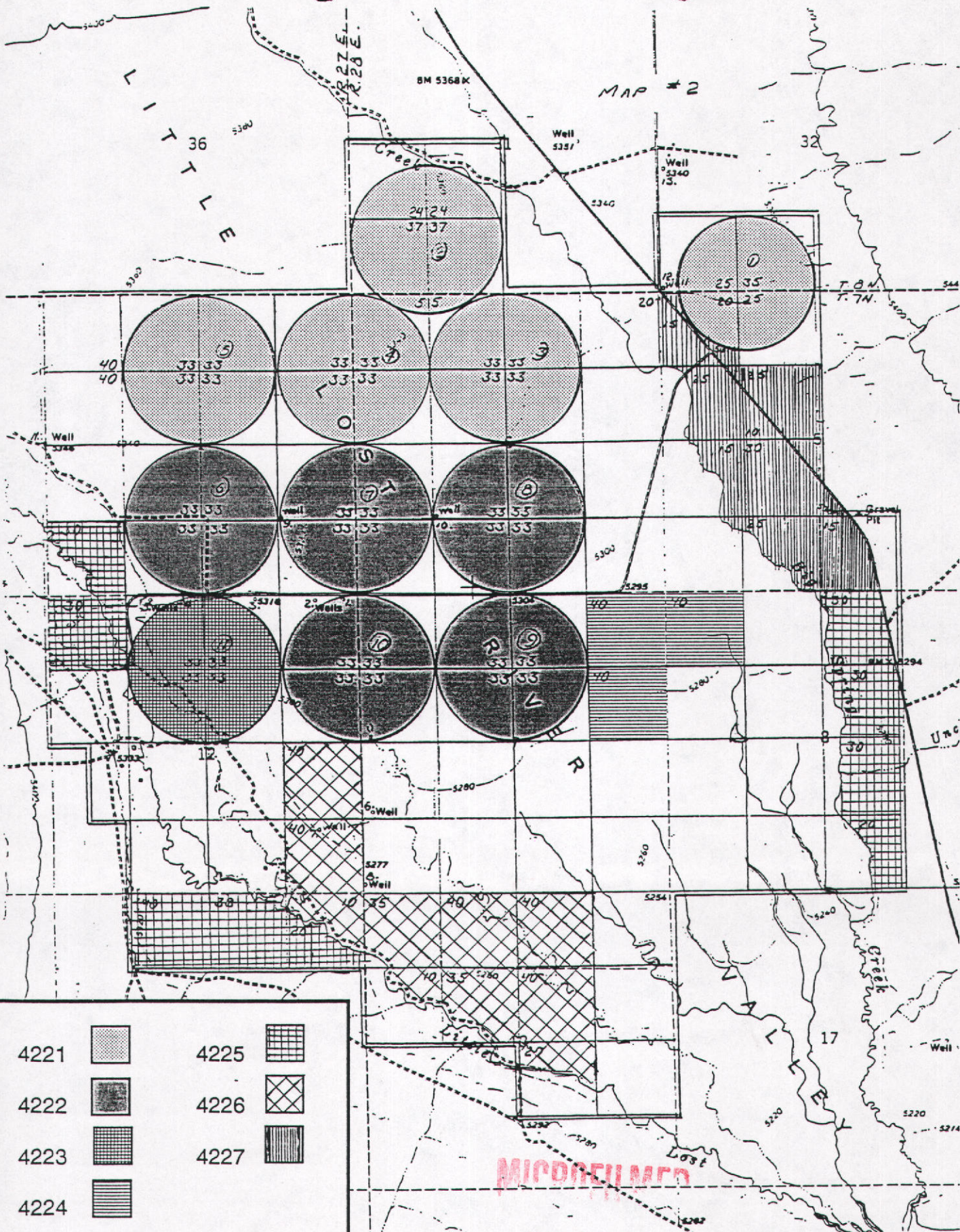
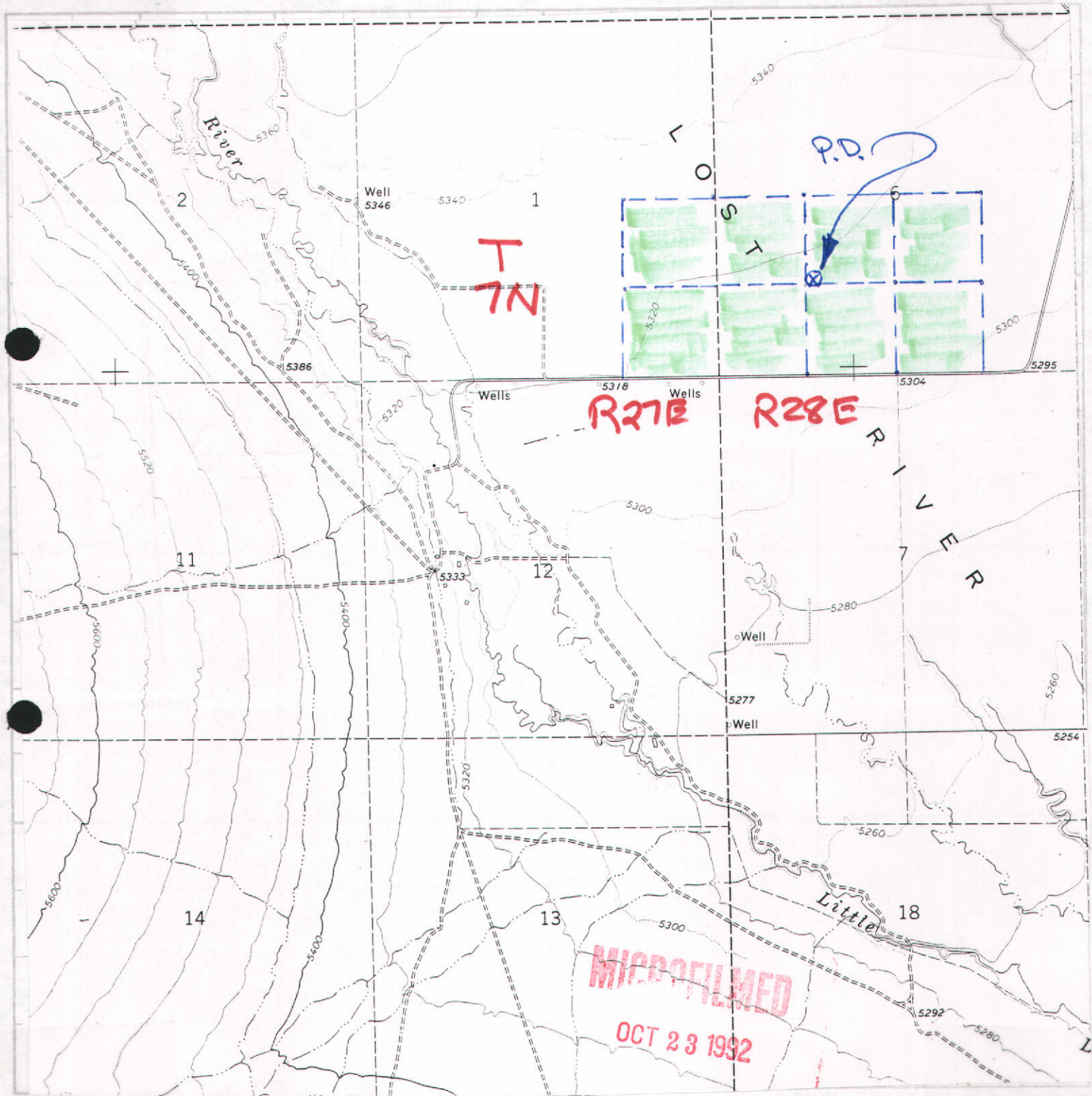




STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT
PART 3

- A. Draw a map or attach a USGS map indicating the new point(s) of diversion and/or the new place of use for rights described in part 1. Clearly depict the land by section, township and range number.



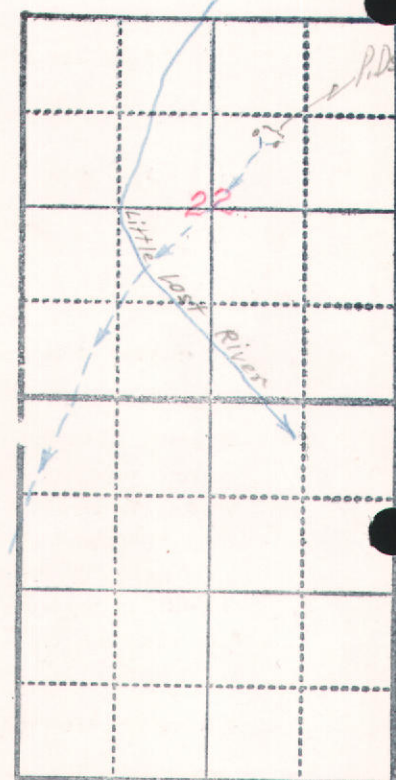
SCALE: 2 inches equal 1 mile. Draw plan in ink.

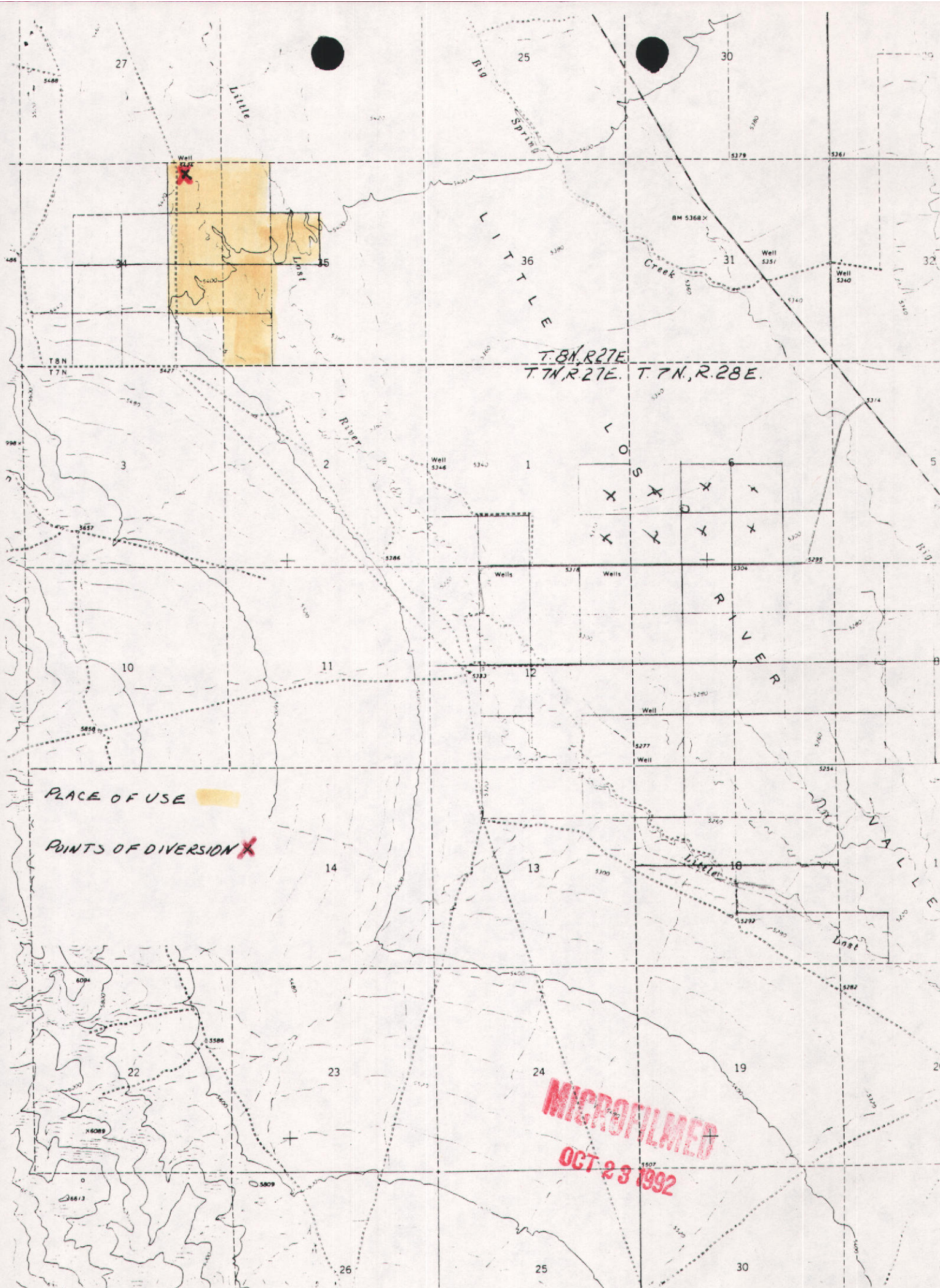
23-2091

APPLICATION FOR PERMIT To Appropriate the Subterranean Waters of The State of Idaho

Application No. G- 36384
Permit No. G- 28692
District No.

1. Name of Applicant: Venice H. Hawley
Postoffice address: Howe County: Butte State: Idaho
2. Quantity of water claimed: 320 miner's inches
(a) Rate of withdrawal in cubic feet per second 6.4 or Idaho
Miners' inches or gallons per minute
(b) Annual withdrawal in acre feet per annum
3. Source of water supply: 2 drilled wells
4. Location of ^{two} points of diversion or wells ^{are} in the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 22
Twp. 8 N , Rge. 27 E , B.M., County of Butte
5. Water is to be used for: Irrigation
6. If for municipal, industrial or recreational purposes, give:
(a) Point of use of water is in the $\frac{1}{4}$ of the $\frac{1}{4}$ of Section , Twp.
Rge. , B.M.
(b) Waste water or sewage effluent is to be returned to
at a point in the $\frac{1}{4}$ of the $\frac{1}{4}$ of Section , Twp. , Rge. , B.M.
7. Kind of works: 2 drilled wells, to be cased and equipped with turbine ^{type} pumps and motors.
8. Estimated cost of works: \$ 30,000
9. (a) Is reservoir to be used? no
(b) Capacity of reservoir:
10. The time required for the completion of such work and complete application of the water to the proposed use is 5 years.
11. If applicant is a corporation, give:
I. (a) Date and place of incorporation:
(b) Amount of capital stock: \$ (c) Amount paid in: \$
(d) Names and addresses of directors:
II. The financial resources of the applicant are (a) Cash on hand: \$
(b) Treasury stock: (c) Bonds to be issued:
(d) Other resources:
12. The land to be irrigated is described in the following tabulation:
13. Existing water rights and/or valid permits appurtenant to the lands to be irrigated are: None
(a) (cubic feet per second, inches or gallons per minute) of the water herein applied for is to be supplemental to the existing water rights.
(b) 6.4 (cubic feet per second, inches or gallons per minute) is for new lands.





