

William Frew
Howe, Idaho 83244

Dear Mr. Frew:

Enclosed is a copy of your approved Application for Permit No. 33-7018. We direct your attention to the conditions of approval as listed on the fourth page.

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

Very truly yours,

BOBBY D. FLEENOR
Assistant Director

BDF: cd

Enclosures

33 7018

September 18, 1972

RE: Application No. 33-7018 - William Frew

Arco Advertiser
Box "C"
Arco, Idaho 83213

Gentlemen:

Would you please submit an affidavit of publication and certified bill in connection with the above referenced application. The legal notice was to have been published in your paper on August 31 and September 7.

Your cooperation in this matter is greatly appreciated.

Very truly yours,

NORMAN C. YOUNG
District Engineer

NCY:ew

*Telephoned
Sept. 25, 1972
BA*

33 7018

August 25, 1972

Re: Application No. 33-7018 - William Frew

Arco Advertiser
Box "C"
Arco, ID 83213

Gentlemen:

Enclosed you will find a legal notice which we wish to have published once a week for two consecutive weekly issues of your newspaper. We have inserted the publication dates allowing ample time for you to submit us a galley proof for our review before publication.

After sending us a galley proof, proceed with the publication on the dates we have inserted assuming the notice is correct. If we have any corrections, we will notify you before the first publication date. If you cannot publish the notice on the proposed dates, please contact us immediately.

An affidavit of publication must be submitted to the Department along with the publication bill. In order to receive payment, the following certification must appear on the bill:

"I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid."

(signature of claimant)

Very truly yours,

Norman C. Young
District Engineer

NCY:BA
Enc: Legal notice

**NOTICE OF APPLICATION
FOR WATER PERMIT**

Notice is hereby given that William Frew, Howe, Idaho has on 8/18/72 submitted Application No. 33-7018 for a permit to appropriate 4.0 cubic feet per second of water from a ground-water source by means of well and pump within the SW $\frac{1}{4}$ -NW $\frac{1}{4}$, Sec. 5 T. 7N, R. 28E, B.M., Butte County; to be used from Jan. 1 to Dec. 31 for stockwatering purposes for 200 head of dairy cows, within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M., and from Apr. 1 to Nov. 1 for the irrigation of 320 acres within the W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 32, T. 8N, R. 28E; NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, 240 South Holmes, Idaho Falls, Idaho, 83401 on or before September 18, 1972.

R. KEITH HIGGINSON
Director

Published in the Arco Advertiser, Arco, Idaho on August 31 and September 7, 1972.

*Bill submitted to
Baise 9/27/72
C.W.*

33 7018

NOTICE OF APPLICATION FOR WATER PERMIT

Notice is hereby given that William Frew, Howe, Idaho

has on 8/18/72 submitted Application No. 33-7018
for a permit to appropriate 4.0 cubic feet per second ~~acre feet per annum~~
of water from a ground-water source
by means of well and pump
within the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M., Butte County;

to be used from Jan. 1 to Dec. 31 for stockwatering purposes for 200 head
~~for~~ of dairy cows, within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 5, T. 7N, R. 28E, B.M., and from
Apr. 1 to Nov. 1 for the irrigation of 320 acres
within the W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 32, T. 8N, R. 28E; NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, T. 7N,
R. 28E, B.M.

If issued, this permit will be subject to all prior water rights. Protests
against the granting of the permit must be filed with the Idaho Department of
Water Administration, 240 South Holmes, Idaho Falls, Idaho, 83401 on or before
September 18, 1972.

R. KEITH HIGGINSON

Director

Published in the Arco-Advertiser, Arco, Idaho

on August 31 and September 7, 1972

33 7018

NCY

August 18, 1972

Mr. William Frew
Howe, ID 83244

Dear Mr. Frew:

Attached herewith is departmental receipt No. 7366 in the amount of \$55 for your Application for Permit which was received in this office.

We have retyped this application once again for your signature. Please sign and return it to this office at your earliest opportunity.

Very truly yours,

NORMAN C. YOUNG
District Engineer

NCY:BA

Enclosures: Receipt No. 7366
Retyped application

33 7018

RECEIVED

UNITED STATES DEPARTMENT OF AGRICULTURE

SOIL CONSERVATION SERVICE

AUG 18 1972

August 17, 1972

Department of Water Administration
Eastern District Office

Mr. Norman C. Young
District Engineer
Department of Water Administration
240 South Holmes Ave.
Idaho Falls, Idaho 83401

Re: William Frew

Dear Mr. Young:

I have been asked by the applicant for a statement regarding the quantitative need for irrigation water.

Under the planned irrigation system, flood irrigation, it is my opinion that adequate irrigation would require 1.25 inches per acre, in order to derive maximum benefit. The soil is shallow and light, and diversion of less than 1.25 inches per acre would not provide an adequate water supply for the soil, under flood irrigation.

Very truly yours,



James R. Stalnaker, District Conservationist
Soil Conservation Service
Arco, Idaho

August 7, 1972

Mr. William Frew
Howe, ID 83244

Dear Mr. Frew:

We are returning your Application for Permit to appropriate ground water near Howe, Idaho, along with check #92-263 in the amount of \$55.00. There are a number of items that must be clarified before processing can begin on this application.

1. The point of diversion (or points of diversion) were not clearly shown on the plat of Item 11.
2. The flow rate applied for does not need to be broken down to season volume; thus, you need not limit yourself to 200 acre feet per annum. The irrigation season for your area is considered to be April 1 to November 1.
3. The place of use for domestic purposes, Item 8a-1, should be clearly shown on the plat. The place of use for irrigation shown in Item 8b does not agree with that shown on the map in Item 11.
4. In Item 8a-3, you have listed 200 dairy cows as a use, but this use is not requested under Item 4. A reasonable rate of diversion for 200 dairy cows would be 0.10 c.f.s. This should be indicated in Item 4.

Also, it appears from the comment made in the Remarks section that you may not want to file for a new application at all, but that you would rather transfer part of your water right for License No. 33-2086 to another well, and thus retain your original date of priority. Because there is a possibility that you do not wish to apply for a new permit, I would recommend that you plan to visit this office to discuss your water rights.

Very truly yours,

NORMAN C. YOUNG
District Engineer

NCY:ba
Enc: App. for Permit
Check #92-263

33 7018