PLACE OF USE

POINTS OF DIVERSION X

MICROFILMED
OCT 23 1992

January 25, 1960

Re: Application No. 36384
Venice H. Hawley

U. S. Bureau of Land Management
P. O. Box 2237
Boise, Idaho

Gentlemen:

Venice H. Hawley has filed application No. G-36384 for a permit to appropriate 6.4 c.f.s. of water from two wells located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 22, to irrigate E $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 34; W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 35, all in T 8 N., R. 27 E.

This land is in the Little Lost River drainage area which has been petitioned to be a critical Ground Water Area. This application is being held pending a decision in the matter.

Very truly yours,

GEO. M. CARTER
State Reclamation Engineer

BY:

(Mrs.) Edna P. Rutledge
Chief Clerk

EPR:ew

cc: Harley M. McDowell
P. O. Box 2161
Boise, Idaho

P. S. Receipt No. G-4584 enclosed for fees. \$ 6 50

28692
RT.

January 14, 1969

Re: Permit No. G-28692

Venice H. Hawley
Howe, Idaho

Dear Mr. Hawley:

A representative of this department has made an examination of the works covered by your permit G-28692 and has found the following:

Quantity of water diverted: 5.60 c.f.s.

Amount of water that can be recognized as beneficially used under Idaho Law: 4.36 c.f.s.*

Purpose of use: Irrigation of 320 acres in E¹/₄NE¹/₄, NE¹/₄SE¹/₄,
Sec. 34; W¹/₄NW¹/₄, SE¹/₄NW¹/₄, W¹/₄SW¹/₄, Sec. 35, T. 8 N, R. 27 E, B.M.

The priority date established is: January 22, 1960.

A fee totaling \$ 21.00 must be received within 30 days from the date of this letter in order that we can issue you the Certificate of Completion of Works and the License and Certificate of Water Right as described above.

Very truly yours,

Dean R. Reynolds
Field Examiner

DRR:dj

*The maximum quantity diverted shall not exceed 960 acre feet per season.

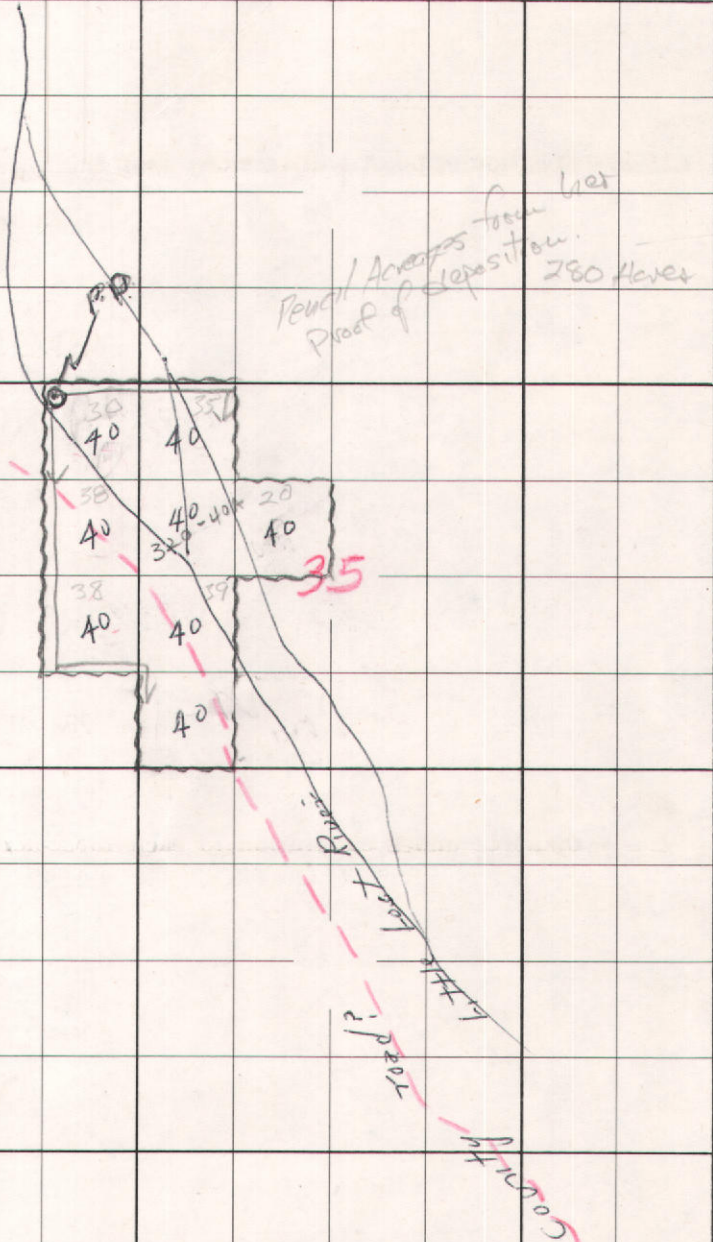
28692

Page 27E.

Trwp. 8 N.

34

35



Subdivisions - 8

(3.0 x 320)

Acreage - 320

Q = 4.36 C.F.S.

Not to exceed 960 A F/Season

To Allow

Priority Jan 22, 1960

Application for Amendment

RECEIVED
MAR 10 1966

POINT OF DIVERSION

Department of Reclamation

Permit No. G-28692

Comes now Venice Hawley and
represent to the State Reclamation Engineer of the State of Idaho:

That she is ~~XXXXXX~~ the owner and holder of Permit to Appropriate the Public
Waters of the State of Idaho, No. G-28692.

That the point of diversion is described in said Permit as being located:

Two wells in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 22, T8N-R27E, B.M.

That he now requests that the point of diversion be changed to a point
located: NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 34, T8N-R27E, B.M.

That the reason for desiring to make such change is as follows:

When this permit was filed, my family was intending to obtain the land through
desert entry that the well was to be located on. However, due to a death in the
family, all of the entries could not be proved up on and only my husband and I
completed our entries. It was decided that it would be wiser to drill on my entry
than on Federal land and it would be better and easier to maintain and use.

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

Signed at Boise, Idaho, this 8th day of March 1966

Venice Hawley

By: Harley M. McDowell

Date of Receipt at Department Of Reclamation: 3/10/66

APPROVAL OF STATE RECLAMATION ENGINEER

CARL E. TAPPAN

I, ~~XXXXXXXXXX~~, State Reclamation Engineer of the State of Idaho, HEREBY APPROVE
the above and foregoing application for amendment to Permit to Appropriate the Public
Waters of the State of Idaho, No. G-28692. This approval constitutes a new
permit and is issued as an amendment to the original permit, to which it refers and of
which it becomes a part, and said application is approved only insofar as the rights of
others will not be adversely affected thereby.

Recorded in Book 101 of
Permits, at Page G-28692
March 11, 1966

Carl E. Tappan
State Reclamation Engineer

28692



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
P. O. Box 2237
Boise, Idaho

IN REPLY REFER TO:

LO:CRK
Idaho 011173

JAN 10 1962

NOTICE OF ALLOWANCE

RECEIVED

JAN 11 1962

Department of Reclamation

Venice Hawley

Howe, Idaho

Dear Mrs. Hawley:

Your Desert Land Entry, Serial No. Idaho 011173,

Receipt No. 836322, for E1/4NE1/4, NE1/4SE1/4, Sec. 34;

W1/4, SE1/4NE1/4, Section 35,

Township 8 N., Range 27 E., Boise Meridian, Idaho,

containing 320 acres, has this day been allowed, subject

to any valid existing rights and your further compliance with laws

and regulations applicable thereto. In correspondence relating to

this entry, always refer to the serial number shown above.

c.c. DM I-3
LM
State Reclamation
Idaho Land & Map

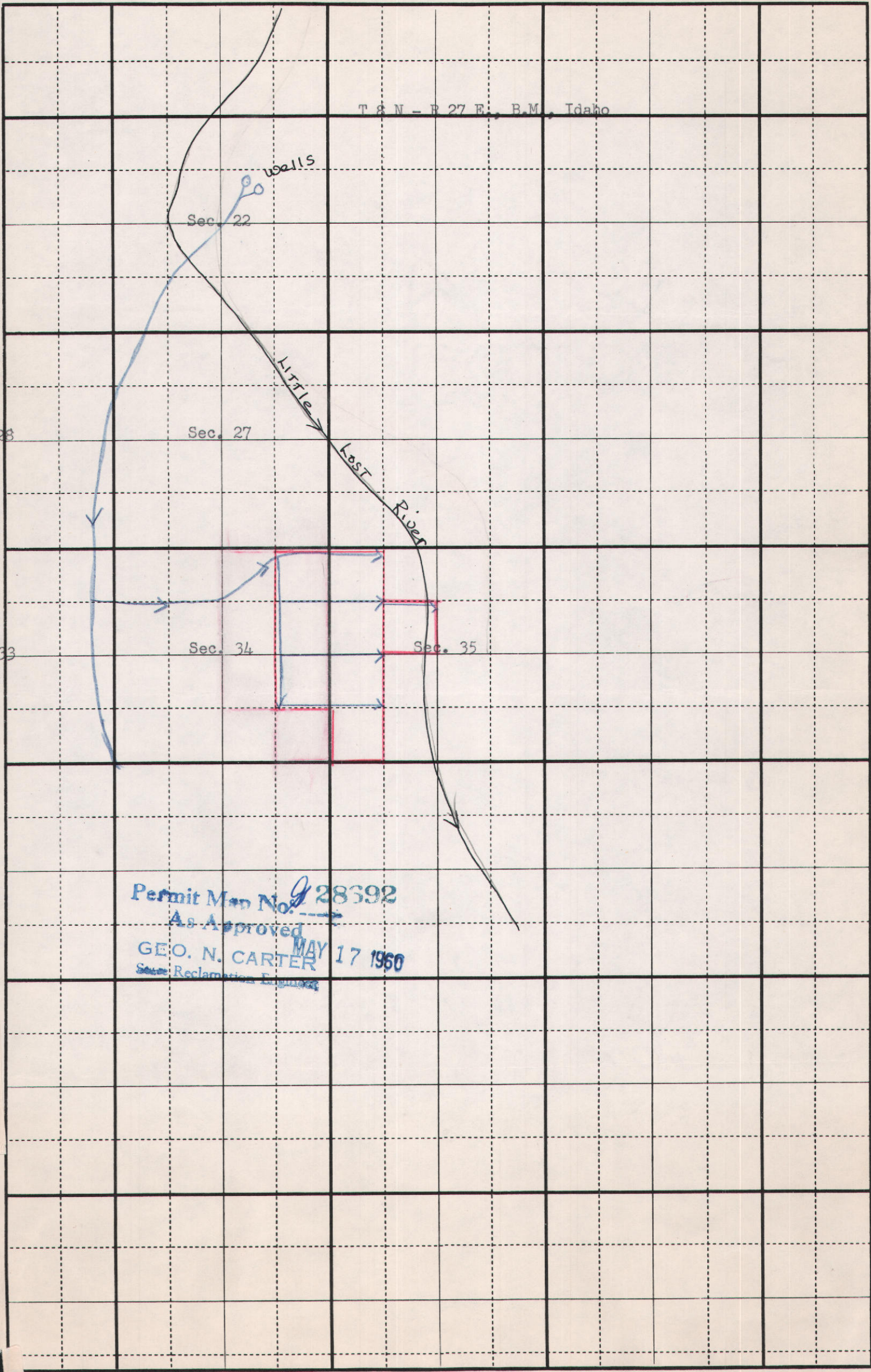
Sincerely yours,

Michael H. Sloan

Manager

NAME OF APPLICANT Venice Hawley

Form No. 0



ALE: 2 Inches Equal 1 Mile. Draw Plan In Ink.

28692

7 hit 02
RECEIVED

JUL 17 2003

Department of Water Resources

FILED IN CHAMBERS AT BLACKFOOT
LINCOLN 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,	)	
<u>Defendants,</u>	)	

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

AUG 20 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 *QJ Christian*
Deputy Clerk

MICROFILMED
AUG 28 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:

MICROFILMED

AUG 20 2003

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 SE $\frac{1}{4}$ of Section 1, T7N, R27E, and the SW $\frac{1}{4}$ and SE $\frac{1}{4}$ 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.

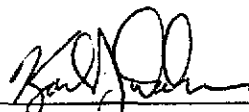
IT IS FURTHER ORDERED that license no. 33-02090 and license no. 33-02091 and portions of all other rights diverted and directly applied to lands in excess of 1,412 acres are FORFEITED.

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 8th day of April, 1996.



KARL J. DREHER, Director

Attachment

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
Deborah Drew-Ellis
Legal Secretary

WATER RIGHT
NUMBER

NAME

CFS

33-02091

Split into 33-02091A/B by Trans. Nos. 4221/4227.

33-02091A SAGEWILLOW INC

4.26

33-02091B SAGEWILLOW INC

0.10

RECEIVED
MAR 27 1996

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

COPY

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:

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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:

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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

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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.

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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

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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

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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.

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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:

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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

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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

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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.

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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.

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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.

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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.

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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):

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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

MAR 27 1996

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

MAR 27 1996

RECEIVED

MAR 20 1993

Page 1 of 12STATE OF IDAHO
DEPARTMENT OF WATER RESOURCESDepartment of Water Resources
Transfer No. 4221APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1Name of applicant Sagewillow, Inc. Phone (208) 523-0620
Post Office address c/o Holden, Kidwell, Hahn & Crapo, 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 make more effective use of water on land owned by applicant, some of which will be brought under sprinkler irrigation.

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>33-02057A</u>	<u>02/01/1950</u>	<u>5.06 cfs</u>	<u>Irrigation</u>	<u>04/01</u> to <u>11/01</u>
<u>33-02083A</u>	<u>08/23/1957</u>	<u>1.06 cfs</u>	<u>Irrigation</u>	<u>04/01</u> to <u>11/01</u>
<u>33-02086A</u>	<u>01/12/1959</u>	<u>1.37 cfs</u>	<u>Irrigation</u>	<u>04/01</u> to <u>11/01</u>
<u>33-02091A</u>	<u>01/22/1960</u>	<u>4.26 cfs</u>	<u>Irrigation</u>	<u>04/01</u> to <u>11/01</u>

2. Total amount of water being transferred 11.75 cubic feet per second and/or _____ acre-feet per annum.
3. Source of water ground water tributary to _____
4. Point(s) of Diversion:

Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion
	SW	SW	SW	32	8N	28E	Butte	Well No. 12
	SE	SE	NE	2	7N	27E	Butte	Well No. 11

5. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE ¼				NW ¼				SW ¼				SE ¼				Totals
			NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	
7N	27E	1	33	33	33	33	33	40	40	33									278
7N	28E	5					25	20											45
		6		33	33		38	38	33	33									208
8N	28E	31									24	24	37	37					122
		32											25	35					60

Total acres 713

PART 1

6. General Information:

a. Description of diversion system Wells and electric pumps.

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 ☐ 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 lands now irrigated will no longer be irrigated and other portions will be irrigated under other water rights.

d. Remarks:

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. 33-02057A, -02083A, -02086A, & 02091A conditionally approved, subject to the following limitations and conditions: Pursuant to Final Order.

Witness my hand this 12th day of March 19 96

Karl J. Diehner, Director

MAR 27 1996

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 & Crapo, 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>0.01 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>

2. 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

PART 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 effect 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

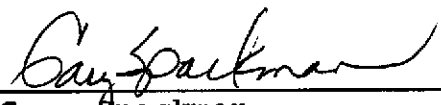
The hearing officer has considered the issues raised in the applicant's petition for reconsideration of the amended recommended order, and finds that they were raised in the initial petition for reconsideration. The issues can be raised again before the Director as exceptions.

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

RECORDED

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


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,	)	AMENDED RECOMMENDED
4225, 4226 AND 4227 IN THE NAME OF	)	ORDER
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?

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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.

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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 deNemours & 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

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.

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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. 45 acres**
T8N R28E Sec. 32	NWSW - 31 ac. 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.

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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

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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	6.4	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

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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

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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

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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 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

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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.

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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

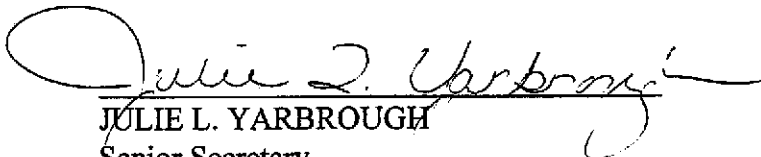
CERTIFICATE OF MAILING

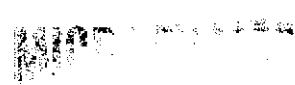
I HEREBY CERTIFY that on this 8th day of November, 1995, I mailed a true and correct copy, postage prepaid, of the foregoing **AMENDED RECOMMENDED ORDER** to the following:

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


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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,

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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

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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.

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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.

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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

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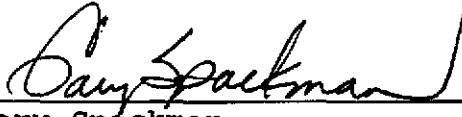
level of clear and convincing evidence justifying a reduction in acreage. This issue may also be addressed by the parties.

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

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I hereby do certify that on this 33rd day of June, 1995, I mailed a true and correct copy of the foregoing ORDER GRANTING PETITION FOR RECONSIDERATION to the following.

Kris Rhodes
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

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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

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located on the west side of the 16th line is commonly known as the Knollin 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	6.4	06/12/1909	Spring Creek
	41.3		

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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

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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.

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

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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

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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

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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

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.

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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.

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.

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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.

RECOMMENDED ORDER - Pg 12

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 1996

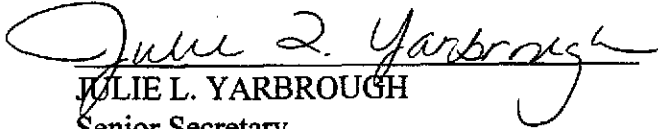
CERTIFICATE OF MAILING

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 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

RECEIVED

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

RECEIVED

MAR 27 1996

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

RECEIVED

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

RECEIVED
MAR 27 1995

MAR 27 1995

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NOS. 4221,)	ORDER GRANTING PETITION
4223, 4224, 4225, 4226, &)	TO
4227 IN THE NAME OF)	AMEND PROTEST
SAGEWILLOW, INC.)	
_____)	

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
Gary Spackman

MAR 27 1996

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

15-0871956

Page _____ of _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Transfer No. 3785

APPLICATION FOR TRANSFER OF WATER RIGHT

PART 1

APPROVED

Name of applicant Sage Willow Inc. c/o Edmund Dumke Phone 622-5385

Post Office address Howe, ID 83244

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 utilize better, more level ground for our agriculture use.

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>33-2091</u>	<u>1-22-1960</u>	<u>4.36</u>	<u>Irrigation</u>	<u>4-1</u> to <u>11-1</u>
					to _____
					to _____
					to _____

2. Total amount of water being transferred 4.36 cubic feet per second and/or _____ acre-feet per annum.

3. Source of water Groundwater tributary to _____

4. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
		NE	SW	6	7N	28E	Butte	

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	27E	1													40			40	80
	28E	6									40	40	40	40		40	40		240

OCT 23 1992

Total acres 320

PART 1

6. General Information:

a. Description of diversion system _____ Well & pump to sprinklers _____

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: _____ We will dry farm this old place of use. _____

d. Remarks: _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. _____ 33-02091
And said application is hereby _____ APPROVED _____, subject to the following limitations and conditions:
SEE ATTACHED SHEET FOR CONDITIONS OF APPROVAL.

RECEIVED

OCT 23 1992

Witness my hand this _____ day of _____

CHIEF, WATER ALLOC. BUREAU

[Signature]

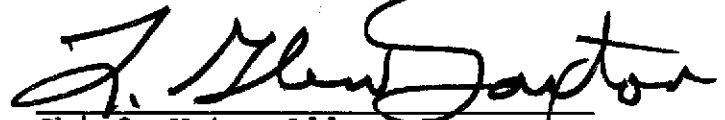
[Signature]

19 92

CONDITIONS OF APPROVAL
Transfer of Water Rights
No. 33-02091

1. The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.
2. Failure to comply with the conditions of this transfer is cause for the director to issue an order to show cause why the approval of the transfer should not be rescinded.
3. Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.
4. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
5. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre for the lands above.

Dated this 8th day of October, 1992.


Chief, Water Alloc. Bureau

OCT 23 1992

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR TRANSFER OF WATER RIGHT

PART 2

(Attach one copy for each right)

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

- a. Decree No. _____ Decreed to _____
in case of _____ vs. _____
dated _____ in _____ county of _____
- b. License No. 33-2091 issued by the Idaho Department of Water Resources.
- c. Claim No. _____ on file with the Idaho Department of Water Resources.
- d. Transfer No. _____ which produced this right.

2. Attach a copy of last year's tax notice for the property to which the water right is appurtenant or other documents which show ownership. Label document as attachment A. Check appropriate box below:

☒ Tax Notice ☐ Warranty Deed ☐ Other _____

Source of water Groundwater tributary to _____

4. Date or priority 1-22-1960

5. Water is used for the following purpose:

amount 4.36 for _____ purposes from _____ to _____
(cfs/ac-ft)
amount _____ for _____ purposes from _____ to _____
(cfs/ac-ft)
amount _____ for _____ purposes from _____ to _____
(cfs/ac-ft)

6. Total amount of water under right 4.36 cubic feet per second and/or _____ acre-feet per annum.

7. Point(s) of Diversion:

Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion
		NE	NE	34	8N	27E	Butte	

8. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE ¼				NW ¼				SW ¼				SE ¼				Totals
			NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	
8N	27E	34	40			40									40				120
		35					40	40	40		40	40							200

Total acres 320

9. Describe any other water rights used for the same purpose as described above None

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of non-use?

If yes, describe:

B. DESCRIPTION OF PORTION OF RIGHT BEING TRANSFERRED

(If the entire right is to be changed by the applicant, omit part B and C.)

1. amount— (cfs/ac-ft)

amount _____ for _____

(cfs/ac-ft) _____ amount _____ for _____

(cfs/ac-ft)

2. Point(s) of Diversion:

[illegible]

3. Lands irrigated or place of use:

[illegible]

Total acres

DESCRIPTION OF UNCHANGED PORTION OF RIGHT (omit if there is no change)

1. amount—

1. amount _____ for _____

amount

amount _____ for _____

amount

amount _____ for _____

(cfs/ac-ft)

(c/s/ac-ft)

2. Point(s) of Diversion:

[illegible]

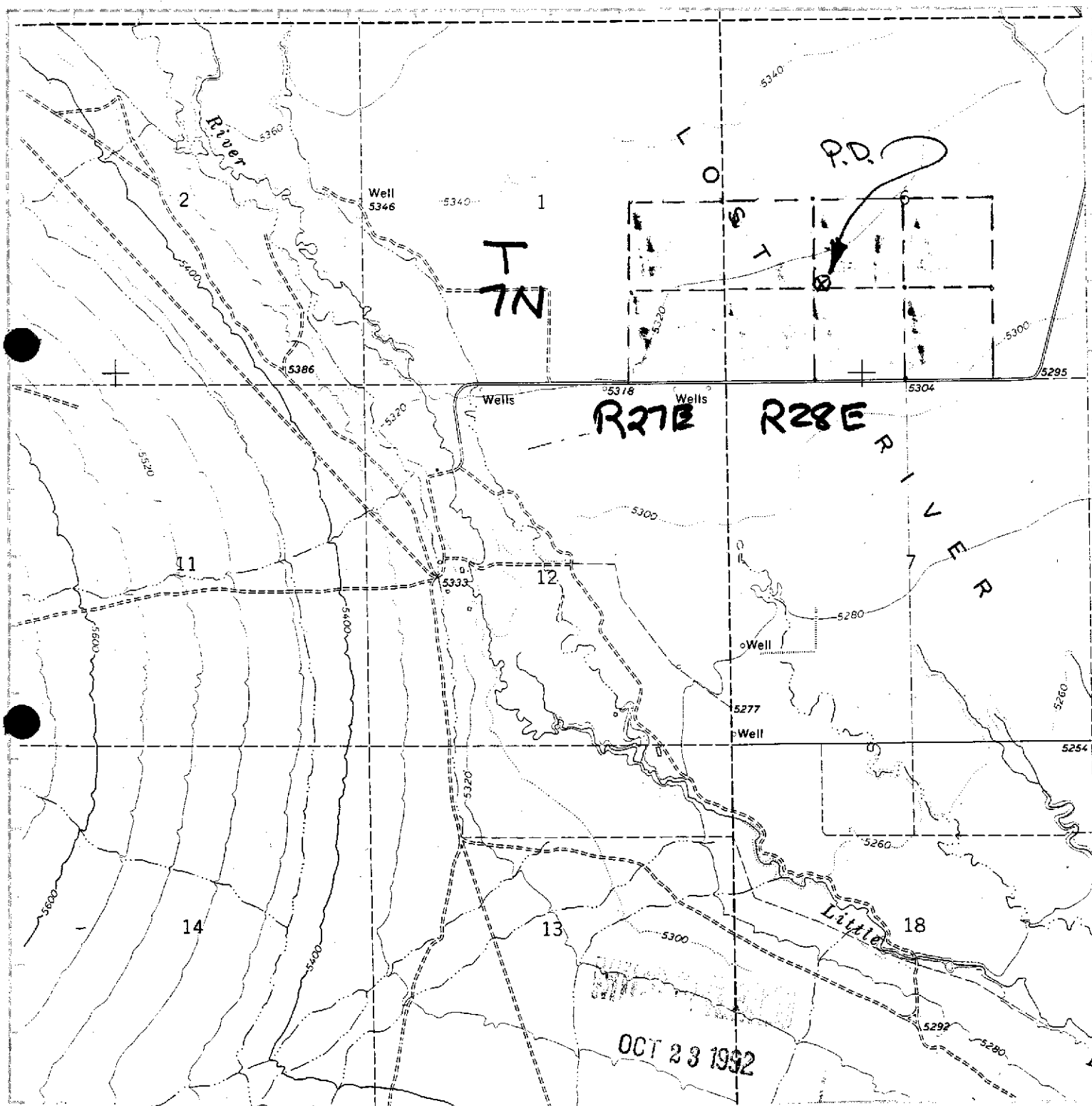
3. Lands irrigated or place of use:

[illegible]

2001-01-01

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT
PART 3

- A. Draw a map or attach a USGS map indicating the new point(s) of diversion and/or the new place of use for rights described in part 1. Clearly depict the land by section, township and range number.**



SCALE: 2 inches equal 1 mile. Draw plan in ink.

PART 3

B. CHANGES IN NATURE OF USE

1. New Nature of Use _____ Amount (cfs/ac-ft) _____ Hours/days/year _____ Period of Use _____

2. Quantity and quality of return flows and location of discharge: _____ to _____ to _____

3. Describe effects on other water uses resulting from the proposed change: _____

I hereby assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge.
I understand that any willful misrepresentations made in this application may result in voiding its approval.

Seagull Inc
Edward W. Danks Pres
(Signature of Applicant) _____ day of *October*, 19 *90*
Willa T. Hansen
(Notary Public) _____

My commission expires *8/8/96*

FOR DEPARTMENT USE ONLY

Ass't by *HWS*
Transfer contains _____ pages and _____ attachments
Received by *00* Date *10-15-90* Fee *\$50.00 # E015327*
Prelim. check by *HWS KWS*
Received by *HWS* Date *10-15-90*
Published in *Area Advertiser*
Pub. dates *Dec. 8-13, 90*
Watermaster recommendation requested on _____
Recommended for ☒ approval ☐ denial
Hearing held by _____ Date _____
Copies of protest forwarded by _____
rec'd. _____ by *ROC*
Copy of transfer sent to lien holder _____

OCT 23 1992

BUTTE COUNTY ASSESSOR
P. O. BOX 157
ARCO, ID 83213

THIS IS NOT A BILL

PARCEL NO. RP 08N27E353000 A

TAX CODE 5-00

CATEGORY DESCRIPTION
5 DRY GRAZING

LOTS / ACRES
200.000 AC
200.000

MARKET VALUE
5,310
5,310*

PRESORTED
FIRST CLASS MAIL
U. S. POSTAGE PAID
PERMIT NO. 005
ARCO, ID 83213

1990

TAXPAYERS
VALUATION

ASSESSMENT NOTICE

Taxes are based on the valuation
listed on this statement

IF THERE ARE ANY QUESTIONS
REGARDING THIS STATEMENT
NOTIFY THE ASSESSOR'S OFFICE BEFORE

JUNE 22, 1990

See the reverse side for further references
KEEP THIS COPY FOR YOUR RECORDS

PROPERTY ADDRESS
PREVIOUS NUMBER

W2W2
SE4NW4
SEC 35

Mail To:
SAGEWILLOW, INC

2416 PLAZA DEL GRANDE
LAS VEGAS, NV 89102

RECEIVED

OCT 15 1990

Department of Water Resources
Eastern District Office

BUTTE COUNTY ASSESSOR
P. O. BOX 157
ARCO, ID 83213

THIS IS NOT A BILL

PARCEL NO. RP 08N27E340100 A

TAX CODE 5-00

CATEGORY DESCRIPTION
1 IRRGTD AG
5 DRY GRAZING
19 WASTE

LOTS / ACRES
292.000 AC
143.000 AC
5.000 AC

MARKET VALUE
107,456
3,797

PRESORTED
FIRST CLASS MAIL
U. S. POSTAGE PAID
PERMIT NO. 005
ARCO, ID 83213

1990

TAXPAYERS
VALUATION

ASSESSMENT NOTICE

Taxes are based on the valuation
listed on this statement

IF THERE ARE ANY QUESTIONS
REGARDING THIS STATEMENT
NOTIFY THE ASSESSOR'S OFFICE BEFORE

JUNE 22, 1990

See the reverse side for further references
KEEP THIS COPY FOR YOUR RECORDS

PROPERTY ADDRESS
PREVIOUS NUMBER

E2NE4
SW4NE4
SE4NW4
SW4
W2SE4
NE4SE4 SEC 34

Mail To:
SAGEWILLOW, INC

2416 PLAZA DEL GRANDE
LAS VEGAS, NV 89102

MICROFILMED

OCT 23 1992

AFFIDAVIT OF PUBLICATION

I, Colleen Babcock
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 Dec. 6, 1990

and ending with the issue dated

Dec. 13, 1990
Colleen Babcock

STATE OF IDAHO }

COUNTY OF BUTTE }

On this 14 day of December
in the year of 1990, before me, a Notary Public,

personally appeared

Colleen Babcock

known or identified to me to be the person whose
name subscribed to the within instrument, and being
by me first duly sworn, declared that the statements
therein are true, and acknowledged to me that he
executed the same.

Thomas D. Cannon
Notary Public for Idaho

Residing at Arco, ID.

My commission expires: 12-17-91

**NOTICE OF PROPOSED
CHANGE OF A WATER RIGHT
NO. 93-02091**

Notice is hereby given that SAGE WIL-
LOW, INC., HOWE, ID. has applied to
the Department of Water Resources to
CHANGE A POINT OF DIVERSION AND
PLACE OF USE of the waters of a
GROUNDWATER source. The right
sought to be changed is evidenced by a
LICENSE and recorded as follows:

LICENSE NO. 93-02091

AMOUNT: 4.36

PRIORITY: 1-22-1960

**POINT OF DIVERSION: NENE, SEC
34, T 8N, R 27E, BUTTE COUNTY**

The water is used to irrigate 320 acres
within the E4NE1/4, NESE, SEC. 34;
NWNW, S4NW1/4, W4SW1/4, SEC. 35, T 8N, R
27E, B.M.

TO BE CHANGED AS FOLLOWS:

The water will be diverted from the
NESW, SEC. 6, T 7N, R 28E and used
from April 1 to November 1 to irrigate
320 acres of land within the E4SE1/4, SEC.
1, T 7N, R 27E; SW1/4, W4SE1/4, SEC. 6, T
7N, R 28E, B.M.

Any protests against the proposed
change must be filed with the Idaho
Department of Water Resources, 150
Shoup Ave., Idaho Falls, ID 83401, on or
before DECEMBER 24, 1990.

R. Keith Higginson
Director

Published in the ARCO ADVERTISER
on DECEMBER 6 & 13, 1990.

RECORDED

DEC 17 1990

Department of Water Resources
Eastern District Office

RECORDED

OCT 23 1992

WATER LICENSE

Water License No. G-28692 Priority January 22, 1960 Amount 4.36 c.f.s.THIS IS TO CERTIFY, that VENICE H. HAWLEY

of Howe, Idaho, made application for a permit to appropriate the public waters of the State of Idaho, dated January 22, 1960; that Permit G-28692 was issued pursuant to said application; that the proposed works were completed on or about 1965, with a storage/or carrying capacity of 5.60 c.f.s., said works consisting of well, pump, motor, and open ditch; and that on January 6, 1967 proof was made to the satisfaction of the State Reclamation Engineer, of the beneficial use of 960 acre feet per season, with a maximum rate of diversion of 4.36 cubic feet per second of the waters of ground water, tributary of _____, for the purpose of irrigation from April 1 to October 31; and for _____ from _____ to _____; and for _____ from _____ to _____; and that the use of said waters has been made in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer and entered in the records of the Idaho Department of Reclamation: the point of diversion is located in NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 34, T. 8 N, R. 27 E, B.M., and other additional points _____, in the County of Butte; and that the amount of water to which such right is entitled and which is hereby confirmed, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes and shall not exceed 960 acre feet per year.

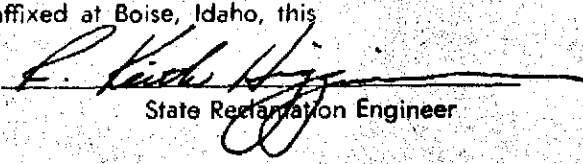
Description and location of place of use:

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 $\frac{1}{4}$	
8 N	27 E	34	40			40									40				120
		35						40	40	40		40	40						200

Total number of acres irrigated 320

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

Witness the seal and signature of the State Reclamation Engineer, affixed at Boise, Idaho, this

30th day of January, 19 69.

 State Reclamation Engineer

28692

99 0001

23-2091

APPLICATION FOR PERMIT To Appropriate the Subterranean Waters of The State of Idaho

Application No. G- 36384
Permit No. G- 28692
District No.

1. Name of Applicant: Venice H. Hawley

Postoffice address: Howe

County: Butte

State: Idaho

2. Quantity of water claimed: 320 miner's inches

(a) Rate of withdrawal in cubic feet per second 6.4 or Idaho
Miners' inches or gallons per minute

(b) Annual withdrawal in acre feet per annum

3. Source of water supply: 2 drilled wells

4. Location of ^{two} points of diversion or wells ^{are} in the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 22
Twp. 8 N , Rge. 27 E , B.M., County of Butte

5. Water is to be used for: Irrigation

6. If for municipal, industrial or recreational purposes, give:

(a) Point of use of water is in the $\frac{1}{4}$ of the $\frac{1}{4}$ of Section , Twp.
Rge. , B.M.

(b) Waste water or sewage effluent is to be returned to
at a point in the $\frac{1}{4}$ of the $\frac{1}{4}$ of Section , Twp. , Rge. , B.M.

7. Kind of works: 2 drilled wells, to be cased and equipped with turbine ^{type} pumps and motors.

8. Estimated cost of works: \$ 30,000

9. (a) Is reservoir to be used? no

(b) Capacity of reservoir:

10. The time required for the completion of such work and complete application of the water to the proposed use is 5 years.

11. If applicant is a corporation, give:

I. (a) Date and place of incorporation:

(b) Amount of capital stock: \$

(c) Amount paid in: \$

(d) Names and addresses of directors:

II. The financial resources of the applicant are (a) Cash on hand: \$

(b) Treasury stock:

(c) Bonds to be issued:

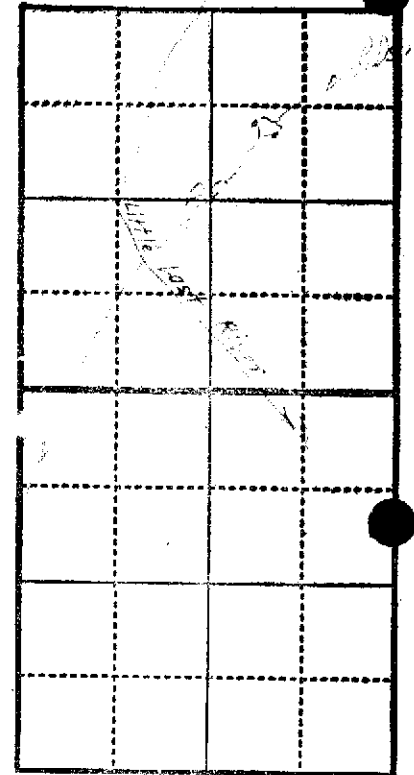
(d) Other resources:

12. The land to be irrigated is described in the following tabulation:

13. Existing water rights and/or valid permits appurtenant to the lands to be irrigated are: None

(a) (cubic feet per second, inches or gallons per minute) of the water herein applied for is to be supplemental to the existing water rights.

(b) 6.4 (cubic feet per second, inches or gallons per minute) is for new lands.



Remarks: This permit to be used in connection with the irrigation of vacant federal land now under application in the Idaho Land Office as a desert entry

BE IT KNOWN THAT The undersigned hereby makes appli cation for permit to appropriate the public waters of the State of Idaho as herein set forth.

Applicant.

Agent.

Date of first receipt at Department of Reclamation: 9:00 A.M. January 22, 1960

Returned to applicant for correction:

DESERT ENTRY - Idaho Ser. No.

Corrected application received:

Allowed: _____

Approval of State Reclamation Engineer

The number of this permit is G— 28692

Recorded in Book 101 Page 28692 Approved May 17, 1960

This is to certify that I have examined the within application for a permit to appropriate the public waters of the State of Idaho, and hereby approve the same, subject to the following limitations and conditions:

Bond in the sum of \$ _____ to be filed on or before _____

Work to begin on or before

and to continue diligently and uninterruptedly to completion, unless

temporarily interrupted by circumstances over which the permit holder has no control.

One-fifth of the work above specified to be completed on or before November 17, 1962

The whole of said work to be completed and beneficial use of water appropriated in accordance herewith, to be made and proofs offered on or before May 17, 1965

Witness my hand this 17th day of May, 1960

s/ GEO. N. CARTER
STATE RECLAMATION ENGINEER.

IN TESTIMONY WHEREOF, We, ROBERT E. SMYLLIE, Governor of the State of Idaho,
and ARNOLD WILLIAMS, Secretary of State of the State of Idaho, have caused this instrument to
be executed in the name of the State of Idaho, and caused the Great Seal of the State of Idaho to be hereunto affixed, this 17th
day of May, 1960.

Countersigned:

STATE OF IDAHO

(SEAL)

By s/ ARNOLD WILLIAMS

By s/ ROBERT E. SMYLIE

Governor

Secretary of State.

12.

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	
8 N	27 E	34 35	40			40				40	40	40		40	40		40		120 200
			STATE OF IDAHO DEPARTMENT OF RECLAMATION WHEREAS, Permit No. G-28692, in the name of Venice H. Hawley, requires proofs of completion of works and beneficial use to be made on or before May 17, 1965; and, WHEREAS, said Permit was issued in connection with Desert Land Entry Idaho Serial #011173; and, WHEREAS, Applicant was prevented from proceeding with construction pending allowance of said Desert Land Entry, which was not allowed until January 10, 1962. NOW, THEREFORE, An Extension of Time is allowed for Completion of Works and Beneficial Use Proofs on Permit No. G-28692 to January 10, 1967, or the length of time applicant was prevented from proceeding pending allowance of Desert Land Entry and a similar extension is allowed for every other act required under the terms and conditions of Permit No. G-28692. Signed at Boise, Idaho, this 16th day of March, 1965. s/ RALPH W. THOMAS Deputy State Reclamation Engineer																320

APPLICATION FOR AMENDMENT
POINT OF DIVERSION

Permit No. G-28692

Comes now Venice Hawley and represent to the State Reclamation Engineer of the State of Idaho: That she is the owner and holder of Permit to Appropriate the Public Waters of the State of Idaho, No. G-28692. That the point of diversion is described in said Permit as being located: Two wells in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 22, T 8 N., R 27 E., B.M. That he now requests that the point of diversion be changed to a point located: NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 34, T 8 N., R 27 E., B.M. That the reason for desiring to make such change is as follows: When this permit was filed, my family was intending to obtain the land through desert entry that the well was to be located on. However, due to a death in the family, all of the entries could not be proved up on and only my husband and I completed our entries. It was decided that it would be wiser to drill on my entry than on Federal land and it would be better and easier to maintain and use.

That no one will be injured by such change and that such change will be made a Permit Holder's own risk.

Signed at Boise, Idaho this 8th day of March, 1966.

/s/ VENICE HAWLEY

By: HARLEY M. McDOWELL

Date of Receipt at Dept. of Reclamation: March 10, 1966.

APPROVAL OF STATE RECLAMATION ENGINEER

I, Carl E. Tappan, State Reclamation Engineer of the State of Idaho, HEREBY APPROVE the above and foregoing application for amendment to Permit to Appropriate the Public Waters of the State of Idaho No. G-28692. This approval constitutes a new permit and is issued as an amendment to the original permit, to which it refers and of which it becomes a part, and said application is approved only insofar as the rights of others will not be adversely affected thereby.

/s/ CARL E. TAPPAN

State Reclamation Engineer

Recorded in book 101, of permits, at page G-28692, March 11, 1966.

LICENSE ISSUED FOR 4.36 SEC. FT.
LICENSE PAGE NO. 28692

MEMORANDUM

TO: FILE 33-02091B

FROM: PAM SKAGGS *JS*

RE: TRANSFER # 4227

DATE: 11-05-93

=====

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

RECEIVED

MAR 27 1996

MEMORANDUM

TO: FILE 33-02091A

FROM: PAM SKAGGS²⁸

RE: TRANSFER # 4221

DATE: 11-05-93

=====

Original Transfer Application, Form and correspondence regarding the above referenced Transfer is located within file # 33-02057A.

MAR 27 1996



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

October 9, 1992

SAGE WILLOW INC
% EDMUND DUMKE
HOWE ID 83244

RE: Transfer of Water Right No. 33-02091

Dear Water Right Holder(s):

Enclosed is a copy of your approved Application for Transfer of the above referenced water right (Transfer No. 3785). Be sure to note any conditions of approval as listed on the second page.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jim Johnson', written over the typed name and title.

JIM JOHNSON
Water Rights Supervisor

JJ:cz

Enclosure

RECEIVED

OCT 23 1992

MEMORANDUM

TO: File 33-02091

FROM: Sharla

DATE: October 7, 1992

RE: Transfer Review (No. 3785)

The above referenced transfer application proposes to change the point of diversion and place of use under this right.

Advertising was completed correctly. Proof of ownership is evidenced in the file in the form of a tax notice.

No indication is made in the file as to when the well was drilled, nor is there a drilling permit. The standard condition regarding drilling permit requirements will be added. The transfer can be approved with the following conditions:

- T07 The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.
- T08 Failure to comply with the conditions of this transfer is cause for the director to issue an order to show cause why the approval of the transfer should not be rescinded.
- T09 Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.
- 046 Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
- R30 This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre for the lands above.

RECEIVED
OCT 23 1992

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
TRANSFER ANALYSIS SHEET

INITIAL REVIEW BY:

KC Wilson

1. Right number 33-2091 Applicant Sage Willow Trac. c/o Edward ^{Dunkle} Smith
2. Type of right: ☐ Decree ☒ License ☐ Claim
3. Purpose of transfer: ☐ Change point of diversion ☐ Add diversion point(s) ☒ Change place of use
☐ Other _____

4. Check:

- a. ☒ Source ☒ Priority ☒ Amount ☒ Purpose ☒ Period of use
- b. ☒ Description of original point of diversion.
- c. ☒ Description of original place of use.

5. Amount of land &/or water transferred:

- a. ☒ All of right.
- b. ☒ Part of right (NOTE! Part B should be filled in only if part of the right is owned by the applicant).
- c. ☒ Check description of point(s) of diversion.
- d. ☒ Check description of place of use.
- e. ☒ Check map (shows p.d. and p.u. after transfer).
- f. ☒ Check for correct signature, notarization, and fee.
- g. ☒ Check proof of ownership of right &/or land from which water is transferred.
- h. ☒ Check for expansion in use of right. Comments NONE

- i. ☒ Check for existing water rights from same source, on land water is being transferred to.

Right number(s) 33-2090 (diff P/D)

- j. ☒ Is use within a Watermaster District? ☐ Yes ☒ No

If yes, what district? _____

FINAL PROCESSING REVIEW BY: _____

1. Watermaster recommendation requested on _____ Received on _____
2. Is transfer published correctly? ☒ Yes ☐ No
3. Protest received? ☐ Yes ☒ No

ADP 12-24-90

RECOMMENDED ACTION

1. ☒ Approve
2. ☐ Deny
3. Conditions* _____

4. By RDC Date 1/2/91

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576
Ident. Number 33-2091
Date Received _____
Receipt Number _____

NOTICE OF CLAIM
TO A
WATER RIGHT
ACQUIRED UNDER STATE LAW

RECEIVED

OCT 15 1990

Department of Water Resources
Eastern District Office

Phone (208) 522-7784

1. Name of Claimant(s) Sage Willow, Inc. Mailing Address 545 Shoup Avenue, Idaho Falls, Idaho Zip 83402
2. Date of Priority (Only (1) per claim) January 22, 1960
3. Source of water supply (a) Groundwater
which is tributary to (b) _____
- 4.a. Location of existing
point of diversion is: Township 8N. Range 27E. Section 34 ,
1/4 of NE 1/4 of NE, Govt. Lot, _____ B.M., County of Butte
Additional points of diversion if any: _____
- b. If instream flow, beginning point of claimed instream flow is:
Township _____ Range _____ Section _____, _____ 1/4 of _____ 1/4 of _____ 1/4,
Govt. Lot _____ B.M., County of _____
ending point is: Township _____ Range _____ Section _____, _____ 1/4 of
_____ 1/4 of _____ 1/4 Govt. Lot _____ B.M., County of _____
5. Description of existing diversion works (Dams, Reservoirs, Ditches,
Wells, Pumps, Pipelines, Headgates, Etc), including the dates of any
changes or enlargements in use, the dimensions of the diversion works as
constructed and as enlarged and the depth of each well. Well and pump.

OCT 23 1992

6. Water is claimed for the following purposes:

(Both dates are inclusive) (cfs) (acre feet)

For Irrigation purposes from 04/01 to 11/01 amount 4.36 or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) 4.36 (cfs) and/or (b) _____ (acre feet)

8. Total consumptive use claimed is 1120 acre feet per annum.

9. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock Etc.)

10. Description of place of use:

- If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
- If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instruction for standard symbols.

TWP:RNG:SEC:	NE1/4				:	NW1/4				:	SW1/4				:	SE1/4				:	TLS
:	NE	NW	SW	SE	:	NE	NW	SW	SE	:	NE	NW	SW	SE	:	NE	NW	SW	SE	:	
8N:27E: 34:40				40	:					:					:	40				:	120
	35				:	40	40	40		:	40	40			:					:	200
					:					:					:					:	
					:					:					:					:	
					:					:					:					:	
					:					:					:					:	
					:					:					:					:	

Total number of acres irrigated 320

11. In which county(ies) are lands listed above as place of use located?
Butte

12. Do you own the property listed above as place of use? Yes X No _____
If your answer is No, describe in Remarks below the authority you have to claim this water right.

13. Describe any other water rights used at the same place and for the same purposes as described above.

_____ or None (X)

14. Remarks:

Last Name Sage Willow, Inc. Ident No. 33-2091

15. Basis of Claim (Check one) Beneficial Use _____ Posted Notice _____
Permit _____ Decree _____ License X

If applicable provide IDWR Water Right Number 33-2091
Court _____ Case Number _____ Decree Date _____
Plaintiff vs Defendant _____

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read, and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.
Number of attachments 1

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s) _____ Date _____
_____ Date _____

For Organizations: I do solemnly swear or affirm that I am _____ of Sage Willow, Inc., that I have signed the
Title Organization

foregoing document in the space below as _____
Title

of Sage Willow, Inc. and that the statements contained in the
Organization

foregoing document are true and correct.

Signature of Authorized Agent Edward W. Dumble President

Title and Organization _____, Sage Willow, Inc. Date 9/27/89

State of Idaho/or Idaho)
County of Blaine) SS.

Subscribed and sworn (or affirmed) before me this 27 day
of September, 1989.

Notary Public Supreme McLaughlin
Residing at Blaine County
My Commission Expires 1994

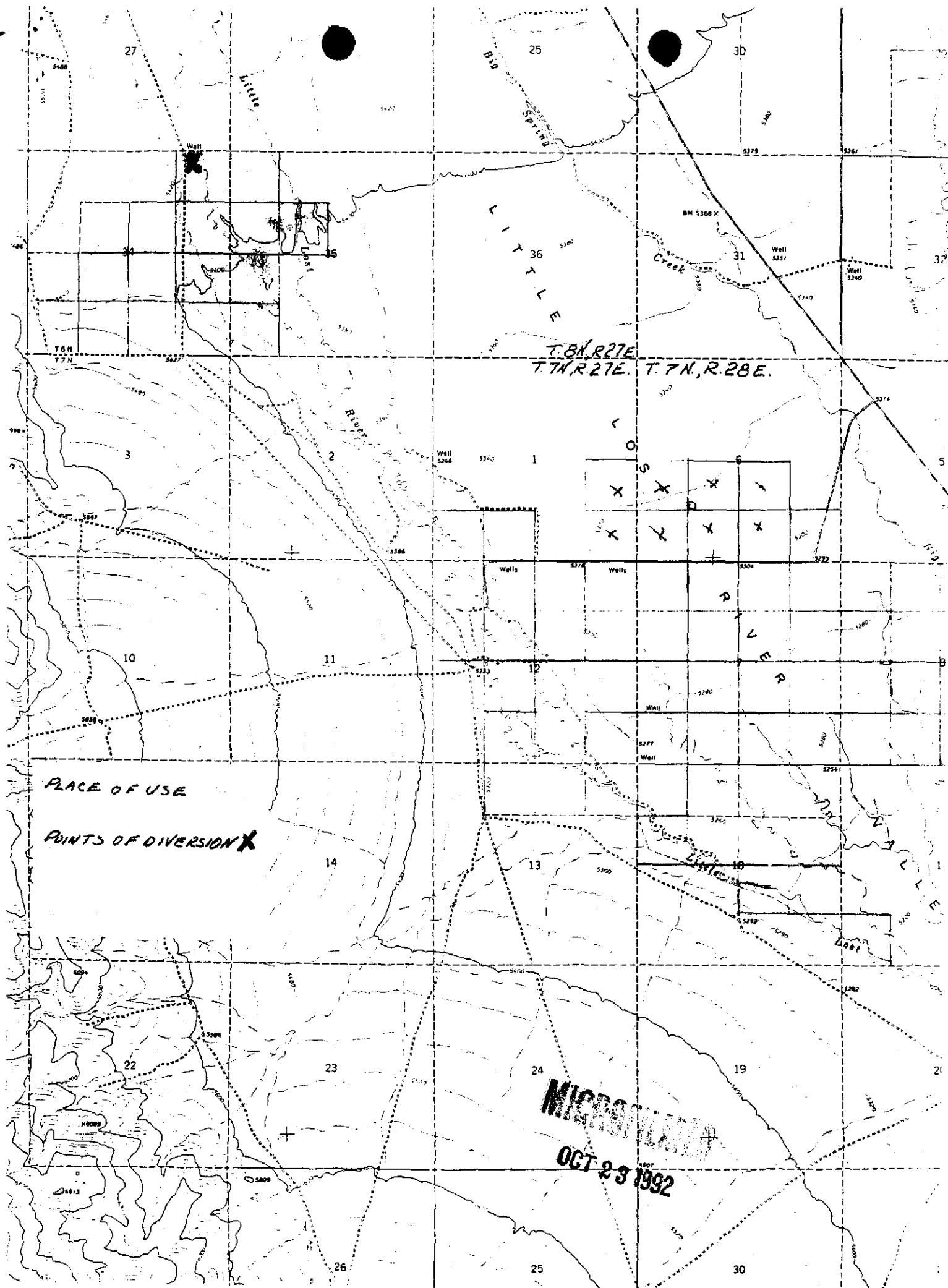
17. Notice of Appearance:

Notice is hereby given that I, Kent W. Foster will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature _____
Address P.O. Box 50130, Idaho Falls, Idaho 83405
Date _____

Last Name Sage Willow, Inc. Ident. Number 33-2091

OCT 23 1992



27-Nov-1990

EDMUND DUMKE

HOWE ID 83244

RE: Application No. 33-02091

Dear Water Right Applicant:

The Department of Water Resources acknowledges receipt of your water right permit. This office is currently in the process of advertising the application in the ARCO ADVERTISER on DECEMBER 6 & 13, 1990. The advertisement will be published for two consecutive weeks, and a period of ten days following the second publication will be allowed for the submittal of protests.

If the application is protested, you will be sent a copy of the protest. The protest must be resolved before the application is approved or denied. If the protest is not resolved voluntarily, this Department will conduct a conference and/or hearing on the matter.

If the application is not protested, it will be forwarded to our state office in about five weeks. State office personnel will conduct a complete review prior to final processing of the application and will notify you of the outcome of this review. When a permit is issued, you will be sent a copy. A typical processing time for an unprotested application is about eight weeks.

Please feel free to contact this office if you have any questions regarding this procedure.

Sincerely,

HAROLD W. JONES
Water Rights Supervisor

HWJ/rb

RECEIVED

OCT 23 1992

27-Nov-1990

ARCO ADVERTISER
PO DRAWER C
ARCO ID 83213

Gentlemen:

Enclosed you will find a legal notice which we wish to have published on the dates indicated (once a week for two consecutive weekly issues) in your newspaper. 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. Your cooperation is appreciated.

Please send the affidavit of publication and publication billing to this office before DECEMBER 24, 1990.

Yours truly,

Rita Bodell
Secretary/Office Coordinator

Encl.

RECEIVED
OCT 23 1992

OCT 23 1992

NOTICE OF PROPOSED CHANGE OF A WATER RIGHT
NO. 33-02091

Notice is hereby given that SAGE WILLOW, INC., HOWE, ID, has applied to the Department of Water Resources to CHANGE A POINT OF DIVERSION AND PLACE OF USE of the waters of a GROUNDWATER source. The right sought to be changed is evidenced by a LICENSE and recorded as follows:
LICENSE NO. 33-02091 AMOUNT: 4.36

PRIORITY: 1-22-1960

POINT OF DIVERSION: NENE, SEC 34, T 8N, R 27E, BUTTE COUNTY

The water is used to irrigate 320 acres within the E1/2NE1/4, NESE, SEC. 34; NWNW, S1/2NW1/4, W1/2SW1/4, SEC. 35, T 8N, R 27E B.M.

TO BE CHANGED AS FOLLOWS:

The water will be diverted from the NESW, SEC. 6, T 7N, R 28E and used from April 1 to November 1 to irrigate 320 acres of land within the E1/2SE1/4, SEC. 1, T 7N, R 27E; SW1/4, W1/2SE1/4, SEC. 6, T 7N, R 28E, B.M.

Any protests against the proposed change must be filed with the Idaho Department of Water Resources, 150 Shoup Ave., Idaho Falls, ID, 83401, on or before DECEMBER 24, 1990.

R. Keith Higginson
Director

Published in the ARCO ADVERTISER on DECEMBER 6 & 13, 1990.

OCT 23 1992

file 33-2070
33-2091
33-2057
33-2083

RECEIVED

AUG 17 1989

Batterymarch: AgriVest

Department of Water Resources

August 14, 1989

Department of Water Resources
Statehouse
Boise, ID 83720

Re: Loan No. 95688-H, Hawley
Permit #R-883, G-28691, G-28692
and License #21362 & G-27052

Gentlemen:

This loan has been paid in full. Therefore, we wish to inform you that we are no longer interested in water Permit #R-882, G-28691, G-28692 and License #21362 & G-27052, as described in Mortgage Deed dated July 16, 1968, given by Lawrence Hawley, et ux.

Said mortgage was recorded in the Public Records of Butte County in Book 17, Page 318.

Sincerely,

Jean Wright

Jean Wright
Assistant Secretary

jw
cc: Ag-Land Mortgage

RECEIVED

OCT 28 1989

January 25, 1960

Re: Application No. 36384
Venice H. Hawley

U. S. Bureau of Land Management
P. O. Box 2237
Boise, Idaho

Gentlemen:

Venice H. Hawley has filed application No. G-36384 for a permit to appropriate 6.4 c.f.s. of water from two wells located in the SW1/4, Sec. 22, to irrigate E1/4, NE1/4, Sec. 34; W1/4, SW1/4, W1/4, Sec. 35, all in T 2 N., R. 27 E.

This land is in the Little Lost River drainage area which has been petitioned to be a critical Ground Water Area. This application is being held pending a decision in the matter.

Very truly yours,

GEO. W. CARTER
State Reclamation Engineer

BY:

(Mrs.) Edna P. Rutledge
Chief Clerk

EPR:ew

cc: Harley M. McDowell
P. O. Box 2161
Boise, Idaho

P. S. Receipt No. G-4584 enclosed for fees. \$ 6 50

28692
RT.

January 30, 1969

Re: Permit No. G-28692

Venice H. Hawley
Howe,
Idaho 83244

Dear Mr. Hawley:

Enclosed you will find your Water License issued on the
above numbered permit.

Also enclosed is departmental receipt No. 2575 in the
amount of \$21.00 covering the fees.

Very truly yours,

C. Stephen Allred, Assistant
State Reclamation Engineer

CSA:kh

Enclosures

28692

C
O
P
Y

January 14, 1969

Re: Permit No. G-28692

Venice H. Hawley
Hawley, Idaho

Dear Mr. Hawley:

A representative of this department has made an examination of the works covered by your permit G-28692 and has found the following:

Quantity of water diverted: 5.60 c.f.s.

Amount of water that can be recognized as beneficially used under Idaho Law: 4.36 c.f.s.*

Purpose of use: Irrigation of 320 acres in E1/4, NE1/4, Sec. 34, W2N1/4, SE1/4, W3N1/4, Sec. 35, T. 8 N., R. 27 E., B.M.

The priority date established is: January 22, 1960.

A fee totaling \$ 21.00 must be received within 30 days from the date of this letter in order that we can issue you the Certificate of Completion of Works and the License and Certificate of Water Right as described above.

Very truly yours,

Dean R. Reynolds
Field Examiner

DRR:dj

*The maximum quantity diverted shall not exceed 960 acre feet per season.

28692

January 14, 1969

Re: Permit No. G-28692

Venice H. Hawley
Howe, Idaho

Dear Mr. Hawley:

A representative of this department has made an examination of the works covered by your permit G-28692 and has found the following:

Quantity of water diverted: 5.60 c.f.s.

Amount of water that can be recognized as beneficially used under Idaho Law: 4.36 c.f.s.*

Purpose of use: Irrigation of 320 acres in E $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{2}$ SE $\frac{1}{4}$,
Sec. 34; W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{2}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 35, T. 8 N, R. 27 E, B.M.

The priority date established is: January 22, 1960.

A fee totaling \$ 21.00 must be received within 30 days from the date of this letter in order that we can issue you the Certificate of Completion of Works and the License and Certificate of Water Right as described above.

Very truly yours,

Dean R. Reynolds
Field Examiner

DRR:dj

*The maximum quantity diverted shall not exceed 960 acre feet per season.

28692

LJ-200
1-63

STATE OF IDAHO DEPARTMENT OF RECLAMATION

P. 4488
9:01 AM

Date 9-13-1968 DISCHARGE MEASUREMENT NOTES

Vanise Hawley

River at _____

Angle cor- rect	Dist. from initial point	Width	Depth	Obser- vation depth	Revo- lutions	Time in sec- onds	VELOCITY		Adjust- ed for hor. angle or -----	Area	Discharge
							At point	Mean in ver- tical			
<u>EW</u>	<u>1.0</u>	<u>.15</u>									
	<u>1.3</u>	<u>.40</u>	<u>.14</u>		<u>15</u>	<u>47</u>	<u>.37</u>			<u>.16</u>	<u>.06</u>
	<u>1.8</u>	<u>.5</u>	<u>.85</u>		<u>20</u>	<u>44</u>	<u>.50</u>			<u>.43</u>	<u>.22</u>
	<u>2.3</u>	<u>.5</u>	<u>1.20</u>		<u>40</u>	<u>47</u>	<u>.89</u>			<u>.60</u>	<u>.53</u>
	<u>2.8</u>	<u>.5</u>	<u>1.25</u>		<u>40</u>	<u>42</u>	<u>.99</u>			<u>.63</u>	<u>.61</u>
	<u>3.3</u>	<u>.5</u>	<u>1.32</u>		<u>40</u>	<u>49</u>	<u>.86</u>			<u>.66</u>	<u>.57</u>
	<u>3.8</u>	<u>.5</u>	<u>1.32</u>		<u>50</u>	<u>48</u>	<u>1.08</u>			<u>.66</u>	<u>.71</u>
	<u>4.3</u>	<u>.5</u>	<u>1.22</u>		<u>40</u>	<u>44</u>	<u>.95</u>			<u>.61</u>	<u>.58</u>
	<u>4.8</u>	<u>.5</u>	<u>1.20</u>		<u>40</u>	<u>49</u>	<u>.84</u>			<u>.60</u>	<u>.50</u>
	<u>5.3</u>	<u>.5</u>	<u>1.02</u>		<u>30</u>	<u>47</u>	<u>.69</u>			<u>.51</u>	<u>.35</u>
	<u>5.8</u>	<u>.45</u>	<u>.50</u>		<u>40</u>	<u>48</u>	<u>.87</u>			<u>.23</u>	<u>.20</u>
<u>EW</u>	<u>6.2</u>	<u>.2</u>	<u>0</u>								
	<u>5.2</u>	<u>.52</u>									
											<u>4.33</u>
											<u>2.18</u>

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

286092

Form 23
2M-4-65

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
BOISE

REPORT OF EXAMINER

PERMIT NO. G-28692

REPORT ON PROOF OF Completion of Works & Beneficial Use

1	6
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(3.0 x 370)

$$Q = 4.36 \text{ C.F.S.}$$

2	4
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Priority Jan 22, 1960

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
BOISE, IDAHO
REPORT OF EXAMINER

Permit No. G-28692

This proof is for Comp. of Works & Beneficial Use

In Water District No. 9

1. Name of applicant Venice H. Hawley
2. Source of water supply: subterranean
3. Location of point of diversion: Is in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34
T. 8 N R. 27 E County of Butte

4. Describe works as they exist, giving dimensions and capacities of same:

Bag-Warner pump 16KxH15TG Serial #35477 2500 G.P.M.
100' head. Powered by V.D.M. International Engine. 12" discharge into
open ditch.

5. Water is used for: irrigation

6. State whether or not water has been turned into works of diversion: yes

7. List legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact number of acres under cultivation in each forty-acre tract. (Describe manner and place of use if other than irrigation):

E $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 34; W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 35, T. 8 N, R. 27 E, B.M.

Her Proof of definition shows 380 Acres

(Submit map on attached plat, showing location and details of above description.)

8. What large stream would the water here appropriated finally reach? Little Lost River

Remarks: Measurement made with Pigny Current Meter #440
Measurement attached. Mr. Hawley started Engine and
Pump for measurement. Desert Entry.

7.50 x 0.2 = 5.60 cfs.

This examination was made on the 13th day of September, 1968

(Signed) Robert W. Hamilton

Examiner.

28692 plat
myl

Venice R. Hawley ditch
Howe, Idaho 16" 155' pt 8-11-67
H-45' 60' 4th line

Permit No. G-28692 - 4-220' 1st line

Examination for Comp. of Works & Beneficial Use

County Butte

Quantity: 6.4 c.f.s. Sec. 34 T. 8N R. 27E

Source: subterranean

P.D.: (2) ~~NE 1/4~~ Sec. 34, T. 8 N, R. 27 E, B.M.

Use: Irrigation

Extension: yes

Protest:

Completion of Works:

Other Rights:

Filed: January 22, 1960

Due: January 10, 1967

Made: January 6, 1967

Priority: January 22, 1960

INSTRUCTIONS TO EXAMINERS

1. Always carefully note the location of the point of diversion and accurately plat same.
2. When proof is for beneficial use, carefully check up the number of acres actually irrigated in each forty and accurately plat same.
3. Make a map showing the correct location of streams and ditches, and the irrigated lands, and any adjacent permanent landmarks, such as towns, lakes, large streams and public roads.
4. If any unusual conditions are discovered, make plain statement of them under remarks.
5. Always see the holder, if possible, and go over the whole ground with him and make your report only upon actual existing facts and conditions.
6. Give general characteristics of soils, topography, and crops raised.

Butte

January 18, 1967

Re: Permit No. G-28692

Venice Hawley
Howe, Idaho

Dear Mrs. Hawley:

We acknowledge receipt of the depositions of holder and two witnesses, also affidavit of publication in the Arco Advertiser, all submitted in proof of completion of works and beneficial use on Permit No. G-28692.

Before final action is taken in the matter, the law requires that a field examination be made by an engineer from this department.

We cannot tell just when this examination will be made, but our field engineer will try to contact you at the time he makes the examination so that arrangements may be made to show him over the grounds.

Very truly yours,

M. Russell Bosch
Office Manager

MRB:rw

28692

Affidavit of Publication

RECEIVED
JAN 12 1967

Department of Reclamation

I, Elizabeth L. Brammer, 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 four (4) consecutive weeks, commencing

with the issue dated December 8, 1966

and ending with the issue dated December 29, 1966

Elizabeth L. Brammer

Subscribed and sworn to before me this

29 day of Dec, 1966

Betty J. Mayo
Notary Public.

Residence: Arco, Idaho.

My commission expires 2-4, 1969

PUBLIC NOTICE

NOTICE OF PROOF OF COMPLETION OF WORKS AND APPLICATION OF WATER TO BENEFICIAL USE

Notice is hereby given that on the 6th day of January, 1967, at Arco, County of Butte, State of Idaho, before Charles Jones, Notary Public at Arco, Idaho, proof will be submitted of the completion of works for the diversion of 6.4 cubic feet per second of underground water from a well, and of the application to beneficial use of said water, in accordance with the terms and conditions of Permit No. G-28692, heretofore issued by the Department of Reclamation of the State of Idaho.

1. The name and postoffice address of the person or corporation holding said permit is Venice H. Hawley, Howe, Idaho.

2. Said works of diversion will be fully completed on the date for such completion, and the amount of water which said works are capable of conveying to the place of use is 6.4 cubic feet per second.

3. The use to which said water has been applied is irrigation purposes, and the amount applied to beneficial use is 6.4 cubic feet per second.

4. The point of diversion of said water is NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 34, Township 8 North, Range 27 East, B. M.

5. The place where said water is used is Township 8 North, Range 27 East, Section 34, NE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$; Section 35, NW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$.

6. The date of priority which said user is prepared to establish is January 22, 1960.

R. KEITH HIGGINSON,
State Reclamation Engineer.
Pub. 12-8 thru 12-29, 1966.

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
Boise, Idaho
Permit No. G-28692

RECEIVED
JAN 12 1967
Department of Reclamation

PROOF OF APPLICATION OF WATER TO BENEFICIAL USE

and Completion of Works

DEPOSITION OF HOLDER

Ques. 1. State your name, residence occupation and postoffice address: _____

Venice Hawley, Howe, Idaho, housewife

Ques. 2. If acting in behalf of corporation, state its name, principal place of business (if foreign corporation, give name of postoffice of statutory agent), your position with reference to same, and your authority for appearing in its behalf:

individual

Ques. 3. State number, approval date of permit, and date of priority: G-28692

approved - 5/17/60 priority - 1/22/60

Ques. 4. State source of water supply: well

Give location of point of diversion, showing subdivision, section, township and range

Township 8 North - Range 27 East, B.M. Section 34 - NE $\frac{1}{4}$ NE $\frac{1}{4}$

Ques. 5. Describe your works of diversion: pump & motor

_____ ; state amount of water they are capable of conveying from point of diversion to place of use: 220" ; Give name of canal or ditch or other works by which water is conducted to such place of use: ditch
_____ ; if a well, state depth of well 155' ; depth and size of casing 155' x 16" ; depth to water 65' ; if pump is used, state discharge of pump: 220" ; tell how it was measured or determined diameter of pipe x length of discharge x a factor ; if sprinkler irrigation, give number and size of nozzles and operating pressure: gravity

Ques. 6. State for what purpose water is used: irrigation
(If for irrigation, name each subdivision in which used and number of acres in each subdivision that have actually been irrigated with said water:

Township 8 North - Range 27 East, B.M. - Section 34 - NE $\frac{1}{4}$ NE $\frac{1}{4}$ - 30 ac.,

SE $\frac{1}{4}$ NE $\frac{1}{4}$ - 38 ac., NE $\frac{1}{4}$ SE $\frac{1}{4}$ - 38 ac. Section 35 - NW $\frac{1}{4}$ NW $\frac{1}{4}$ - 35 ac., SW $\frac{1}{4}$ NW $\frac{1}{4}$ - 40 ac.,

SE $\frac{1}{4}$ NW $\frac{1}{4}$ - 20 ac., NW $\frac{1}{4}$ SW $\frac{1}{4}$ - 39 ac., SW $\frac{1}{4}$ SW $\frac{1}{4}$ - 40 ac.

Well Log in

28692

State nature of all improvements which have been made as a direct result of said use:

All improvements made are a direct result of said use.

Ques. 6-a: If this is a ground water permit, give name and address of person that drilled the well: Bob Wade, Hamer, Idaho

Ques. 7. If for other than irrigation purposes, show full legal description of place of use and state purpose for which water is used:

irrigation only

Ques. 8: If you are not the person or representative of the corporation to whom above mentioned permit was originally issued, please state how ownership was acquired by present holder:

original holder

Quest. 9: State when and in what amount the water diverted under above mentioned permit has been first used: spring, 1965 - Time used since first use:

Drilled the well in the spring of 1965 and have used it continuously since that time.

Ques. 10. Describe all other water rights appurtenant to same place of use: none

(sign) X Venice Hawley
Venice Hawley

I hereby certify that the foregoing testimony was read to the above subscribed, before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in

Arco, County of Battle
State of Idaho, on this 6th day of January, A. D. 1967.

My commission expires: 5-14-70

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
Boise, Idaho
Permit No. G-28692

RECEIVED
JAN 12 1967
Department of Reclamation

PROOF OF APPLICATION OF WATER TO BENEFICIAL USE
and Completion of Works

DEPOSITION OF WITNESS

The deposition of two witnesses on this form, taken separately, required in each case.

Ques. 1 State your name, age, residence, occupation and postoffice address:

Jay Little, 38, farmer, Howe, Idaho

Ques. 2 Are you acquainted with Venice Hawley, the holder of Permit No. G-28692? How long have you known him and where does he reside?

I have known her about 25 years and know she lives at Howe, Idaho

Ques. 3. Have you read or heard said Permit No. G-28692 read, and are you familiar with its provisions and conditions: Yes XX No.

Ques. 4. State source of water supply: well

Give location of place of diversion, showing subdivision, section, township and range

Township 8 North - Range 27 East, B.M. Section 34 - NE $\frac{1}{4}$ NE $\frac{1}{4}$

Describe works for conveying water to place of use: pump, motor

Ques. 5. How many second feet of water do you estimate said works will safely conduct to place of use: 4.5 How much water have you seen being so conveyed? 4.5

Ques. 6 If for irrigation, show number of acres irrigated in each subdivision, giving full legal description:

Township 8 North - Range 27 East, B.M. - Section 34 - NE $\frac{1}{4}$ NE $\frac{1}{4}$ - 40 ac.,

SE $\frac{1}{4}$ NE $\frac{1}{4}$ - 40 ac., NE $\frac{1}{4}$ SE $\frac{1}{4}$ - 38 ac., Section 35 - NW $\frac{1}{4}$ NW $\frac{1}{4}$ - 35 ac., SW $\frac{1}{4}$ NW $\frac{1}{4}$ - 40 ac.,

SE $\frac{1}{4}$ NW $\frac{1}{4}$ - 20 ac., NW $\frac{1}{4}$ SW $\frac{1}{4}$ - 39 ac., SW $\frac{1}{4}$ SW $\frac{1}{4}$ - 40 ac.

Ques. 7. If for other than irrigation purposes, show full legal description of place of use, and state purpose for which water is used.

irrigation only

Ques. 8. (If for irrigation) state character of land that has been reclaimed, and give your estimate of the amount of water required for its profitable cultivation.

The soil is sandy loam type and should have 1" per acre.

Ques. 9. Have you any ownership interest in the works, water or lands above mentioned?

If so, in what way and to what extent? no

Ques. 10. When did you first see this water used? spring, 1965

Other times you have seen such use: consecutively since that time

(Signed):

Jay Little

Jay Little

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me in

Arvo, County of Butte, State of Idaho, on
this 6 day of January, A. D. 1967

Charles J. Jones

Notary Public for the State of Idaho

Residing

Arvo

My commission expires

5-14-70

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
Boise, Idaho

RECEIVED
JAN 12 1967
Department of Reclamation

Permit No. G-28692

* * * * *

PROOF OF APPLICATION OF WATER TO BENEFICIAL USE
and Completion of Works

DEPOSITION OF WITNESS

The deposition of two witnesses on this form, taken separately, required in each case.

Ques. 1 State your name, age, residence, occupation and postoffice address:

Jack Mays, 43, farmer, Howe, Idaho

Ques. 2 Are you acquainted with Venice Hawley, the holder of
Permit No. G-28692? How long have you known him and where does he reside?

I have known Venice Hawley about 30 years and know she lives at Howe, Idaho.

Ques. 3. Have you read or heard said Permit No. G-28692 read, and are you familiar
with its provisions and conditions: Yes XXX No.

Ques. 4. State source of water supply: well

Give location of place of diversion, showing subdivision, section, township and range

Township 8 North - Range 27 East, B.M. Section 34 - NE $\frac{1}{4}$ NE $\frac{1}{4}$

Describe works for conveying water to place of use: pump, motor, ditches

Ques. 5. How many second feet of water do you estimate said works will safely conduct
to place of use: 4.5 How much water have you seen being so
conveyed? 4.5

Ques. 6 If for irrigation, show number of acres irrigated in each subdivision, giving
full legal description:

Township 8 North - Range 27 East, B.M. - Section 34 - NE $\frac{1}{4}$ NE $\frac{1}{4}$ - 40 ac.,

SE $\frac{1}{4}$ NE $\frac{1}{4}$ - 40 ac., NE $\frac{1}{4}$ SE $\frac{1}{4}$ - 38 ac., Section 35 - NW $\frac{1}{4}$ NW $\frac{1}{4}$ - 35 ac., SW $\frac{1}{4}$ NW $\frac{1}{4}$ - 40 ac.,

SE $\frac{1}{4}$ NW $\frac{1}{4}$ - 20 ac., NW $\frac{1}{4}$ SW $\frac{1}{4}$ - 40 ac., SW $\frac{1}{4}$ SW $\frac{1}{4}$ - 40 ac.

Ques. 7. If for other than irrigation purposes, show full legal description of place of use, and state purpose for which water is used.

irrigation only

Ques. 8. (If for irrigation) state character of land that has been reclaimed, and give your estimate of the amount of water required for its profitable cultivation.

This is a sandy loam soil and would require 1" per acre for top cultivation.

Ques. 9. Have you any ownership interest in the works, water or lands above mentioned?

If so, in what way and to what extent? no

Ques. 10. When did you first see this water used? spring, 1965

Other times you have seen such use: consecutively since that time

(Signed):

Jack Mays
Jack Mays

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me in

Arco, County of Butte, State of Idaho, on
this 6 day of January, A. D. 1967

Charles G. Jones

Notary Public for the State of Idaho

Residing Arco

My commission expires 5-14-70

RECEIVED
NOV 30 1966

Department of Reclamation

NOTICE TO ACCOMPANY THIS LETTER MUST BE MADE IN DUPLICATE

(Date) November 29, 1966

(P. O.) P. O. Box 2161, Boise, Idaho 83701

TO THE STATE RECLAMATION ENGINEER

Boise, Idaho

Dear Sir:

You are hereby authorized to have the attached notice published
at my expense in the Advertiser of

Arco, Idaho Published in

the county in which the works are situated. Please send statement of charges and
Affidavit of Publication to Idaho Land & Appraisal Service, P. O. Box 2161, Boise
Idaho 83701.

x Venice Hawley

(In case of canals or other works designed to divert and
carry more than 50 cubic feet of water per second, the following certificate
must be signed by a well known and competent engineer)

I hereby certify that the facts set forth in the attached
notice are true.

Engineer

28692

RECEIVED
NOV 30 1966

NOTICE OF PROOF OF COMPLETION OF WORKS
and
APPLICATION OF WATER TO BENEFICIAL USE

Department of Reclamation

Notice is hereby given that ~~at 10:30 A.M.~~, on the 6th day of January
19 67, at Arco, County of Butte, State of Idaho
before Charles Jones, Notary Public, at (address) Arco, Idaho
proof will be submitted of the completion
of works for the diversion of 6.4 cubic feet per second of underground water from a
well, and of the application to beneficial use of said water, in accordance with the
terms and conditions of Permit No. G-28692, heretofore issued by the Department of
Reclamation of the State of Idaho.

1. The name and postoffice address of the person or corporation holding said permit
is Venice H. Hawley, Howe, Idaho

2. Said works of diversion will be fully completed on the date for such completion,
and the amount of water which said works are capable of conveying to the place of
use is 6.4 cubic feet per second.

3. The use to which said water has been applied is irrigation
purposes and the amount applied to beneficial use is
6.4 cubic feet per second.

4. The point of diversion of said water is NE1/4, Section 34, Township 8 North -
Range 27 East, B.M.

5. The place where said water is used is Township 8 North-Range 27 East, Section 34
NE1/4, SE1/4, NE1/2; Section 35, NW1/4, SW1/4, SE1/4, NE1/2, SW1/4

6. The date of priority which said user is prepared to establish is January 22, 1960

State Reclamation Engineer

28692
WV

Re: Permit No. G-28692

Arco Advertiser
Arco, Idaho

Gentlemen:

Enclosed you will find a legal notice which we wish to have published for four consecutive weeks prior to January 6, 1967. The expense of the publication is to be paid by Idaho Land & Appraisal Service of P.O. Box 2161, Boise, Idaho 83701, to whom you should furnish proof of publication on or prior to the above date.

Please acknowledge receipt of this notice and furnish this office with a copy or tear sheet of the notice for checking at least one week prior to the first publication.

Very truly yours,

~~EARL E. TAPPAN~~
State Reclamation Engineer

RKH:nw

28692

November 30, 1966

Re: Permit No. G-28692
Mrs. Venice Hawley

Idaho Land & Appraisal Service
P.O. Box 2161
Boise, Idaho 83701

Gentlemen:

This acknowledges the Notice of Proof of Completion of Works and Application of Water to Beneficial Use under Permit No. G-28692. The proofs are to be made XX at 10:00 AM, on the 5th day of January, 19 67, before Charles Jones, Area, Idaho, Notary Public.

As of this date, we have mailed the Notice to the Area Advertiser, with instructions to publish it once a week for four consecutive weeks prior to the date set for final proof then mail the Affidavit of Publication and statement of costs to you.

It is important that the enclosed depositions be executed by you and two disinterested witnesses who are familiar with the terms of the permit and the work done thereunder, at the place, on the date, and at the time and before the Notary, as advertised. It is very important and necessary that each question be answered in detail.

In returning the depositions to this office, be sure that all copies have been signed, the Notary's seal has been placed on each and that all depositions, (holder and two witnesses) are being returned. Also be sure to enclose the AFFIDAVIT OF PUBLICATION

Very truly yours,

MRE:ms

N. Russell Bosch
Office Manager

Encl.

cc: Notary
Applicant

28692

STATE OF IDAHO
DEPARTMENT OF RECLAMATION

Boise, Idaho

Re: Permit No. G - 28692 - Venice H. Hawley

Nov. 1, 1966

Idaho Land & Appraisal Service
P. O. Box 2161
Boise, Idaho

Gentlemen:

The date for proofs of Completion of Works and Application of water to beneficial use, as set out under terms of Permit No. G- 28692 are due not later than **Jan. 10, 1967**

Before these proofs can be made, the statutory requirement is that a notice of your intention of proof be published once a week for four consecutive weeks in a newspaper within the county in which the land is located. In completing the Notice of proof for publication, the information should be taken from your Permit, including any amendments made in connection with a change of point of diversion or land list, which has been recorded in this department. If changes have been made and no amendments are on record, we advise you request a form for this purpose before your Notice is published.

We enclose Form 36, in duplicate, which is to be filled out and returned to this department at least FORTY (40) DAYS BEFORE THE MENTIONED DATE, (allowing for four weeks publication). Please give the name of the town, the address of the place where the depositions will be executed, and, the name of the notary public before whom you will appear to make the depositions of proof (this may be at any place convenient for you and your two witnesses), the quantity of water filed; for what purpose it is used; the point, or points, of diversion; and the location of use or the lands which are irrigated - - all by legal land description.

Enclosed also is Form 11, which is the authorization for us to have the notice published in the designated county newspaper at your expense. This is to be returned with two Forms 36.

At the time we send the notice to the newspaper we will send to you the forms for the depositions of holder and two disinterested witnesses. It is important that the depositions be executed at the time, on the date set, at the place named, and before the notary public, as advertised in the publication notice.

Very truly yours,

R. KEITH HIGGINSON

STATE RECLAMATION ENGINEER

Enc. Form 36 and 11

cc: Venice H. Hawley
Howe, Idaho

28692



IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

L:VSS
Idaho 011173

Idaho Land Office
P. O. Box 2237
Boise, Idaho 83701

RECEIVED

MAR 14 1966

Mrs. Venice Hawley
Howe,
Idaho

Department of Reclamation

MAR 11 1966

Dear Mrs. Hawley:

According to the final proof for your desert entry, Idaho 011173, water for irrigation is obtained from a well in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 34, T. 8 N., R. 27 E. Your State water appropriation permit, G-28692, shows the point of diversion to be in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 22, T. 8 N., R. 27 E.

It will be necessary to submit evidence that you have a right to appropriate the water from the well in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 34, either by:

1. Filing an amendment of the point of diversion for permit G-28692 approved by the State Department of Reclamation, or
2. Submit a new water appropriation permit with the correct point of diversion and lands to be irrigated.

Proof of completion of works and beneficial use of water under permit G-28692 was to have been made on or before May 17, 1965. You must submit evidence that either the proof of completion and beneficial use has been completed and accepted by the State Department of Reclamation or that the State has granted an extension to complete the proof.

Will you please file the above evidence in this office within the next 30 days.

Sincerely yours,

/s/ EUGENE E. BABIN

Eugene E. Babin
Acting Manager, Land Office

cc: State Department of Reclamation ✓

G-28692

28692

March 11, 1966

RE: Permit No. G-28692

Idaho Land and Appraisal Service
P.O. Box 2161
Boise, Idaho 83701

Gentlemen:

Enclosed is amendment to Point of Diversion which has been recorded in this office on the above numbered permit.

Also enclosed is departmental receipt No. G-10205 in the amount of \$1.00 covering the fees.

Very truly yours,

(Mrs.) EDNA P. BULE
Chief Clerk

EPR:ejw
Encl: Amendment
Receipt

28692

RECEIVED

MAR 10 1966

Application for Amendment

POINT OF DIVERSION

Department of Reclamation

Permit No. G-28692

Comes now Venice Hawley and represent to the State Reclamation Engineer of the State of Idaho:

That ~~he is~~ she is the owner and holder of Permit to Appropriate the Public Waters of the State of Idaho, No. G-28692.

That the point of diversion is described in said Permit as being located:

Two wells in the SW 1/4, Section 22, T8N-R27E, B.M.

That he now requests that the point of diversion be changed to a point located: NE 1/4, Section 34, T8N-R27E, B.M.

That the reason for desiring to make such change is as follows:

When this permit was filed, my family was intending to obtain the land through desert entry that the well was to be located on. However, due to a death in the family, all of the entries could not be proved up on and only my husband and I completed our entries. It was decided that it would be wiser to drill on my entry than on Federal land and it would be better and easier to maintain and use.

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

Signed at Boise, Idaho, this 8th day of March 19 66

Venice Hawley

By: Harley M. McDowell

Date of Receipt at Department of Reclamation: 3/10/66

APPROVAL OF STATE RECLAMATION ENGINEER

CARL E. TAPPAN

I, ~~GEORGE XXXX~~ CARL E. TAPPAN, State Reclamation Engineer of the State of Idaho, HEREBY APPROVE the above and foregoing application for amendment to Permit to Appropriate the Public Waters of the State of Idaho, No. G-28692. This approval constitutes a new permit and is issued as an amendment to the original permit, to which it refers and of which it becomes a part, and said application is approved only insofar as the rights of others will not be adversely affected thereby.

Recorded in Book 101 of Permits, at Page G-28692

March 11, 19 66

Carl E. Tappan
State Reclamation Engineer

28692

Exclamation

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

WHEREAS, Permit No. G-28692, in the name of Venice H. Hawley, requires proofs of completion of works and beneficial use to be made on or before May 17, 1965; and,

WHEREAS, said Permit was issued in connection with Desert Land Entry Idaho Serial #011173; and,

WHEREAS, Applicant was prevented from proceeding with construction pending allowance of said Desert Land Entry, which was not allowed until January 10, 1962.

NOW, THEREFORE, An Extension of Time is allowed for Completion of Works and Beneficial Use Proofs on Permit No. G-28692 to January 10, 1967, or the length of time applicant was prevented from proceeding pending allowance of his Desert Land Entry and a similar extension is allowed for every other act required under the terms and conditions of Permit No. G-28692.

Signed at Boise, Idaho, this 16th day of March, 1965.

Deputy State Reclamation Engineer

March 16, 1965

Re: Permit No. G-28654 - Joseph G. Mayall
No. G-28691 - Lawrence R. Hawley
No. G-28692 - Venice H. Hawley

Idaho Land & Appraisal Service
P. O. Box 2161
Boise, Idaho

Gentlemen:

Enclosed are the following extensions:

Permit No. G-28654, in the name of Joseph G. Mayall,
extension to August 8, 1966.

Permit No. G-28691, in the name of Lawrence R. Hawley,
extension to January 10, 1967.

Permit No. G-28692, in the name of Venice H. Hawley,
extension to January 10, 1967.

Very truly yours,

CARLE TAPPAN
State Reclamation Engineer

By:

(Mrs.) Edna P. Rule
Chief Clerk

EPR:ew

Extensions (3)

28692

ALL PROPERTY APPRAISALS

CUSTOM DRAFTING, MAPPING
LAND PURCHASES
OIL AND GAS LEASES

GRAZING MANAGEMENT

FEDERAL LAND APPLICATIONS
WATER FILINGS & PROOF
STATE LAND LEASES & ASSIGNS

IDAHO LAND & APPRAISAL SERVICE

HARLEY M. McDOWELL — E. J. McDOWELL, MGR. OWNERS
MERVIN J. CHRISTENSEN JOSEPH J. THACKABERRY
(LICENSED SURVEYOR)

329 IDAHO BLDG. BOISE, IDAHO 83701
P. O. Box 2161
PHONE 344-2525

March 10, 1965

RECEIVED
MAR 11 1965

Department of Reclamation

Mr. Carl E. Tappan
State Reclamation Engineer
State House
Boise, Idaho

Re: Permit G-28692, Venice H. Hawley

Dear Mr. Tappan:

With reference to the above water permit, please be advised that this was applied for in connection with my desert land entry, Idaho Serial No. 011173, which was not allowed in the Land Office until January 10, 1962.

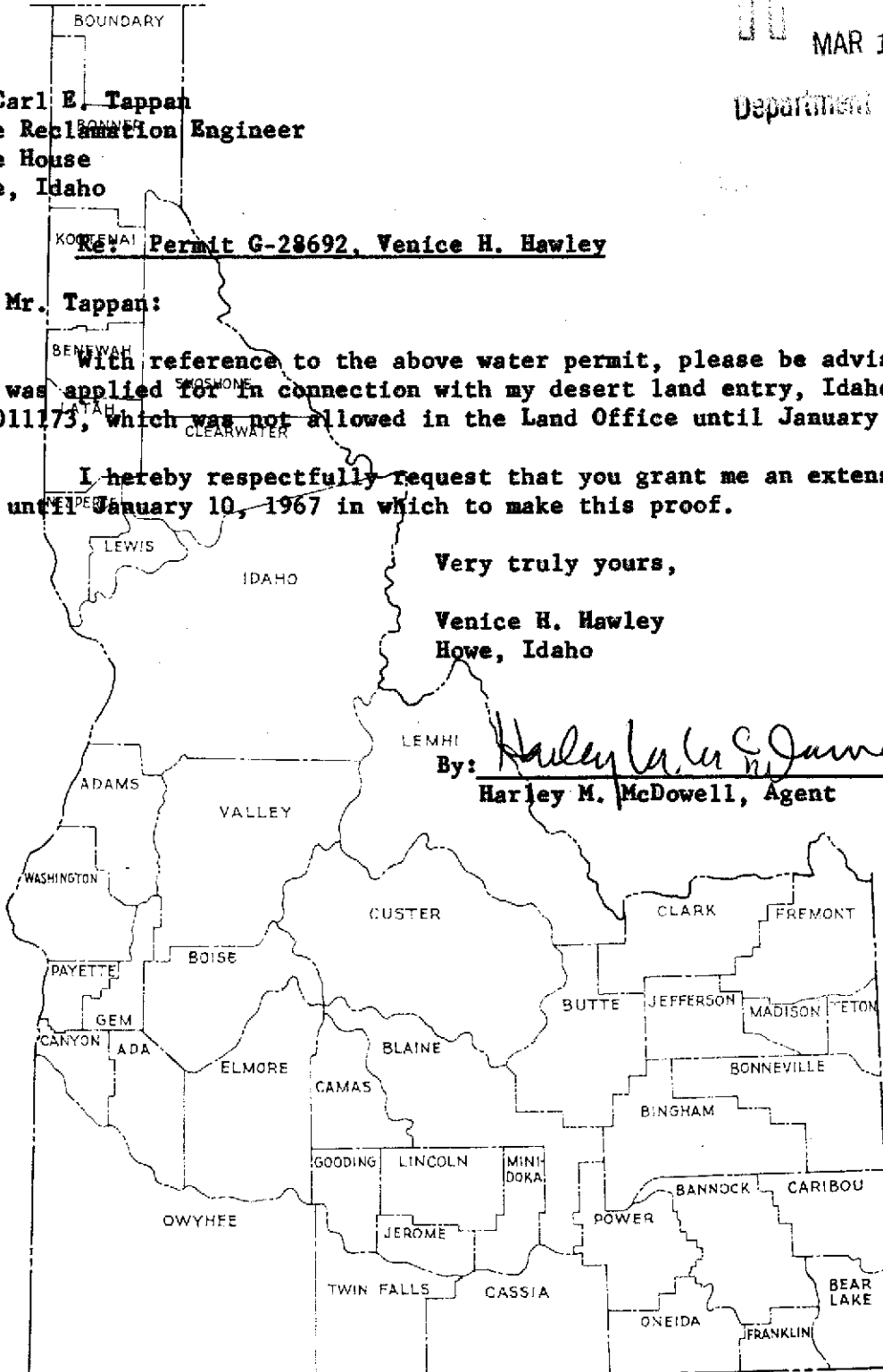
I hereby respectfully request that you grant me an extension of time until January 10, 1967 in which to make this proof.

Very truly yours,

Venice H. Hawley
Howe, Idaho

By: Harley M. McDowell
Harley M. McDowell, Agent

sld



28692

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

Boise, Idaho

Re: Permit No. G-

28691 - Lawrence R. Hawley
G- 28692 Venice R. Hawley

March 1, 1965

Idaho Land & Appraisal Service
Box 2161
Boise, Idaho

Gentlemen:

The date for proofs of Completion of Works and Application of water to beneficial use, as set out under terms of Permit No. G- 28691 are due not later than **May 17, 1965**
G- 28692

Before these proofs can be made, the statutory requirement is that a notice of your intention of proof be published once a week for four consecutive weeks in a newspaper within the county in which the land is located. In completing the Notice of proof for publication, the information should be taken from your Permit, including any amendments made in connection with a change of point of diversion or land list, which has been recorded in this department. If changes have been made and no amendments are on record, we advise you request a form for this purpose before your Notice is published.

We enclose Form 36, in duplicate, which is to be filled out and returned to this department at least FORTY (40) DAYS BEFORE THE MENTIONED DATE, (allowing for four weeks publication). Please give the name of the town, the address of the place where the depositions will be executed, and, the name of the notary public before whom you will appear to make the depositions of proof (this may be at any place convenient for you and your two witnesses), the quantity of water filed; for what purpose it is used; the point, or points, of diversion; and the location of use or the lands which are irrigated -- all by legal land description.

Enclosed also is Form 11, which is the authorization for us to have the notice published in the designated county newspaper at your expense. This is to be returned with two Forms 36.

At the time we send the notice to the newspaper we will send to you the forms for the depositions of holder and two disinterested witnesses. It is important that the depositions be executed at the time, on the date set, at the place named, and before the notary public, as advertised in the publication notice.

Very truly yours,

Carl E. Tappan

State Reclamation Engineer

Enclosures **Forms 36 and 11 (2 sets)**

cc: Lawrence R. Hawley
Horse, Idaho

Venice R. Hawley
Horse, Idaho

28692



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
P. O. Box 2237
Boise, Idaho

IN REPLY REFER TO:

LO:CRK
Idaho 011173

JAN 10 1962

NOTICE OF ALLOWANCE

Venice Hawley

Nowa, Idaho

Dear Mrs. Hawley:

Your Desert Land Entry, Serial No. Idaho 011173,
Receipt No. 834322, for BLM, NE, Sec. 34;
W, NE, Sec. 35, Section 35,
Township 8 N., Range 27 E., Boise Meridian, Idaho,
containing 320 acres, has this day been allowed, subject
to any valid existing rights and your further compliance with laws
and regulations applicable thereto. In correspondence relating to
this entry, always refer to the serial number shown above.

24692
c.c. DM I-3
LAM
State Reclamation
Idaho Land & Map

Sincerely yours,

Michael H. Sloan

Manager

May 24, 1960

Re: Permit No. G-28692
Venice H. Hawley

Mr. Harley M. McDowell,
Idaho Land & Map Service,
Box 2161,
Boise, Idaho.

Dear Mr. McDowell:

We enclose Permit No. G-28692 in which we direct your attention to the limitations and conditions as given on the fourth page under approval of the State Reclamation Engineer.

Departmental Receipt No. G-4584, which was issued covering payment in the amount of \$6.50 for the filing fee of the above mentioned permit, was sent to you with our letter of January 25, 1960.

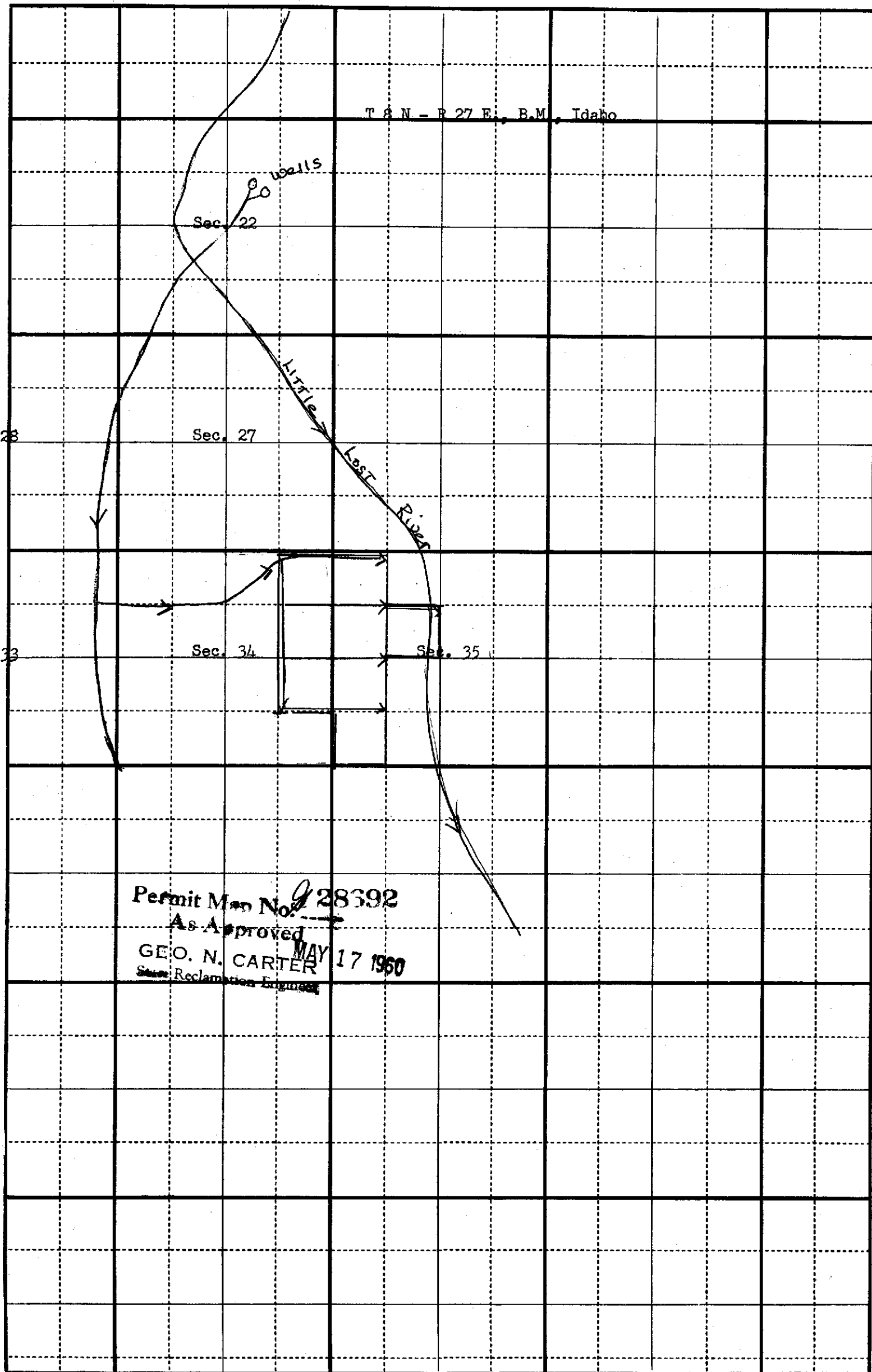
Very truly yours,

GEO. N. CARTER
State Reclamation Engineer
By

(Mrs.) Edna P. Rule
Chief Clerk

Encl.
EPR:pmk
cc: Venice H. Hawley
Howe, Idaho

28692



Permit Map No. 28692
 As Approved
 GEO. N. CARTER
 State Reclamation Engineer
 MAY 17 1960

NOTICE OF PROOF OF COMPLETION OF WORKS AND APPLICATION OF WATER TO BENEFICIAL USE *W*

Notice is hereby given that on the 6th day of January, 1967, at Arco, County of Butte, State of Idaho, before Charles Jones, Notary Public at Arco, Idaho, proof will be submitted of the completion of works for the diversion of 6.4 cubic feet per second of underground water from a well, and of the application to beneficial use of said water, in accordance with the terms and conditions of Permit No. G-28692, heretofore issued by the Department of Reclamation of the State of Idaho.

1. The name and postoffice address of the person or corporation holding said permit is Venice H. Hawley, Howe, Idaho.

2. Said works of diversion will be fully completed on the date for such completion, and the amount of water which said works are capable of conveying to the place of use is 6.4 cubic feet per second.

3. The use to which said water has been applied is irrigation purposes, and the amount applied to beneficial use is 6.4 cubic feet per second.

4. The point of diversion of said water is NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 34, Township 8 North, Range 27 East, B. M.

5. The place where said water is used is Township 8 North, Range 27 East, Section 34, NE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$; Section 35, NW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$.

6. The date of priority which said user is prepared to establish is January 22, 1960.

R. KEITH HIGGINSON,
State Reclamation Engineer.
Pub. 12-8 thru 12-29, 1966.

28692
PUBLIC NOTICE